TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915

No. 85

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, APPELLANT,

vs.

GUARDIAN TRUST COMPANY, CENTRAL IMPROVEMENT COMPANY, CAMBRIA STEEL COMPANY AND KANSAS CITY SUBURBAN BELT RAILROAD CO.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED MARCH 10, 1914.

(24,092)

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a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1913, of said Court, before the Honorable Walter H. Sanborn, Circuit Judge, and the Honorable John A. Marshall and the Honorable William H. Munger, District Judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the sixth day of October, A. D. 1910, a transcript of record pursuant to appeals allowed by the Circuit Court of the United States for the Western District of Missouri was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in certain causes wherein the Central Improvement Company, et al., are Appellants, and the Cambria Steel Company, et al., are Appellees, and the Guardian Trust Company is Appellant and the Cambria Steel Company, et al., are Appellees, which said causes were docketed in said Circuit Court of Appeals as Nos. 3489 and 3490 respectively, and which said transcript is in the words and figures following, to-wit:

1 UNITED STATES OF AMERICA, *ss:*

To Cambria Steel Company, The Kansas City Suburban Belt Railroad Company, Edward F. Swinney as Receiver of the Kansas City Suburban Belt Railroad Company, The Kansas City Southern Railway Company, Guardian Trust Company, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an order allowing an appeal from a decree of the Circuit Court of the United States for the Western Division of the Western District of Missouri, wherein Central Improvement Company, H. H. Crittenden Receiver of Central Improvement Company are appellants, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants as in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Smith McPherson, Judge of the Circuit Court of the United States for the Western Division of the Western District of Missouri, this 10th day of August in the year of our Lord one thousand nine hundred and ten.

[Seal U. S. Circuit Court, Western Division, Western District, Missouri.]

SMITH McPHERSON, *Judge.*

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, sct:

We hereby acknowledge due service of the within Citation this 23 day of August, A. D. 1910.

FRANK HAGERMAN,
Sol. for Cambria Steel Co., Appellee.
EDWARD P. GATES & GEO. H. ENGLISH, JR.,
Solicitors for Guardian Trust Co.
S. W. MOORE & THOMAS R. MARKS,
Solicitors for K. C. Sub. Belt Ry. Co. & Edward F. Swinney, Its Receiver, and The Kansas City Southern Ry. Co.

2 2468. United States Circuit Court, Western District of Missouri, Western Division. Central Improvement Co. vs. Cambria Steel Co., et al. Citation. Filed August 24, 1910. Adelaide Utter, Clerk.

UNITED STATES OF AMERICA, *sct:*

To Cambria Steel Company, The Kansas City Suburban Belt Railroad Company, Edward F. Swinney as Receiver of the Kansas City Suburban Belt Railroad Company, The Kansas Southern Railway Company, Central Improvement Company, H. H. Crittenden as Receiver of Central Improvement Company, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an order allowing an appeal from a decree of the Circuit Court of the United States for the Western Division of the Western District of Missouri, wherein the Guardian Trust Company is appellant and you appellee, to show cause, if any there be, why the decree rendered against the said appellant as in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Smith McPherson, Judge of the Circuit Court of the United States for the Western Division of the Western District of Missouri, this 10th day of August in the year of our Lord one thousand nine hundred and ten.

[Seal U. S. Circuit Court, Western Division, Western District, Missouri.]

SMITH McPHERSON, *Judge.*

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, sct:

We hereby acknowledge due service of the within Citation this 23 day of August, A. D. 1910.

FRANK HAGERMAN,
Sol. for Cambria Steel Co., Appellee.
EDWARD P. GATES & GEO. H. ENGLISH, JR.,
Solicitors for H. H. Crittenden, Receiver for Central Improvement Co.
S. W. MOORE & THOMAS R. MARKS,
Solicitors for K. C. Sub. Belt Ry. Co. & Edward F. Swinney, Its Receiver, and Kansas City Southern Ry. Co.

3 & 4 2468. United States Circuit Court, Western District of Missouri, Western Division. Guardian Trust Co. vs. Cambria Steel Co., et al. Citation. Filed August 24, 1910. Adelaide Uiter, Clerk.

5 UNITED STATES OF AMERICA, *sct:*

Be it remembered, that heretofore, to-wit, on the 6th day of September, A. D. 1900, there was filed in the office of the clerk of the Circuit Court of the United States for the Western Division of the Western District of Missouri, a bill of complaint wherein Cambria Steel Company is complainant and The Kansas City Suburban Belt Railroad Company, The Union Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator and Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company and Northern Town-site Company are defendants.

Said bill of complaint is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, In Equity.

CAMBRIA STEEL COMPANY, Complainant,
vs.
THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, THE Union Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator and Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Town-site Company, Defendants.

Original Bill of Complaint.

To the Judges of the United States Circuit Court for the Western Division of the Western District of Missouri, in the Eighth Circuit, Sitting in Equity:

Your orator, the Cambria Steel Company, a corporation organized and existing under and by virtue of the laws of the State of

Pennsylvania and a citizen of said State, brings this its Bill of Complaint against the Kansas City Suburban Belt Railroad Company, Kansas City and Independence Air Line, Guardian Trust Company, Missouri Elevator and Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Town-site Company, each and all of them corporations organized and existing under and by virtue of the laws of Missouri and citizens and residents of said State, and each of them having their principal office and place of business at Kansas City in said State, and an inhabitant of the Western Division of the Western District thereof, and against The Union Terminal Railroad Company, a corporation organized and existing under and by virtue of the laws of the state of Kansas and a citizen and resident of said state, having its principal office and place of business at the city of Kansas City in said State, and an inhabitant of the First Division of the District of Kansas.

6

And thereupon your orator complains and says that your orator is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania, having its principal office in said state and is a citizen and resident of said state; that the defendants, The Kansas City Suburban Belt Railroad Company (hereinafter called the Belt Company), the Kansas City and Independence Air Line (hereinafter called the Air Line), the Guardian Trust Company (hereinafter called the Trust Company), the Missouri Elevator and Terminal Company (hereinafter called the Elevator Company), the Central Improvement Company (hereinafter called the Central Company), the Second Street Improvement Company (hereinafter called the Second Street Company), the Fairmount Amusement Company (hereinafter called the Amusement Company), and the Northern Town-site Company (hereinafter called the Town-site Company), are each and all of them corporations organized and existing under and by virtue of the laws of the state of Missouri; that each of them has its principal office in Kansas City in said State, and that each of them is a citizen and resident of said state of Missouri and an inhabitant of the Western Division of the Western District thereof, and that the defendant, The Union Terminal Railroad Company, (hereinafter called the Union Company) is a corporation organized and existing under and by virtue of the laws of the state of Kansas, has its principal office in the City of Kansas City in the county of Wyandotte in said state of Kansas, and is a citizen and resident of said state of Kansas and an inhabitant of the First Division of the District of Kansas.

Your orator further shows that from the date of its incorporation about the year 1885, or prior thereto, until about the month of June, 1899, the name of the said Guardian Trust Company was "Missouri Kansas and Texas Trust Company," and that in or about said month of June, 1899, the said Missouri, Kansas and Texas Trust Company, did, in accordance with the provisions of the statutes of Missouri in such cases made and provided, change its name to Guardian Trust Company.

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Your orator further shows that at various times between the first day of November, 1897, and the first day of March, 1898, the Belt Company became indebted to your orator for steel rails purchased, to the amount of about One Hundred Thousand ($100,000) Dollars, and that the larger part of said indebtedness being unpaid, your orator thereupon brought suit in this Honorable Court against the said Belt Company upon the obligations given to evidence the balance then due upon said indebtedness, and in said suit did recover a judgment of this Honorable Court against the said Belt Company, to-wit: on the 6th day of September, 1900, for the sum of $100962.91, no part of which has been paid, but all of which remains due to your orator: that having so recovered said judgment, your orator caused a writ of execution to be issued thereon directed to the Marshal of the United States for the Western District of Missouri and against the said Belt Company, and the said Marshal, prior to the filing of this bill, did return the said execution wholly unsatisfied for want of property of the said Belt Company upon which to levy the same: and that the said Belt Company is utterly insolvent and has no property subject to be reached by legal process to be issued against it upon the judgment so recovered by your orator as aforesaid.

Your orator further shows that prior to the year 1887 the said Trust Company conceived and entered upon the plan and purpose to cause to be constructed a large number of railroads in and about Kansas City in the state of Missouri and leading from or to said city: that it was a part of the said plan and purpose of the said Trust Company to cause said railroads to be built, constructed and operated by various corporations to be organized by the said Trust Company and to elect various officers, agents and representatives of the said Trust Company to be the officers and directors of the said several railroad companies, so as at all times to absolutely dominate and control the actions of the said railroad companies and their several directors and officers; that it was still further a part of said plan and purposes of said Trust Company to organize a large number of auxiliary corporations, either in the way of construction companies to construct and build said several lines of railroad or in the way of companies to hold the legal title to lands, buildings, and other structures necessary to be used by the said railroad companies in their operations or for purposes incident thereto, and to also cause various officers, agents, employees and other representatives of said Trust Company to become the officers and directors of each
8 and all of the said last mentioned construction and auxiliary companies so as thereby to be enabled to completely dominate and control the actions of the said construction and auxiliary companies and of their several officers and directors; and that it was also a part of the plans and purposes of the said Trust Company to utilize and employ some one or more of the said railroad companies or auxiliary companies to act for and on behalf of the said Trust Company in carrying out various portions of the above said general plan and purpose of the said Trust Company, so as to gather unto said Trust Company all the profits and other advantages ac-

cruing in the premises and with the purpose and intent on its part to undertake to foist upon the said railroad company or auxiliary company so utilized, and upon those (other than said Trust Company) who might become interested in said railroad companies or auxiliary companies, or any of them, particularly by becoming creditors thereof, any and all losses, [burdend*s*], or other liabilities which might result in the premises; and that in carrying out its said plans and purposes, the said Trust Company did assume the position and duty of trustee and agent in managing and disposing of the bonds, stocks, funds and other assets of said railroad companies and auxiliary companies in trust and for the use and benefit of the parties who might become concerned or interested therein; and that consequently the relation of the said Trust Company to each and all of the said railroad companies and auxiliary companies, so far as the said Trust Company might employ the same, or either of them as agents and instrumentalities to further its own plans and purposes, was that of principal bound and charged with a duty to i-demnify and protect the railroad Company or auxiliary company so employed and utilized in any particular transaction, against any and all losses, burdens and liabilities arising in the premises, and that so far as persons becoming interested in the said railroad companies and auxiliary companies, or either of them, as creditors or otherwise, it became and was the duty of the said Trust Company, as trustee, having charge of the management, disposition and control of the stocks, bonds, funds and other assets of said railroad companies and auxiliary companies, or either of them, to so handle, manage and dispose of the same for the use and benefit of the persons interested, or who might become interested, in the said railroad companies and auxiliary companies, or either of them, including particularly creditors thereof and your orator.

Your orator further shows that in pursuance of the plans and purposes so conceived and entered upon by the said Trust Company as aforesaid, the said Trust Company did on or about the first day of January, 1887, cause a corporation to be formed
9 under the laws of the state of Missouri known as the "Kansas City Suburban Belt Railroad Company" (hereinafter called the Suburban Company) for the stated and avowed purpose of building a belt line of railroad to encircle the cities of Kansas City, Missouri, and Kansas City, Kansas, and that it did thereupon cause said Suburban Company to build a portion of said projected line, namely; from a point at or near Second Street and Broadway in Kansas City, Missouri, eastwardly and southwardly to a point at or near the mouth of Brush Creek, in Jackson County, Missouri; that it did also cause the said Suburban Company to place a mortgage upon its property, then held and to be thereafter acquired, to secure an issue of its bonds aggregating One Million Dollars ($1,000,000.) and to issue and deliver the said bonds to the said Trust Company; that as your orator is informed and believes, the said Trust Company thereupon proceeded to sell and dispose of the said bonds and all of the same are now outstanding; and that default having been made in the payment of interest heretofore accruing upon the said bonds,

the principal thereof has been reclared to be due and payable according to the terms and provisions of the mortgage securing the said bonds, and that a bill to foreclose said mortgage has been filed and is now pending in this Court; and that the said Trust Company likewise caused various of its officers, agents and employees to be elected and constituted the officers and directors of the said Suburban Company and by means thereof did absolutely dominate and control the affairs and *and* actions of the said Suburban Company continuously until its consolidation as hereinafter stated; that subsequently, to-wit; on or about the 21st day of May, 1891, the said Trust Company, instead of carrying out and completing the projects and purposes for which the said Suburban Company was stated to have been formed, and in order to benefit itself in the premises, did cause the Consolidated Terminal Railway Company (hereinafter called the Terminal Company) to be incorporated under the provisions of the laws of the state of Missouri for the purpose, as stated in its articles of incorporation, of likewise constructing and building a line of railroad to encircle the said cities of Kansas City, Missouri, and Kansas City Kansas; that thereupon the said Trust Company did cause the said Terminal Company to place a mortgage upon all its property, constructed and to be constructed, owned and to be acquired, to secure an issue of its bonds aggregating $750,000, and to issue and deliver the said bonds to the said Trust Company; that the said Trust Company thereupon proceeded to sell and dispose of the said bonds and the same are now outstanding; that de-
10 fault having occurred in the payment of various installments of interest heretofore accruing upon said bonds, the principal of said bonds, as your orator is informed and believes, has been declared to be due and payable in accordance with the terms and provisions of said mortgage and a suit has been brought and is now pending in this court to foreclose the said mortgage; that the said Trust Company caused various of its officers, agents and employees to be elected as the officers and directors of the said Terminal Company and thereupon proceeded to absolutely dominate and control the actions and doings of the said company and its officers and directors continuously until its consolidation as hereinafter stated; and that instead of completing the line of railroad of said Terminal Company specified and mentioned in its articles of incorporation, said Trust Company caused only a part thereof to be built, to-wit; commencing at or about the said Western terminus of said Suburban Company above specified and running thence westwardly through Kansas City, Missouri to the state line between the states of Missouri and Kansas; that in further pursuance of its plans and purposes, the said Trust Company did on or about the 30th day of December, 1891, cause the defendant, The Union Terminal Railroad Company to be incorporated under the laws of the State of Kansas for the purpose of building that part of the belt railroad mentioned and outlined in the articles of association of the said Suburban Company and Terminal Company which would lie in and encircle the city of Kansas City in the state of Kansas, and did thereupon cause the said Union Company to place a mortgage upon

the railroad proposed to be built by it and upon its property then owned or to be thereafter acquired, to secure an issue of bonds aggregating Two Million Dollars, and to issue and deliver said bonds to the said Trust Company and to cause the said Union Company to build a part of the line specified in its articles of association, to-wit: beginning at the western terminus of the line so built by the said Terminal Company as aforesaid: namely: at the said line between the states of Missouri and Kansas, and running thence to the city—Argentine in the State of Kansas; that as your orator is informed and believes the said Trust Company did thereupon sell and dispose of all of said bonds and all of the same are now outstanding; that default having occurred in the payment of various installments of interest heretofore accruing upon said bonds, the principal has been declared to be due and payable according to the terms and provisions of said mortgage and a suit to foreclose said mortgage has been brought and is now pending in this court; that the said Trust Company caused various of its officers, agents and employees to be elected as the officers and directors of the said Union Com-
11 pany, and by means thereof did continuously, until about the month of April, 1900, dominate and control the actions and affairs of said Union Company and its officers and directors; that by means of its control and domination as aforesaid the said Trust Company did cause the said Suburban Company to endorse upon each of the bonds so issued by the said Terminal Company and said Union Company, its guaranty for the payment of the principal and interest thereof; and that the said Trust Company, by reason of its domination and control as aforesaid, did on or about the 25th day of July, 1892, cause the said Suburban Company and said Terminal Company to be consolidated in accordance with the provisions of the statute of the state of Missouri in such cases made and provided and thereby to form the defendant Belt Company; and that the said Trust Company caused various of its officers, agents and employees to be elected as the officers and directors of said Belt Company and by means thereof did continuously, until about the month of April, 1900, completely dominate and control the actions and affairs of said Belt Company and its officers and directors; and that in further pursuance of its plans and purposes as aforesaid the said Trust Company did cause the said Air Line to be incorporated under the laws of the state of Missouri on or about the 23rd day of January, 1891, for the purpose of building a line of railroad from and connecting with the line of the said Suburban Company to the city of Independence in the state of Missouri, and did cause the said Air Line to place a mortgage upon its property, then owned or to be thereafter acquired, to secure an issue of bonds aggregating Three Hundred Thousand ($300,000) dollars and to issue and deliver the said bonds to the said Trust Company; that the said Trust Company thereupon sold and disposed of the said bonds and the same are now outstanding; that default having occurred in the payment of various installments of interest heretofore accruing on said bonds, the principal thereof has been declared to be due and payable according to the terms and provisions of the mortgage securing

the same and suit to foreclose the said mortgage has been brought and is now pending in this court; that the said Trust Company likewise caused various of its officers, agents and employees to be elected as the officers and directors of the said Air Line so as to absolutely dominate and control the affairs of the said company and the actions of its said officers and directors; and that by means of its said domination and control the said Trust Company did cause the various lines of railroad of the said Suburban, Union Terminal and Belt Companies, respectively, and of the said Air Line to be operated as constituting one entire, allied, continuous system of railroad. And that at all times, up to said month of April, 1900, the said Trust Company caused all or substantially all of the shares of the
12 capital stock of said several railroad companies to be issued to and held and voted, either by some one or more of the railroad companies so controlled or dominated by it as aforesaid, or by and in its own name, or by and in the name of some one or more of its officers, agents and employees for and on its behalf and so as to serve its aforesaid plans and purposes and to enable it to effectuate the same and its absolute control of and dominion over said several railroad companies and each of them and their respective properties, actions and affairs.

Your orator is informed and believes that a total cost of the lines of said Suburban and Terminal companies consolidated into the Belt Company, as aforesaid, did not cost to exceed One Million Seven Hundred Thousand Dollars, and that there were issued and delivered to the said Trust Company, by the said three last named railroad companies, bonds and stocks aggregating, as your orator is informed and believes, over Five Million Dollars, and that the said Trust Company claims that it has applied the excess of said securities over the actual cost of said properties, in payment of its own commissions and services in the premises and by way of allowance of certain discounts in the sale and disposal of said securities; your orator is informed and believes that the cost of the railroad and other property of the said Union Company did not exceed Eight Hundred and Sixty Five Thousand Dollars, and that the said Trust Company received into its possession the bonds and stocks of the said Union Company to the amount of Four Million Dollars and claims that it has applied the excess of the amount of said bonds and stocks over the said cost of said road in payment of its own services and commissions in the premises, and in the way of an allowance of discounts in the sale and disposal of said securities; and that your orator is informed and believes that the cost of said Air Line did not exceed Two Hundred Thousand Dollars, and that said Trust Company received into its possession bonds and stocks of the said Air Line to the amount of Eight Hundred and Fifty Thousand Dollars and claims that it has applied the excess of said securities over the cost of said railroads, in payment of its own services and commissions in the premises, and in the allowance of certain discounts in the sale and disposal of said securities. Your orator is informed and believes that the said Trust Company has often been requested to make a true and correct accounting of its trusteesship

in respect of the sale and disposal of such bonds and stocks, but has hitherto failed and still fails and refuses to make such accounting; that the facts in respect of the sale and disposal of the said securities and the application of the proceeds thereof, are
13 peculiarly and solely within the knowledge of said Trust Company, and your orator is unable to state the said account, or how much is due by the said Trust Company, by reason of the premises, but alleges that upon a correct and proper accounting between the parties the said Trust Company owes the said Belt Company a large amount, by reason of the premises last mentioned, all of which is justly and equitably applicable to the payment of your orator's aforesaid judgment against the said Belt Company.

Your orator further shows that in pursuance of its aforesaid plans and purposes to organize auxiliary companies for the purpose of taking and holding the legal title to property necessary to be used in connection with the railroads of the said several railroad companies above mentioned or incidental thereto, and with the fraudulent intent and purpose of preventing the properties so taken in the names of said auxiliary companies, respectively, from being reached by the creditors of said railroad companies or either of them and particularly by the creditors of the said Belt Company, said Trust Company did contrive the formation of the said Elevator, Amusement, Central Second Street and Town-site companies, respectively; that the said Trust Company did cause various of its officers, agents and employees to be selected as the incorporators, stockholders, officers and directors of the said several auxiliary companies, and by means thereof, did at all times dominate and control the management of the said several auxiliary companies and the actions of the stockholders and boards of directors thereof; that, as your orator is informed and believes, all or substantially all, of the moneys invested in the purchase, improvement and acquisition of the several properties of the said auxiliary companies and each of them, was paid and supplied by the said Belt Company, and each and every one of the said auxiliary companies was a mere device or "dummy" contrived and provided by the said Trust Company as a means for taking and holding the naked legal title to such properties as might be vested in the said auxiliary companies, respectively, for the use and benefit of the said Belt Company, and that, as to the creditors of the said Belt Company and particularly as to your orator, the properties and shares of stock of each and every of the said auxiliary companies in equity belongs to the said Belt Company and are chargeable with the lien and payment of your orator's aforesaid judgment against the said Belt Company; a list of real estate in the name of the auxiliary companies so far as known to complainant, is attached hereto as "exhibit 2".

Your orator further shows that during the year 1897, the said Trust Company entered into contracts for the purpose of
14 gaining large benefits and advantages therefrom, with several railroad companies owning and operating lines of railroad in Northwestern Missouri and in Southwestern Iowa, to-wit; the Omaha & St. Louis Railroad Company and the Quincy, Omaha

& Kansas City Railroad Company, and the Omaha, Kansas City and Eastern Railroad Company, by which the said Trust Company agreed and bound itself to provide for each of the said last mentioned railroad companies a railroad connection with an entrance to Kansas City, Mo.; that such connection and entrance necessitated the construction on behalf of said Trust Company of a line of railroad from Kansas City, Missouri, to the town of Pattonsburg in said state; that said trust Company being desirous to gain and reap unto itself all the benefits and advantages of said contracts, and of relieving itself of all burdens, obligations and losses by reason thereof, did, by means of its domination and control of the said Belt Company and of its officers and directors, conclude and contrive that it would cause the said Belt Company to enter into a pretended contract for the construction of said line of railroad from said Kansas City to said Pattonsburg; that said Trust Company did, thereupon, cause to be formed a corporation under the laws of the state of Missouri, known as the Kansas City & Northern Connecting Railroad Company (hereinafter called the Northern Connecting Company), for the purpose of holding the title of said last mentioned link or line of railroad, and did cause certain of its officers, directors and agents to become the officers and directors of the said Northern Connecting Company, so as to absolutely dominate and control its management and affairs and the action of its officers and directors, and that, in pursuance of its said plans and to accomplish its aforesaid purposes and designs, the said Trust Company thereupon did cause the said Belt Company, as aforesaid, so dominated and controlled by it as aforesaid, on or about the — day of ——, 1896, to go through the form of entering into a contract with the said Northern Connecting Company, so dominated and controlled by the said Trust Company as aforesaid, for the construction in the name of said Belt Company, but as agent and for the use and benefit of said Trust Company of the said link or line of railroad as aforesaid; that the said Trust Company did cause the said Northern Connecting Company to issue its certain bonds and stocks for the purpose of paying for said construction, and the said Trust Company did cause the said stocks and bonds to be delivered partly into its own possession and control, and party into the possession and control of the said Belt Company, so controlled and dominated by its as aforesaid; that in pursuance of its plans aforesaid, the said Trust Company did undertake to charge to the account of the said Belt Company all moneys expended by the said Trust Company for the purpose of constructing the said link or line of railroad of the said Northern Connecting Company, and went through the form of giving said Belt Company credit for the proceeds of all securities of the said Northern Connecting Company sold and disposed of by the said Trust Company, less such charges as the Trust Company saw fit to make in the premises for its own services and commissions in making said sale, and for such discounts as the said Trust Company saw fit to claim it had allowed in making said sale and disposition. That the result of the construction of said link or line of the Northern Connecting Company was a loss of over Three Hundred Thousand Dollars, which amount

your orator avers is justly and properly chargeable to the said Guardian Trust Company, and should be borne by it, but which the said Guardian Trust Company wrongfully claims constitutes a liability on the part of said Belt Company to it. Your orator says that the said Belt Company was without lawful power either to make said contract for the construction of the railroad of the said Northern Connecting Company, and that said contract was ultra vires the powers of the said Belt Company under its charter and the laws of the State of Missouri, all of which the said Trust Company well knew; and you rorator further charges that by reason of the fact hereinabove alleged, the said Belt Line Company was a mere instrumentality and agency, designated and used by the said Trust Company in and about the construction by the said Trust Company, as principal, of the said link or line of railroad of the said Northern Connecting Company, and that, therefore, the said Trust Company was and is bound to assume and make good out of its own funds any and all losses resulting from the construction of said Northern Connecting Company, and that the act of the said Trust Company in undertaking to charge the said loss to the said Belt Company, and in claiming the same as a liability in its favor against the said Belt Company, was, as to the creditors of the said Belt Company, fraudulent in fact and in law.

Your orator further shows that in pursuance of its general plans and purposes hereinbefore outlined, the said Trust Company did also cause to be organized a corporation under the laws of the state of Missouri under the name of the Kansas City, Pittsburg & Gulf Railroad Company, for the purpose of constructing and operating a line of railroad, for the use and benefit of said Trust Company, from Kansas City in the state of Missouri, to a point on the Gulf of Mexico at or near Port Arthur in the state of Texas, and caused
16 the said Kansas City, Pittsburg & Gulf railroad Company to make a mortgage to secure an issue of bonds therein specified; that prior to the first day of April, 1899, there were issued, and there were then outstanding bonds of the Kansas City, Pittsburg & Gulf Railroad Company, so secured by the mortgage aforesaid, aggregating the principal of Twenty Three Million Dollars; that on the first day of April, 1899, default was made in payment of an installment of interest due on said bonds, and the said Kansas City, Pittsburg & Gulf Railroad Company was wholly insolvent; that a bill to foreclose the said mortgage was thereupon filed and the property of the said Kansas City, Pittsburg & Gulf Railroad Company passed into the hands of receivers appointed by this Honorable Court and thereupon such proceedings were had that a decree of foreclosure was entered in said cause on or about the fifth day of February, 1900, and the property of said Kansas City, Pittsburg & Gulf Railroad Company sold under the terms thereof.

Your orator further shows that for some months prior to said first day of April, 1899, and all times thereafter, the said Trust Company was aware and had knowledge of the fact that said default, receivership, foreclosure and sale of the said Kansas City, Pittsburg

& Gulf Railroad company were inevitable and was also aware and had knowledge of the fact that such default, receivership, foreclosure and sale would necessarily and inevitably cause and result in default in the payment of installments of interest accruing on the said several mortgages of the said Suburban, Terminal, Union and Belt Companies, of the said Air Line, and of the said Northern Connecting Company, and would cause each and all of the said companies, and also the aforesaid auxiliary companies, and each of them, to become insolvent and to be unable to continue their respective operations and to pay their liabilities as the same matured; and that being aware and having knowledge of the facts aforesaid, the said Trust Company contrived and planned to gather and appropriate unto itself all of the stocks, bonds and other assets and property of the said railroad and auxiliary companies last mentioned, and particularly those of the defendant Belt Company, and to cause the same, under various pretenses and because of various false and unfounded claims and demands advanced by said Trust Company to be delivered to the said Trust Company, to be held by it as alleged collateral security for various pretended claims and demands which it fraudulently asserted to exist in its favor as against said Belt Company, and for the purpose of hindering, delaying and defrauding the creditors of the said Belt Company in the collection of their respective demands, and particularly your orator in the collection of its demands hereinbefore mentioned.

17 Your orator further shows that in pursuance of said last mentioned plan, the said Trust Company, so dominating and controlling the officers and directors of the said Belt Company as aforesaid, did cause the said Belt Line Company to go through the form, at various dates between the thirty-first day of March, 1899, and the ninth day of February, 1900, of executing to the said Trust Company a number of pretended negotiable promissory notes of the said Belt Company for amounts aggregating as your orator is informed and believes, about the sum of Five Hundred Thousand Dollars, and that for the pretended purpose of securing the payment of said pretended promissory notes, the said Trust Company, so dominating and controlling the said Belt Company and its officers and directors, did cause the latter to go through a form of delivering to the said Trust Company, to be held by it for the purpose of securing the said promissory notes, so in form made to it by the said Belt Company as aforesaid, all of the bonds, stocks and *and* other securities, and all of the movable personal property and other assets of the said Belt Company.

Your orator is informed and believes that among the pretended notes so fraudulently caused to be made, in form, by said Belt Company to said Trust Company and among the stocks of the said Belt Company so fraudulently caused to be delivered, in form, by said Belt Company to said Trust Company, and which are now claimed to be held by said Trust Company, are the following, to-wit:

Note dated March 31st, 1899, due July 2nd, 1899, for $50,000 with interest at the rate of 6% per annum from said date. On this note was credited on June 14th, 1900, $12,500.

Note dated November 7th, 1899, due January 9th, 1900, for $50,000 with six per cent interest per annum from said date. On this note is a credit of June 14th, 1900, of $12,500.

Note dated February 8th, 1900, due May 12th, 1900, for $109,500 with interest at the rate of eight per cent per annum from maturity.

Note dated July 26th, 1899 on demand for $203,900 with interest at the rate of six per cent per annum from date. On this note is a credit of June 11th, 1900, of $9,996.65.

A note dated September 21st, 1899, due on demand for $23,056.48 with interest thereon from date at the rate of eight per cent per annum.

A note dated October 23rd, 1899, due on demand for $7,162.40, with interest thereon at the rate of eight per cent per annum from date.

18 338 first mortgage thirty year 5% gold bonds of the Kansas City & Northern Connecting Railroad Company of the denomination of $1,000 dated January 1st, 1897, being bonds numbered 1467, 1769 to 1773 both inclusive; 1799 to 1818 both inclusive; 1324 to 1331 both inclusive; 1756 to 1768 both inclusive; 1184 to 1216 both inclusive; 1466, 1369 to 1400, both inclusive; 1431 to 1440 both inclusive; 1609 to 1658 both inclusive; 1659 to 1708 both inclusive; 1819 to 1851 both inclusive; 1774 to 1798 both inclusive; 1301 to 1323 both inclusive.

67.9 second mortgage thirty year five per cent income bonds of the Kansas City Northern Connecting Railroad Company of the denomination of One Thousand Dollars ($1,000.) each dated January first, 1897, being bonds numbered 1064 to 1098 both inclusive; 1149 to 1157 both inclusive; 1162 1173 both inclusive; 1192 to 1202 both inclusive; also certificate numbered 229 entitling the holder to 250/1000 of said mortgage income bonds and certificate No. 227 entitling the holder to 250/1000 of said second mortgage income bonds; and certificate No. 220 entitling the holder to 150/1000 of said second mortgage income bonds.

25 shares of the capital stock of the Fairmount Amusement Company of the par value of $100 each as evidenced by certificates numbered 9, 6, 5 and 4.

1120 shares of the capital stock of the Central Improvement Company of the par value of $100 each as evidenced by certificates numbered 148, 149, 147.

439 shares of the capital stock of the Northern Townsite Company of the par value of $100 each as evidenced by certificate No. 11; and

425 shares of the capital stock of the Missouri Elevator & Terminal Company of the par value of $100 each as evidenced by certificates numbered 36, 34, 37, 40 and 38.

Your orator is informed and believes that said Trust Company as part and parcel of the scheme contrived by it as aforesaid has caused the said Belt Company to go through the form of fraudulently making to it certain other and further pretended promissory notes and has fraudulently caused said Belt Company to go through

the form of delivering to it certain other personal property for the pretended purpose of securing said fraudulent and alleged promissory notes of said Belt Company. Your orator is unable to give or obtain a description of said other alleged notes, but alleges that they aggregate a large sum, to-wit: more than $100,000.00. And your orator further shows that among the further property of the
19 Belt Company which the said Trust Company so fraudulently caused to be delivered to it, as aforesaid, was and is the following, to-wit:

19,997 shares of the 20,000 shares constituting the capital stock of the said The Union Terminal Railroad Company, and 4,994 shares out of the 5,000 shares constituting the capital stock of the said Kansas City & Independence Air Line, all of which shares the said Trust Company as your orator is informed and believes has heretofore undertaken to sell and dispose of, also, about 600 tons of the new steel rails heretofore purchased from your orator as hereinbefore averred, by and then belonging to said Belt Company and on store in its yards, which the said Trust Company has likewise sold and disposed of; also $76,000 in first mortgage bonds and $15,000 in second mortgage bonds of the Northern Connecting Company which are still held by or for said Trust Company. And your orator charges that in some way unknown to it, the said Trust Company has also appropriated fraudulently unto itself and for its advantage and without consideration or right, all the shares of the capital stock of the Second Street Improvement Company and a large number of the shares of stock of the Central Improvement Company, constituting, in connection with the 1120 shares above mentioned, all, or substantially all, of the capital stock of the said Central Improvement Company; and also a large number of the shares of the capital stock of the Northern Townsite Company, constituting, in connection with the 139 shares above mentioned, all, or substantially all, of the capital stock of the last named company; and also a large amount of other property of said Belt Company, consisting of other stocks and bonds, and of notes, claims and demands in favor of said Belt Company, and of various items of personal assets, a particular description of which is unknown to your orator and concealed by said Trust Company. Your orator charges that each and all of the aforesaid shares of stock, assets and other personal property so passing into the possession of the said Trust Company, constitute assets and property of the said Belt Company, equitably and justly chargeable with the lien and payments of your orator's aforesaid judgment, and that the said shares of stock and other property were fraudulently taken into the possession of said Trust company without consideration moving from the said Trust Company, and that said Trust Company has no right to such possession or title to any part of said stocks, or property.

Your orator further shows that the said Trust Company is totally insolvent; that it has outstanding a large number of matured obligations, the holders of which are pressing the said Trust Company for payment thereof, and that the said Trust Company is wholly
20 unable to meet such demands; that said Trust Company has ceased the active conduct of business and its affairs are in

process of liquidation; that the said Trust Company is threatening to proceed to sell the negotiable promissory notes which it so fraudulently caused the said Belt Line Company to go through the form of executing to it as aforesaid and the various shares of stock and other property which it claims to hold as collateral thereto, all to the end that the creditors of said Belt Company, and particularly your orator, may be hindered, delayed and defrauded of their just rights and remedies in the premises; and your orator verily believes that unless enjoined fom doing so, as hereinafter prayed, the said Trust Company will carry its said threats into execution.

And your orator is informed and believes that on or about the first day of September, 1900, by a notice, a copy of which is hereto attached as "Exhibit 1", the said Trust Company undertook to declare and advise said Belt Company that it, the said Trust Company, would without any reservation, proceed, on the 7th day of September, 1900, at twelve o'clock, noon, to sell to the highest bidder, at public auction the said 338 first mortgage bonds, 67.9 second mortgage bonds and three certificates of the Northern Connecting Company hereinbefore described; and, also, the 25 shares of the Amusement Company's stock, the 1120 shares of the Central Company's stock, the 439 shares of the Townsite Company's stock, and the 425 shares of the Elevator Company's stock hereinbefore described; all under the pretence that it was entitled so to do by virtue of the said alleged notes and alleged delivery of said securities which the said Trust Company so fraudulently caused the said Belt Company to go through the form of making to it as aforesaid.

Your orator further shows that the property held in the name of the Elevator Company, a corporation contrived by the said Trust Company as aforesaid, as a device and dummy to take and hold the legal title to said property for and on behalf of the Belt Company, and which property is equitably and justly chargeable with the debts and liabilities of the said Belt Company, consists, among other things, of three (3) elevators known respectively as the "Star", "Eclipse", and "Diamond" Elevators, which are located in the Northeastern part of Kansas City, Missouri, and adjacent to the railroad of said Belt Company, and that the same are necessary and indispensable to a proper operation of said Belt Company's property; that the property held in the name of said Central Company consists, among other things, of various tracts of real estate in Kansas City, Missouri, acquired for the use of the said Belt Line
21 and necessary and indispensable to such use, for station grounds, yards, switches, side tracks and necessary buildings, and that said property as hereinbefore alleged, is in equity the property of the said Belt Line, the said Central Company being a mere device and dummy contrived by the said Trust Company to hold and carry the legal title thereto for the use and benefit of the said Belt Line and its creditors; that the property held in the name of the said Second Street Company consists, among other things, of certain tracts of real estate in or near Kansas City, Missouri, and used and indispensably necessary to be used by the said Belt Company for depot grounds, neccessary buildings, right of way, yards,

freight houses and machine shops; that the said Second Street Company was contrived by the said Trust Company as aforesaid, as a mere device and dummy to take and hold the legal title to said property for the use and benefit of said Belt Company, and that the said property in equity belongs to the said Belt Company and is chargeable with the debts and liabilities thereof, including the judgment of your orator as aforesaid; that the property and assets, the legal title to which is held by the said Amusement and the said Townsite Companies, respectively, are likewise essential and indispensably necessary to the successful operation of the property of the said Belt Line, and that the said two last mentioned companies are likewise devices and dummies contrived by the said Trust Company for the purpose of taking and holding the legal title to said assets and properties for the use and benefit of said Belt Company as the equitable owner thereof, and that such assets and property so held are equitably and justly chargeable with the claims and demands of the creditors of the said Belt Company, and particularly the judgment so obtained by your orator as aforesaid. Your orator further shows that the management and control of the assets and property of said auxiliary companies is still in the hands and under the domination and control of the said Trust Company by means of its various officers, agents and representatives acting as officers and directors of said auxiliary companies, and that by reason of holding possession of the said shares of stock in the said companies respectively, by means of the transactions as aforesaid, the said Trust Company is still [enable-] to and does control and dominate the management of the said several companies and the actions and doings of their respective officers and directors. Your orator further shows that it is necessary to the protection of the interests of the creditors of the Belt Company, and particularly of your orator,

22 in the premises that a receiver or receivers be appointed of and for all of the property and assets held by or in the name of or for the use and benefit of or in trust for the defendants Belt Company, Elevator Company, Amusement Company, Central Company, Second Street Company and Townsite Company and of and for the several shares of stock in the said five last named companies held by or standing in the name of the said Trust Company, and also of and for the bonds of the said Northern Connecting Company so in the possession of the said Trust Company as aforesaid, and also for and of any and all other properties or assets passing from the said Belt Company to the said Trust Company by means of the transactions occurring between said thirty-first day of March, 1899, and ninth day of February, 1900, hereinabove set forth; and further that such receivership shall be extended to and made to cover the railroads and — of the other properties of the said Belt Company, Union Company, and Air Line respectively, as an entirety, so that the same may be operated as an allied and continuous system. Your orator further shows that the control and domination of the affairs of said Belt Company by said Trust Company hereinabove set forth, ceased during the month of April, 1900, when, by reason of an election held by the then stockholders of

said Belt Company the officers, agents and representative- theretofore controlling and managing the affairs and property of said Belt Company were displaced.

Your orator brings this bill as well for itself, as for the benefit of all other creditors and persons interested in said Belt Company, similarly situated, and willing to become parties to this action and to contribute to the expense thereof.

In consideration whereof, and forasmuch as your orator is remediless in the premises at and by the strict rules of the common law and *in* relievable in a court of equity where matters of this kind are properly cognizable and relievable, your orator therefore prays the aid of this Honorable Court:

(*a*) That an accounting be taken of the various transactions and dealings between the said Trust Company and the said Belt Company, or by the said Trust Company for the use and benefit of and as trustee and agent for the said Belt Company, and that the said Trust Company be required to pay from the balance found to be due by it upon such accounting, and that in taking such accounting all claims and demands alleged or pretended by the said Trust Company to exist in its favor against the said Belt Company by reason of transactions in which the said Belt Company was used as an agency or instrumentality of the said Trust Company, be charged to and against the said Trust Company, and that the said Trust Company be decreed to make good any and all losses
23 defrayed or incurred in such transactions out of the assets or other property of said Belt Company.

(*b*) That the said Trust Company be decreed to hold the shares of stock hereinbefore described respectively in the Elevator Company, the Amusement Company, the Central Company, the Second Street Company and the Townsite Company, and the aforesaid bonds of the Kansas City & Northern Connecting Railroad Company, in trust for the use and benefit of the creditors of said Belt Company, and particularly of your orator, and that said Trust Company be decreed to account for the value of all other assets or property of said Belt Company which have come into its possession or control.

(*c*) That the property and assets, the legal title to which is held, respectively, by the said Elevator Company, Amusement Company, Central Company, Second Street Company, and Townsite Company be declared to be in equity the property of the said Belt Company and chargeable with the lien and payment of the debts and liabilities of the said Belt Company, and, particularly, the judgment aforesaid of your orator.

(*d*) That the assets and property of the said Belt Company, real, personal or mixed, and wheresoever situated, including all rights of action, legal or equitable, be marshalled for the benefit and protection of all persons concerned therein;

(*e*) That the rights and interests of all persons in and to the said assets of the said Belt Company, be ascertained, adjudicated and decreed.

(*f*) That the said assets and property, and each and every part

thereof, be sold and the proceeds thereof, after paying the costs and expenses of this proceeding and all allowances which may be made therein, be distributed among those found to be entitled thereto; and

(*g*) That your orator may have such further and other relief in the premises as the nature of this case may require and to this Court shall seem meet.

And your orator further prays that a receiver or receivers be appointed according to the course of practice in this Court, with the usual powers of receivers in like cases, of and for all the property, equitable interests, choses in action, effects, money, receipts, earnings rights, privileges, franchises, immunities; stocks; bonds; and securities of said Belt Company, all the stocks and bonds respectively, of the said Elevator Company, Amusement Company, Central Company, Second Street Company, Townsite Company
24 and Northern Connecting Company so passing in the hands of the said Trust Company, as hereinbefore alleged, and every part thereof, and of and for the property and assets, real, personal or mixed, the legal title to which is held, respectively, by the said Elevator Company, Amusement Company, Central Company, Second Street Company, and Townsite Company and that said receivers be authorized and directed by and with the consent of the court of appropriate ancillary jurisdiction, to assume also the operation and maintenance of the railroads and other property of said Union Company, and that said receivers be authorized and directed to institute all proper proceedings for the recovery of all assets and demands belonging to or existing in favor of the said Belt Company, and generally with powers and directions to take such steps as may be necessary for the full protection of all persons concerned and interested in the said Belt Company.

And your orator further prays that a writ of injunction may be issued out of and under the seal of this Honorable Court, or issued by one of your Honors, directing, commanding, enjoining and restraining the said defendants and each of them and all other persons from interfering with, transferring, selling or disposing of any of the property hereinbefore mentioned, and particularly that the said Trust Company and all other persons may be enjoined and restrained from selling or disposing of any part of the said negotiable promissory notes of the said Belt Company, so made to it as hereinbefore alleged, or of the stocks, bonds, or other securities claimed by the Trust Company to have been delievered to it as collateral security for the said notes, and likewise that the Elevator Company, Amusement Company, Central Company, Second Street Company, and Townsite Company, and all others be enjoined and restrained from in any wise incumbering, selling or disposing of any part of the property or assets, the legal title to which is held in the name of said companies respectively, and such other injunctions, orders and decrees as to the Court may seem meet and proper for the protection of the interests concerned.

And may it please your Honor to grant unto your orator the subpœna of the United States of America, issuing out of and under the seal of this Honorable Court, directed to the Kansas City Sub-

urban Belt Company, The Union Terminal Railway Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Fairmount Amusement Company, Central Improvement Company, Second Street Improvement Company, and Northern Townsite Company, the defendants herein respectively, therein and thereby commanding them on a day certain therein to be made, and under a certain penalty, to be and appear before this Honorable Court then and there to answer (but not under oath, an answer under oath being hereby expressly waived) all and singular the premises and to stand to and perform and abide by such orders, directions or decrees as may be made against them in the premises and as shall seem meet and agreeable to equity and good conscience.

And your orator, as in duty bound, will ever pray.

CAMBRIA STEEL COMPANY,
By L. C. KRAUTHOFF,
FRANK HAGERMAN,
Its Solicitors.

L. C. KRAUTHOFF,
Of Counsel.

STATE OF MISSOURI,
County of Jackson, ss:

Frank Hagerman, being first duly sworn, deposes and says that he is one of the solicitors and of counsel for the complainant in the foregoing bill of complaint; that he has read said bill of complaint and knows the contents thereof; that the allegations therein contained are true so far as they relate to his own acts and the acts of the complainant; and as far as they relate to the acts of others, he believes them to be true; that the reason this verification is not made by said Cambria Steel Company is that the said complainant is a corporation of the State of Pennsylvania having its principal office in said State, and that no officer or director thereof, competent to make this verification on behalf of said corporation, is within this jurisdiction.

FRANK HAGERMAN.

Subscribed and sworn to before me this 6th day of September, 1900.

[SEAL.]

OSCAR HOCHLAND,
Notary Public within and for Jackson County, Missouri.

My commission expires the 4th day of September, 1904.

EXHIBIT "1".

KANSAS CITY, MO., September 1, 1900.

To the Kansas City Suburban Belt Railroad Company:

The Guardian Trust Company begs again to call your attention to the fact that it holds a number of your promissory notes
26 which are past due and unpaid, and that among said notes are the following:

1. Note dated March 31st, 1899, due July 2nd, 1899, for $50,000. with interest at the rate of 6% per annum from said date. On this note was credited on June 14th, 1900, $12,500.

2. Note dated November 7th, 1899, due January 9th, 1900, for $50,000. with six per cent interest per annum from said date. On this note is a credit of June 14th, 1900, of $12,500.

3. Note dated February 8th, 1900, due May 12th, 1900, for $109,500. with interest at the rate of eight per cent per annum from maturity.

4. Note dated July 26th, 1899, on demand for $203,900, with interest at the rate of six per cent per annum from date. On this note is a credit of June 11th, 1900, of $9,996.65.

5. A note dated September 21st, 1899, due on demand for $23,056.48 with interest thereon from date at the rate of eight per cent per annum.

6. A note dated October 23rd, 1899, due on demand for $7,162.40 with interest thereon at the rate of eight per cent per annum, from date.

All of the above notes were duly executed and delivered by the Kansas City Suburban Belt Railroad Company for value received payable to the order of the Guardian Trust Company, either in its present name or in its former name, Missouri, Kansas & Texas Trust Company.

All of said notes are long since due and unpaid.

We also again call your attention to the fact that you heretofore delivered to the Guardian Trust Company and it accepted and now holds as collateral security for the payment of the said notes the following described choses in action, stocks and, bonds, to-wit:

388 first mortgage thirty-year 5% gold bonds of the Kansas City Northern Connecting Railroad Company of the denomination of $1,000, dated January 1st, 1897, being bonds numbered, 1467, 1769 to 1773 both inclusive; 1799 to 1818 both inclusive; 1358 to 1368 both inclusive; 1582 to 1595 both inclusive; 1600 to 1608 both inclusive; 1324 to 1331 both inclusive; 1756 to 1768 both inclusive; 1184 to 1216 both inclusive; 1466, 1369 to 1400 both inclusive; 1431 to 1440 both inclusive; 1609 to 1658 both inclusive; 1659 to 1708 both inclusive; 1819 to 1851 both inclusive; 1774 to 1798 both inclusive; 1301 to 1323 both inclusive.

27 67.9 second mortgage thirty-year five per cent income bonds of the Kansas City Northern Connecting Railroad Company of the denomination of One Thousand Dollars ($1,000.) each dated

January first, 1897, being bonds numbered 1064 to 1098 both inclusive; 1149 to 1157 both inclusive; 1162 to 1173 both inclusive; 1192 to 1202 both inclusive; also certificate numbered 229 entitling the holder to 250/1000 of said second mortgage income bonds, and certificate No. 227 entitling the holder to 250/1000 of said second mortgage income bonds; and certificate No. 220 entitling the holder to 150/1000 of said second mortgage income bonds; and certificate No. 231 entitling the holder to 250/1000 of said mortgage income bonds. 25 shares of the capital stock of the Fairmount Amusement Company of the par value of $100, each as evidenced by certificates numbered 9, 6, 5, and 4.

1120 shares of the capital stock of the Central Improvement Company of the par value of $100 each as evidenced by certificates numbered 148, 149 and 147.

439 shares of the capital stock of the Northern Townsite Company of the par value of $100 each as evidenced by certicate No. 11; and

425 shares of the capital stock of the Missouri Elevator & Terminal Company of the par value of $100 each as evidenced by certificates numbered 36, 34, 37, 40 and 38.

The Guardian Trust Company hereby again requests and demands that you forthwith pay the amounts due on each and all of said notes at its office at Seventh and Wyandotte Streets in Kansis City, Missouri, where all of said notes except the one for $109,500 are made payable, and where they are all now held ready for delivery to you upon the payment and satisfaction thereof, the note for $109,500 is by its terms payable at the National Bank of Commerce, Kansas City, Missouri, where it will be ready for delivery to you in case you should indicate that you prefer to pay it there rather than at the office of the Guardian Trust Company.

The Guardian Trust Company hereby notifies you that unless the amounts of money due on each and all of the said notes above described shall have been fully paid to it on or before twelve o'clock noon on Friday the 7th day of September, 1900, it will at that hour on that day at public auction at the office of Houston, Fible & Co., 723 Delaware Street, Kansas City, Jackson County, Missouri, cause to be sold to the highest bidder for cash all of the above named choses in action, stocks and bonds so held as aforesaid as
28 collateral security for said notes, or so much thereof as may be necessary to satisfy and pay said notes and the costs of said sale.

[SEAL.] GUARDIAN TRUST COMPANY,
By T. L. CHADBOURNE, JR.,
Vice President.

EXHIBIT "2".

List of Known Real Estate Belonging to Auxiliary Companies, Upon Which Also Are Various Improvements, All in Jackson County, Missouri.

To Central Improvement Company.

(1) That part of Northwest quarter of Section 6, Township 49, North Range 33, West, in Jackson County, Missouri, described as follows:

Beginning at a point 36 poles south and 208.5 feet east of the Northwest corner of said Section 6; thence south along the east line of Armour Packing Company's addition to a point on the North line of a 28 foot strip of right of way, conveyed to the Suburban Belt Railroad Company by West Kansas City Land Company said point being 111.5 feet north of the southeast corner of Lot D in said Armour Packing Company's Addition; thence in a southeasterly direction on the Northerly line of said right of way to the East line of Wyoming Street, produced north; thence north along said Extension of the East line of Wyoming Street to the South line of the right of way of main line of the Kansas City Suburban Belt Railroad Company; thence westerly along such right of way to an intersection with a line 36 poles south of the north line of said Section 6; thence West parallel to the north line of said section 6, and 36 poles therefrom, to the point of beginning; all of which was conveyed by warranty deed from West Missouri Land Company to Central Improvement Company, dated February 17th, 1896, consideration $5,500.00 recorded in Book B. 523, page 165.

(2) A tract of land beginning at a point on the east line of the west half of the northwest quarter of section 6, Township 49 Range 33, which is 36 poles south of the north line of said Section 6; thence west parallel to the said north line of section 6, and at a uniform distance of 36 poles therefrom, about 700 feet to an intersection with the north line of the right of way of the Kansas City Suburban Belt Railroad Company; thence southeasterly along said north right of way line to the said east line of the west half of the northwest quarter of Section 6; thence north about 65 feet to beginning.

29 (3) A tract of land beginning at a point in the north extension of the east line of Hickory street, 8 feet south of the center line of the Kansas City Suburban Belt Railroad; thence in a southeasterly direction on a line parallel to the center line of the Kansas City Suburban Belt Railroad and 8 feet therefrom 192.8 feet to a point in the north extension of the east line of lot 8, block 16, West Kansas Addition No. 1; thence south along said line 55.9 feet to a point; thence in a straight line southwesterly 192.8 feet to a point in the north extension of the east line of Hickory Street, 526 feet north of the north line of Ninth Street; thence north along said line 87.6 feet to place of beginning, containing 0.308 acres.

(4) A tract of land lying between the north line of the right of way of the Kansas City Suburban Belt Railroad and a line parallel to and 30 feet north therefrom, and between the east line (extended north) of Lot 16, and the west line (extended north) of lot 14, all of block 16, West Kansas Addition No. 1.

(5) A tract of land beginning at the northeast corner of lot 16, block 16, West Kansas Addition No. 1; thence west along north line of block 16, to the northwest corner of Lot 14, Block 16; thence north on extension of west line of Lot 14, to the south line of right of way of the Kansas City Suburban Railroad; thence easterly along said right of way line to a point in the northerly prolongation of the east line of Mulberry Street thence south along said east line of Mulberry Street to a point on the prolongation of the north line of Block 16, West Kansas Addition No. 1; thence west along said line to a point of beginning.

(6) A tract of land beginning at the northeast corner of Lot 1, Block 15, west Kansas Addition No. 1; thence north along the prolongation of the east line of Mulberry Street to the south line of the right of way of the Kansas City Suburban Belt Railroad Company; thence northeasterly along said right of way line to a point on the prolongation of the east line of Lot 8 (said block and Addition); thence south along said prolongation of the east line of lot 8 to the northeast corner of said lot; thence west along the north line of said Block 15 to a point 99 feet, more or less, east of the northwest corner of said block, said point being 6 feet measured at right angles from the center line of the most northerly switch track of the Kansas City, Fort Scott & Memphis Railroad Company; thence in a southwesterly direction on a line parallel to said center line of switch track and 6 feet distant therefrom, to the west line of Mulberry Street; thence north along said line to the northeast corner of Block
30 16, West Kansas Addition No. 1; thence east along the north line of blocks 15 and 16, to the point of beginning.

(7) A tract of land beginning at a point in the west line of block 14, West Kansas Addition No. 1, which is 120 feet north of the north line of Eighth Street; thence west 40 feet; thence north to the Missouri River; thence easterly following the meanderings of said river to the west line of said Block 14, extended north; thence south along said line to the beginning.

(8) All of lots 1, 2, 3, 4, 5, 6, and 7 in Block 14, West Kansas Addition No. 1, also commencing at the northwest corner of said Lot 1; thence running due north to the Missouri River; thence easterly following the meanderings of said river to a point due north of the northeast corner of Lot 5; thence due south to the northeast corner of Lot 5; thence west to place of beginning; also beginning at the southwest corner of Lot 11, in said Block 14; thence north along the east line of Santa Fe Street 86.87 feet to the northwest corner of Lot 8, in said Block 14; thence east along the north line of said Lot 8 a distance of 98.2 feet; thence southwesterly, making an interior angle with the last described line of 50 degrees, 35 minutes 112.2 feet to the south line of lot 11, being the north line of

Eighth Street; thence west 26.2 feet to beginning. Subject to right of way of Kansas City Suburban Belt Railroad Company.

(9) A triangular piece of ground in the northwest corner of Block 3, Coates & Hopkins Addition to Kansas City, bounded as follows: Beginning at a point on the west side of Block 3, which is 16 feet from the northwest corner thereof; thence north 16 feet to said northwest corner; thence easterly along the north line of said Block 3, a distance of 70 feet; thence southwesterly to beginning. Also a portion of Block 7, in said Coats & Hopkins Addition described as follows: Beginning at a point on the east side of Block 7, which [—] 252.4 feet from the northwest corner of Eighth and Henning Streets; thence northerly 46 feet along the east side of said Block to the northeast corner thereof; thence northwesterly along the northerly side of said Block 7, a distance of 144.7 feet to the northwest corner of said Block; thence south along the west line of said Block 84 degrees, 4 minutes, included angle 244.3 feet; thence northeasterly 35 deg. 20 min. included angle; 118.1 feet; thence northeasterly 187 degrees, 15 minutes included angle 67.5 feet; thence northeasterly 188 degrees, 26 minutes included angle 68.7 feet to beginning. Containing 0.487 acres.

(10) All of lot 4, Block 5, Lykins Addition to Kansas City.

31 (11) All of lot 7, Block 4, Lykins Addition to Kansas City.

(12) All of Lot 124, Block 12, Old Town, now Kansas City, Missouri.

(13) All of lots 139, 140, 319 and 320 in Block 13, Old Town, now Kansas City, Missouri, subject to right of way of Consolidated Terminal Railroad.

(14) All of Lots 31-47 and 48 of Hurck's Subdivision of Guinotte Farm.

(15) All of lot 32 Hurck's Subdivision of Guinotte Farm, line between right of way of the Kansas City Suburban Belt Railroad and the Missouri River.

(16) All of Lots 1-45 and 46 in Block 2, Modern Mutual Place, an Addition to Kansas City, Missouri, and so much of lots 2 and 44 in Block 2, and so much of Lots 6-7 and 8 in Block 1, as lie north and northwest of a line parallel to and 50 feet south of the most southerly track of the Kansas City Suburban Belt Railroad as now located across said lots.

(17) A tract of land beginning at the northeast corner of the northwest quarter of the southeast quarter of Section 27, Township 50, Range 33; thence south 255.61 feet; thence west 255.61 feet; thence north 255.61 feet; thence east 255.61 feet to beginning. Subject to right of public in Monroe Avenue on the East and County Road on the North.

(18) All of southeast quarter of the southeast quarter of Section 28, Township 50, range 33, lying south of the Missouri River, except right of way of Kansas City Suburban Belt Railroad.

(19) Lot 21, Block 29, Centropolis.

To Missouri Elevator and Terminal Company.

(1) A tract of land beginning at a point in the west line of Lot 34, of Hurck's Subdivision of Guinotte Farm, said point being 122.7 feet north of the southwest corner of said lot 34; thence north, along the west line of said lot 74.8 feet, to the south line of the right of way of the Kansas City Suburban Belt Railroad Company; thence in a northeasterly direction, along said right of way line, 164.6 feet, to the east line of the west one-half of said lot 34; thence southerly 74.8 feet to a point 220 feet north of the southeast corner of the west one-half of said Lot 34; thence southwesterly 164.6 feet to point of beginning, containing 0.227 acres.

(2) A tract of land commencing at a point on the south line of the right of way of Kansas City Suburban Belt Railroad Company 620 feet north of the southeast corner of the northeast quarter of Section 26, Township 50, north, Range 33, West of the
32 Fifth Principal Meridan; thence east with the south line of the said right of way 163.6 feet to a point; thence south 80 degrees, 28 minutes west, 150.95 feet to a point 25 feet south of the said right of way; thence west and parallel with said right of way 221.2 feet to a point; thence south 75 feet to a point; thence west and parallel with said right of way 150 feet to a point; thence north 75 feet to a point 25 feet south of said right of way; thence west and parallel with said right of way 221.2 feet to a point; thence north 80 degrees and 28 minutes west; 150.95 feet to the south line of said right of way; thence east with the south line of said right of way 726.4 feet to beginning, containing 68/100 of an acre.

(3) A tract of land commencing at a point in the north line of the right of way of the Kansas City Suburban Belt Railroad Company, 700 feet north of the southeast corner of the northeast quarter of Section 26, Township 50, Range 33, West of the Fifth Principal Meridian; thence East with the north line of the said right of way 398 feet to a point; thence north 80 degrees, 28 minutes west, 120.75 feet to a point 20 feet north of the said right of way; thence west and parallel with the north line of said right of way 250.9 feet to a point; thence north 80 feet; thence west 150 feet to a point; thence south 80 feet to a point 20 feet north of the north line of said right of way; thence west and parallel with said right of way 250.9 feet to a point; thence south 80 degrees and 28 minutes west 120.75 feet to the north line of said right of way; thence east with the north line of the said right of way 492 feet to beginning, containing 63/100 of an acre.

To Second Street Improvement Company.

A strip of land containing one-half acre, described and bounded as follows: Beginning at a point which is 300 feet southwesterly, measured at right angles from the center line of the right of way of the Kansas City Suburban Belt Railroad Company, at station 356.07,7; thence turning an angle of 90 degrees from a line parallel to said center line of right of way and running in a southwesterly direction,

on a line at right angles to said center line, 147.58 feet; thence turning an angle of 90 degrees to the right and running at right angles to said last mentioned line 147.58 feet; to a point 300 feet from the center line of right of way; thence turning an angle of 90 degrees to the right, and running at right angles to said last mentioned line 147.58 feet, to point of beginning.

To Central Improvement Company.

All that part of Lot 41 in Hurck's Subdivision of Guinotte Farm described as follows: Beginning at a point in the west line of
33 said lot 55 feet south of the northwest corner thereof; thence south on said west line 88 feet; thence east on a line parallel to the north line of said lot 150 feet; thence north on a line parallel to the west line of said lot 88 feet; thence westerly 150 feet to place of beginning. Land for National Elevator.

To Central Improvement Company and Fairmount Amusement Company.

(1) Fairmount Park, being all of the northwest quester of the southeast quarter of Section 33, Township 50, Range 32, containing 40 acres.

(2) Also a tract commencing at the southwest corner of the southeach quarter of Section 33, Township 50, Range 32; thence north along the west line of the southeast quarter of said Section 33, 986.7 feet; thence east and parallel to the south line of the section, 750.42 feet; thence south and parallel with the west line of the southeast quarter of Section 33, 986.7 feet to the south line of the section; thence west along the said south line 750.42 feet to beginning; less easement in Independence Avenue containing 17 acres more or less.

(3) A tract of land beginning at the southeast corner of the southwest quarter of Section 33, Township 50, Range 32; thence west on the section and township line for a distance of 1000 feet thence north on a line parallel to the east line of said quarter section for a distance of 1742.4 feet; thence east on a line parallel to said township line 200 feet; thence north on a line parallel to the east line of said quarter section 435.6 feet; thence east on a line parallel to said township line 800 feet; thence south on the east line of said quarter section 861.5 feet to the northwest corner of the southwest quarter of the southeast quarter of said section 33; running thence east 16 poles; thence south 20 poles; thence west 16 poles; thence south 900 feet, more or less, to beginning; making in all 50 acres, more or less, except three acres, conveyed by deed.

Afterwards, to-wit, on the 6th day of September, 1900, the Entry of appearance of the Kansas City Suburban Belt Railroad Company, et al. was filed. Said entry of appearance is in words and figures as follows:

34 In the United States Circuit Court for the Western Division of the Western District of Missouri, at Kansas City.

CAMBRIA STEEL COMPANY, Complainant,
vs.
THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, THE Union Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator and Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Entry of Appearance of The Kansas City Suburban Belt Railroad Company, The Union Terminal Railroad Company and Kansas City & Independence Air Line.

Now come the defendants, The Kansas City Suburban Belt Railroad Company, the Union Terminal Railroad Company and Kansis City & Independence Air Line, and enter their appearance herein.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY,
THE UNION TERMINAL RAILROAD COMPANY,
KANSAS CITY & INDEPENDENCE AIR LINE,
By C. W. LUCAS, *Their Solicitor.*

Afterwards, to-wit, on the 6th day of September, 1900, the following order was filed, and entered of record:

In the United States Circuit Court for the Western Division of the Western District of Missouri, at Kansas City.

CAMBRIA STEEL COMPANY, Complainant,
vs.
THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, THE Union Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator and Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Order.

Now on this 6th day of September, 1900, this cause coming on to be heard upon the application of the complainant for the appointment of a receiver or receivers for the several properties and purposes mentioned in the bill of complaint and for an injunc-
35 tion as prayed in said bill, come the complainant by its solicitors, and the defendants The Kansas City Suburban Belt

Railroad Company, The Union Terminal Railroad Company and the Kansas City & Independence Air Line, by their solicitors, and the court doth take under consideration and advisement the said several motions, except so far as the same may stand granted by the provisions hereof, and thereupon it is ordered, adjudged and decreed as follows:

1. That Stuart R. Knott and Edward F. Swinney who have heretofore been appointed receivers of the property of The Kansas *S*ity Suburban Belt Railroad Company described in the decretal orders of appointment entered in the causes numbered respectively 2464, 2465, 2466 and 2467 on the docket of this court, be and they are appointed receivers generally of all the assets, property, rights, titles and interests, legal or equitable, of the said The Kansas City Suburban Belt Railroad Company, with all the rights, powers, duties and obligations set forth in said several decretal orders of appointment, and that the receivership decreed and *and* established in and by said three several decretal orders be extended to and over this cause and the properties hereinafter described.

2. That said receivers be and they are hereby authorized, empowered and directed to collect and take into posession all of said assets and property of said The Kansas City Suburban Belt Railroad Company, or to which the same is entitled, at law or in equity, including all notes, accounts, claims, demands, rights of action, certificates for shares of stock, bonds, coupons, books, vouchers and other papers, and that said receivers be authorized and empowered to institute such suits or other proceedings as may be deemed proper and advisable by counsel to recover any and all such property held by others and also to sue upon and recover any and all claims, demands and rights of action against any person whatsoever in favor of said The Kansas City Suburban Belt Railroad Company, or any of its creditors, and also to bring suits for an accounting, or to enforce any other proper remedy, against any and all persons whatsoever based upon or arising out of past dealings or relations on the part of said The Kansas City Suburban Belt Railroad Company, or on its behalf, with any other person whatsoever, all to the end that the assets, rights of action and other property may be reduced to the control and possession of said receivers subject to the orders and decrees of this court. And the court reserves to itself the right to make any and all further orders that may appear to it to be proper and meet to effectuate the true purpose and intent hereof.

Each of the said receivers shall within thirty days file herein his bond in such form and with such surety as may be approved
36 by a judge of this court, in the sum of Ten Thousand Dollars, for the faithful performance of his duties as receiver.

3. The application of the complainant for the appointment of a receiver of and for the property mentioned in the bill of complaint herein as being in the possession of the defendant Guardian Trust Company, and of and for the property of the defendants, the Missouri Elevator and Terminal Company, the Northern Townsite Company, the Fairmount Amusement Company, the Central Improvement Company and the Second Street *Street* Improvement Company,

and the application of complainant for an injunction against said parties, are hereby continued to and set for the 27th day of September, A. D. 1900, at 10 o'clock a. m. without prejudice to the rights of any of the persons named or concerned.

4. The said Guardian Trust Company and all persons claiming by, through or under it, and each of them, and their several and respective officers, agents, employes and representatives, are in the meantime, and until the further order of this court, restrained from in any manner, directly or indirectly, selling, transferring, assigning, pledging or otherwise disposing or parting with the possession of control of (*a*) any of the property, assets, notes, stocks, bonds, claims and demands mentioned and referred to in the bill of complaint herein.

(*b*) Any of the following described property:

1. Note dated March 31st, 1899, due July 2nd, 1899, for $50,000 with interest at the rate of 6% per annum from said date. On this note was credited on June 14th, 1900, $12,500.

2. Note dated November 7th, 1899, due January 9th, 1900, for $50,000 with six per cent interest per annum from said date. On this note is a credit of June 14th, 1900, of $12,500.

3. Note dated February 8th, 1900, due May 12th, 1900, for $109,500, with interest at the rate of eight per cent per annum from maturity.

4. Note dated July 26th, 1899, on demand for $203,900 with interest at the rate of six per cent per annum from date on this note is a credit of June 11th, 1900, of $9,996.65.

5. A note dated September 21st, 1899, due on demand for $23,056.48 with interest thereon from date at the rate of eight per cent per annum.

6. A note dated October 23rd, 1899, due on demand for $7,162.40 with interest thereon at the rate of eight per cent per annum from date.

37 338 first mortgage thirty year 5% gold bonds of the Kansas City & Northern Connecting Railroad Company of the Denomination of $1,000 dated January 1st, 1897, being bonds numbered 1467, 1769 to 1773, both inclusive; 1799 to 1818, both inclusive; 1358 to 1368, both inclusive; 1582 to 1595, both inclusive; 1600 to 1608, both inclusive; 1324 to 1331, both inclusive; 1756 to 1768, both inclusive; 1184 to 1216, both inclusive; 1466, 1369 to 1400, both inclusive; 1431 to 1440, both inclusive, 1609 to 1658, both inclusive; 1659 to 1708, both inclusive; 1619 to 1851, both inclusive; 1774 to 1798, both inclusive; 1301 to 1323, both inclusive.

67.9 second mortgage thirty year five per cent income bonds of the Kansas City & Northern Connecting Railroad Company of the denomination of One Thousand Dollars ($1,000) each, dated January 1st, 1897, being bonds numbered 1064 to 1098, both inclusive; 1149 to 1157, both inclusive; 1162 to 1173, both inclusive; 1192 to 1202, both inclusive; also certificate numbered 229 entitling the holder to 230/1000 of said mortgage income bonds, and certificate No. 227 entitling the holder to 250/1000 of said second mortgage income bonds; and certificate No. 220 entitling the holder *of*

150/1000 of said second mortgage income bonds; and certificate No. 231 entitling the holder to 250/1000 of said mortgage income bonds.

25 shares of the capital stock of the Fairmount Amusement Company of the par value of $100 each as evidenced by certificates numbered 9, 6, 5 and 4.

1120 shares of the capital stock of the Central Improvement Company of the par value of $100 each, as evidenced by certificates numbered 148, 149 and 147.

439 shares of the capital stock of the Northern Townsite Company of the par value of $100 each, as evidenced by certificates No. 11; and

425 shares of the capital stock of the Missouri Elevator & Terminal Company of the par value of $100 each as evidenced by certificates numbered 36, 34, 37, 40 and 38.

(*c*) The notes of The Kansas City Suburban Belt Railroad Company for $25,000, dated Januar 25th, 1900, payable to the order of Guardian Trust Company, 50 first mortgage and 15 second mortgage bonds of the Kansas City & Northern Connecting Railroad Company securing same.

(*d*) The note of The Kansas City Suburban Belt Railroad Company for $10,400, dated February 9th, 1900, and 26 first
38 mortgage bonds of the Kansas City & Northern Connecting Railroad Company.

Said parties are also likewise restrained from taking any steps to make the sale or disposition of property threatened to be made on September 7th, 1900, by the notice a copy of which is attached to the bill herein as "Exhibit 1".

The Missouri Elevator and Terminal Company, the Northern Townsite Company, the Fairmount Amusement Company, the Central Improvement Company and the Second Street Improvement Company, and each of them, and their several and respective officers, agents, employes and representatives, are also in the meantime, and until further order herein, hereby restrained and enjoined from in any manner, directly or indirectly, selling, encumbering, pledging, transferring, assigning, or otherwise disposing or parting with the possession or control of any part of the assets, property, moneys or demands of said companies respectively.

5. That notice of the aplication for the appointment of a receiver and of the restraining order mentioned and contained in the third and fourth paragraphs hereof and of the further hearing of said application be given to each of the defendants in said paragraphs named by serving upon each of them, respectively, a copy of this order; complainant shall file forthwith bond for ten thousand dollars conditioned in form & with surety to be approved by a Judge hereof.

(Signed) JNO. F. PHILIPS,
District Judge.

Afterwards, to-wit, on the 1st day of October, 1900, the entry of appearance of the Guardian Trust Company was filed. Said entry of appearance is in words and figures as follows:

UNITED STATES OF AMERICA:

In the Circuit Court for the Western Division of the Western District of Missouri.

No. 2468.

CAMBRIA STEEL COMPANY, Complainant,
vs.
THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, GUARDIAN TRUST COMPANY et al., Defendants.

Now comes the defendant Guardian Trust Company, one of the defendants in the above entitled cause and enters it- appearance in this cause as such defendant.

GUARDIAN TRUST COMPANY,
By TRIMBLE & BRAILEY,
Its Solicitors.

39 THOS. L. CHADBOURNE, JR.,
Of Counsel.

Afterwards, to-wit, on the 1st day of October, 1900, the following Entry of Appearance of the Second Street Improvement Company et al., was filed:

In the United States Circuit Court for the Western Division of the Western District of Mo.

In Equity. #2468.

CAMBRIA STEEL COMPANY, Complainant,
vs.
KANSAS CITY SUBURBAN BELT RD. CO. et al., Defendants.

Now come the Second Street Improvement Company, the Missouri Elevator & Terminal Company, the Central Improvement Company, the Fairmount Amusement Company, and the Northern Townsite Company, by their attorneys and hereby and herewith enter their separate appearances in the above entitled cause.

THE SECOND STREET IMPROVEMENT COMPANY,
THE MISSOURI ELEVATOR & TERMINAL COMPANY,
THE CENTRAL IMPROVEMENT COMPANY,
THE FAIRMOUNT AMUSEMENT COMPANY,
THE NORTHERN TOWNSITE COMPANY,
By TRIMBLE & BRALEY, *Their Attorneys.*

Afterwards, to-wit on the 5th day of November 1900, the Guardian Trust Company filed its answer to the original bill of complaint of the Cambria Steel Company.

Said answer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,
vs.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, THE UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Answer of the Defendant, Guardian Trust Company, to the Bill of Complaint of the Cambria Steel Company, Complainant.

40 This defendant now and at all times hereafter saving and reserving to itself all benefit and advantage of exceptions which can or may be had or taken to the many errors and uncertainties and other imperfections in the said bill contained, for answer thereto, or to so much and such portions thereof as this defendant is advised it is material or necessary for it to answer unto, answering says:

That this defendant admits that the complainant is a corporation and citizen of the state of Pennsylvania, and that the defendants are all corporations and are all citizens of the state of Missouri,
41 and inhabitants of the Western Division of the Western District of Missouri, as alleged in the bill of complaint, except the defendant, The Union Terminal Railroad Company, which is a citizen of Kansas, and an inhabitant of the First Division of the District of Kansas, as alleged in the bill of complaint.

This defendant admits that its name was "Missouri, Kansas & Texas Trust Company," from the date of its incorporation until about June, 1899, when it was duly changed to that of "Guardian Trust Company," as alleged in the bill of complaint; but this defendant denies that the date of its incorporation was about the year 1885.

This defendant admits that the defendant, the Kansas City Suburban Belt Railroad Company, became indebted to the complainant prior to the institution of this suit in a large sum, for steel rails purchased by said Belt Company from the complainant, but this defendant has not sufficient knowledge or information to enable it to form a belief as to whether or not the amount of said indebtedness was about One Hundred Thousand Dollars, nor as to whether the said steel rails were so purchased by the said Belt Company between the first day of November, 1897, and the first day of March 1898, as alleged in the bill of complaint.

This defendant admits that a suit was brought in the name of the

complainant, upon the obligation given it by the said Belt Company evidencing the balance due upon said indebtedness, and this defendant avers the fact to be that said obligation consisted of a promissory note executed and delivered by the defendant, the Kansas City Suburban Belt Railroad Company to the complainant, on January, 15th, 1900, for Ninety Eight Thousand, Seven Hundred and Forty Four and 23/100 Dollars ($98,744.23), which note was a renewal in whole or in part of former notes executed by the said Belt Company to the complainant, for the purchase price of steel rails.

This defendant admits that a judgment was recovered in this Honorable Court on the said note in the name of the complainant on the sixth day of September, 1900, against the said Belt Company for the sum of One Hundred Thousand, Nine Hundred, and Sixty Two and 91/100 Dollars ($100,962.91), but this defendant has no knowledge or information sufficient to enable it to form a belief as to whether or not any part of said judgment has been paid, hence demands proof of the complainant's allegation that no part of the same has been paid.

This defendant admits that an execution was issued on said judgment, directed to the Marshal of the Western District of
42 Missouri, and against said Belt Company, and that the said Marshal did make return of said execution, which return as written, shows upon its face that the execution was wholly unsatisfied for want of property of the said Belt Company upon which to levy the same, but this defendant states and avers the fact to be that said suit on said note was instituted in this Honorable Court on the said sixth day of September, 1900; that by a prearrangement the said defendant, Belt Company, entered its appearance on the same day and consented to said judgment's being rendered against it, which was done on the same day and hour, and that counsel appearing as the attorneys for the complainant in that suit, without any purpose or desire of collecting said judgment, did, on the same day go through the form of causing an execution to be issued on said judgment, and wrote a pretended return of nulla bona thereon, and placed said execution in the hands of said Marshal, solely for the purpose of having him sign the said pretended return which had been so written and prepared for him, and the said Marshal, without making any search for property on which to levy said execution, and without making any demand on the said Belt Company for the payment thereof, and without in any way attempting to collect the same, did on the same day, at the request and direction of those persons who appeared as attorneys for the plaintiff in said execution, through one of his deputies, sign said pretended return of nulla bona which had been previously written and prepared for his signature, as aforesaid.

This defendant denies that the said defendant, Kansas City Suburban Belt Railroad Company was or is insolvent, and denies that it had or has no property subject to be reached by legal process to be issued upon the said judgment so secured by the complainant, as aforesaid, as aileged in the bill of complaint; but this defendant states and shows that on the contrary the truth is that the

said Belt Company then had and still has ample money and means provided and at its command to pay the said debt of the complainant and all its other liabilities which was fully known to the complainant prior to and at the time of the institution of the said suit on said note, and at all times since.

This defendant further states and shows to the Court that in addition to the fact that the said Belt Company had and has ample money and means provided and at its command to pay the complainant's said debt, as aforesaid, the complainant itself ever since the execution of the said note, has held and still holds in its own hands a large amount of valuable property of the said Belt Company as collateral security to secure the payment of the said
43 note, duly pledged by the said Belt Company to complainant for that purpose. This defendant does not know the exact amount or description of the said personal property so pledged to and held as collateral security by the complainant, but avers that it was and is of sufficient value upon foreclosure to pay a large part, if not the whole of the complainant's said debt; that a part of said collateral security consists of one hundred and fifty four (154) First Mortgage, Thirty Year, Five Per Cent Gold Bonds of the Kansas City and Northern Connecting Railroad Company of the denomination of One Thousand Dollars ($1,000.00) each, which are secured by a first lien on about one hundred miles of first class, standard gauge railroad, between Kansas City and Pattonsburg, Missouri, at the rate of Twenty Thousand Dollars in bonds to each mile of said railroad; that said bonds could have been and can now easily be subjected to the payment of the complainant's debt and to the satisfaction of a large part thereof, but the complainant has made no attempt whatever to collect its debt in any way, but has failed and refused to even appropriate, as it lawfully might and could have done, that part of the Belt Company's property which was and is in its own hands for that express purpose.

This defendant further answering unto that part of the complainant's bill of complaint which refers to the recovery of the said alleged judgment against the said Belt Company and the alleged issuance and return of execution thereon, states and *and* shows that the said suit was not instituted and the said judgment was not recovered, and the said execution was not issued in good faith for the purpose of collecting the complainant's said debt, but that upon the contrary, the said Belt Company, and its attorneys, agents and officers, and The Kansas City Southern Railway Company, who completely dominates and controls them, and certain other persons having the charge and control of some of its business and financial affairs, hereinafter called the Philadelphia Committee, whose personnel and connection with the Belt Company and its affairs will be more definitely hereinafter stated, unlawfully conceived the fraudulent purpose and design of hindering, delaying and defrauding the creditors of the said Belt Company, including this defendant, in the collection of their just debts by procuring the appointment of receivers at the hands of this Honorable Court to take possession of all of the property of the said Belt Company, and by procuring

restraining orders and injunctions from this Honorable Court, preventing such creditors, except the complainant, from in any way subjecting any of the assets or property of the Belt Company to the payment of their debts, upon the false and fraudulent pretense that the appointment of receivers and the granting of said restrain-
44 ing orders and injunctions against such creditors were necessary to the protection of the interests of said creditors, and further by seeking to foreclose certain mortgages on separate parts of the Belt Company's property on the false and fraudulent pretense that there had been a demand for and default in the payment of certain installments of interest thereon, so as to cut out by foreclosure and defeat, the unsecured creditors of said Belt Company, including this defendant in the collection of their debts; that in pursuance of said fraudulent purpose and design the said Belt Company in connection with and through the said Kansas City Southern Railway Company, and the said Philadelphia Committee, approached the complainant and requested it to allow them to bring a suit in its name on said note and recover a judgment thereon against the Belt Company and afterwards to allow them to bring this suit, in its name, so as to make it falsely appear that a bona fide judgment creditor was diligently and in good faith attempting to enforce the collection of its debt through the instrumentality of this creditor's bill and its accompanying receivership, whilst in truth and reality it would be and was intended to be in substance and effect the Belt Company suing for and obtaining a judgment and execution against itself, and procuring the appointment of receivers for its own property for the fraudulent purpose aforesaid.

That this defendant is informed and believes, and upon such information and belief avers the fact to be that the said Belt Company, the said The Kansas City Southern Railway Company, and the said Philadelphia Committee promised and agreed with the complainant that if it would allow them to bring the said suit in its name, they would see to it that its debt was fully paid, and would indemnify and save it harmless against any and all costs and expenses on account of said suits so to be conducted in its name; that the complainant, with full knowledge of the said fraudulent purpose and design, and participating therein, for the purpose of carrying the same out, did consent that they might institute, conduct and prosecute in its name the said suits; that the said Belt Company and the said The Kansas City Southern Railway Company and the said Philadelphia Committee then employed counsel, whether in their own name or not or in the name of the complainant, this defendant does not know, and has no present means of ascertaining, to institute and prosecute the said suit on said note to judgment and execution and to present this bill of complaint based thereon; but whatever form may have been used in the employment of said counsel, that the fact is that the said Belt Company, the said The Kansas City Southern Railway Company and the said Philadelphia
45 Committee are the real employers and are by agreement to bear the expense thereof.

That in the further prosecution of their said fraudulent purpose

and design of hindering, delaying and defrauding the unsecured creditors of the said Belt Company, they, the said Belt Company, the said The Kansas City Southern Railway Company, and the said Philadelphia Committee, requested and procured the Provident Life & Trust Company of Philadelphia, who, at their instigation was and still is claiming and asserting itself to be the trustee in four certain mortgages which are liens or apparent liens on separate portions of the property heretofore operated by the Belt Company, but now operated by the said The Kansas City Southern Railway Company, to institute four suits for the foreclosure of said mortgages in this Honorable Court, on the false pretense that there had been a default in the payment of the interest on the bonds in said mortgages described. That the person who owns and holds all or substantially all of the bonds described in all of the said mortgages, to-wit, The Kansas City Southern Railway Company, is the same person who controls and directs the business and affairs of all the companies that executed said mortgages, and who owns and holds all or substantially all, of the Capital Stock of all of said Companies, and is the same person who has the possession and management of the property of all *the property of all* of said companies, and who controls and operates all of the railroads covered by said mortgages, and who collects and receives all the earnings and income thereof, so that the same person who holds or owns substantially all of said bonds, is the same person who is equitably charged with the duty of paying whatever may be lawfully due on any of said bonds, if anything.

That said foreclosure suits were brought at the instance and request of those persons only who are so responsible for the alleged default and were fraudulently and collusively brought to sell said property for the fraudulent purpose aforesaid of cutting out and defeating the unsecured creditors, and not for the purpose of enforcing the payment of said bonds.

That the said suit in the name of the complainant to recover judgment on said note, and this bill of complaint in this cause, and each of said four suits brought in the name of the Provident Life & Trust Company to foreclose said mortgages, were all brought against the Belt Company, and its property, at the solicitation and request of the Belt Company, and of those said persons who dominate and control its action; that they were all drawn and prepared
46 simultaneously by the same counsel, and were all instituted at the same time; by the same counsel, and the Belt Company, together with all of the other defendants which it controls were present in Court at the time of the filing of all of the said suits, and voluntarily entered their appearance therein, and fradulently and collusively consented to the relief sought in each case, but the defendants who were not controlled by the said Belt Company, were not present and were not notified that each and all of the said suits are parts of one and the same transaction, collusively and fraudulently contrived and instituted by the Belt Company and those said persons who control its action, with the fraudulent purpose and in-

tent of hindering, delaying and defrauding all of its unsecured creditors excepting the complainant.

This defendant prays leave to refer to and use upon any hearing of this cause, any and all of the files and records in any and all of said causes, as fully as if they were set out herein and made a part of the record in this cause.

This defendant further states and shows that on April, 1st, 1899, and prior thereto, the Kansas City, Pittsburg and Gulf Railroad Company, a Missouri corporation, was operating a railroad from Kansas City, Missouri, to Port Arthur, Texas, and under a rental contract was using the lines, tracks, station houses, yards and depots of the said Belt Company and its associated lines as its Kansas City Terminals, and was using the canal of the Port Arthur Channel & Dock Company in Texas as its southern terminals, so as to get its freight to and from the open sea.

That on April 1st, 1899, the said Kansas City, Pittsburg & Gulf Railroad Company defaulted in the payment of the interest on its mortgage bonds and a suit to foreclose its mortgage on account of said default was instituted in this Honorable Court on the 6th day of April, 1899, and receivers were appointed and operated the railroad pending the foreclosure.

That a certain number of persons about that time got together and appointed themselves as a committee herein called the Philadelphia Committee to reorganize the Kansas City, Pittsburg & Gulf Railroad Company and readjust its securities so that it would be thereafter burdened with a less interest charge and one clearly within its ability to earn.

That said Philadelphia Committee, after some resignations and substitutions was composed of Wm. F. Harrity, A. Heckscher, Herman Sielcken, William Edenborn, Max Pam, Samuel R. Shipley, Silas Petitt and Winthrop Smith.

47 That the said Philadelphia Committee, in pursuance of said purpose, adopted and published a plan and agreement for the reorganization of the said Kansas City Pittsburg & Gulf Railroad Company and the said Terminal Companies, which provided among other things, for the formation of a new railroad company, which would issue its bonds and stocks in exchange for the bonds and stocks of the said Kansas City, Pittsburg & Gulf Railroad Company and in exchange for the stock and bonds of the Kansas City Suburban Belt Railroad Company, The Union Terminal Railroad Company, the Consolidated Terminal Railroad Company of Kansas City, the Kansas City & Independence Air Line, and the Port Arthur Channel & Dock Company, in order, as stated in said published plan, "to merge these three corporate managements into one so that the system shall be capable of operation as a whole under one management, from Kansas City to the ship's side at Port Arthur," so that said new railroad company which would after the reorganization own the main line and property of the said Kansas City, Pittsburg & Gulf Railroad Company, would also own the bonds and capital stock of the Kansas City Suburban Belt Railroad Company, and its operated lines at Kansas City, and of the Port Arthur Channel &

Dock Company in Texas and that hereby "all three parties would be under one corporate ownership, management and control."

That the Provident Life & Trust Company, complainant in said four foreclosure suits filed simultaneously with this suit, was a party to the said plan and agreement of reorganization, and its president, Samuel R. Shipley, was a member of the said Philadelphia Committee.

That the said Philadelphia Committee, in furtherance of its said plan of reorganization, caused the proposed new railroad to be incorporated under the laws of the state of Missouri under the name of The Kansas City Southern Railway Company, and placed three of its members on the Board of Directors of said New Company, and two others of its members, one of whom is the said Samuel R. Shipley, President of the said Provident Life & Trust Company, as aforesaid, on a Board of Voting Trustees, who were to be and are vested with the absolute and unlimited power of voting all of the stock of The Kansas City Southern Railway Company for the next five years.

That the said Philadelphia Committee, for and on behalf of the said The Kansas City Southern Railway Company, as well as on its own account, did invite and request the owners and holders of the stock and bonds of the Kansas City, Pittsburg & Gulf Rail-
48 road Company, the Port Arthur Channel & Dock Company, and the said Kansas City Suburban Belt Railroad Company and its operated lines at Kansas City, to deposit their said stock and bonds with the said Provident Life & Trust Company and to receive in payment therefor the stocks and bonds of the said The Kansas City Southern Railway Company, at a ratio prescribed in said ·b-lished plan.

That in response to said invitation and request, the respective owners and holders of the stock and bonds of all of the said companies, and particularly of the Kansas City Suburban Belt Railroad Company and its operated lines at Kansas City, for the purpose of converting them into the stock and bonds of The Kansas City Southern Railway Company, to the end that the said purposes of said reorganization plan might be carried out, did deposit all or substantially all of their stocks and bonds so as to enable the said Philadelphia Committee to consummate its said plan of reorganization, and the same was thereupon declared effective and carried out as proposed.

That after the said plan of reorganization had been declared effective, and the said The Kansas City Southern Railway Company had thereby acquired substantially all of the stocks and bonds of the Kansas City Suburban Belt Railroad Company, and its operated lines at Kansas City, to-wit, on or about the first day of April, 1900, a majority of the then directors and officers of the Kansas City Suburban Belt Railroad Company resigned their respective offices, and persons who were directors, officers and agents of the said The Kansis City Southern Railway Company, were chosen in their stead so that from that time ever since the said The Kansas City Southern Railway Company and the said Philadelphia Committee have had

and exercised full and unrestrained control, direction and management of all of the corporate affairs of the said defendant, the Kansas City Suburban Belt Railroad Company.

That on or about the said first day of April, 1900, the said The Kansas City Southern Railway Company in furtherance of said plan of reorganization, took actual possession of all of the railroad, tracks, shops, depots, station houses, rolling stock, and other equipment and appurtenances, and appliances of the Kansas City Suburban Belt Railroad Company and its operated lines at Kansas City, and has ever since that time been and still is managing, controlling and operating the same and receiving and collecting all of the earnings and income thereof.

That it was a part of the said plan and agreement of reorganization that the said Philadelphia Committee should cause a syndicate of capitalists to be formed who would buy enough of the stock
49 and bonds of the said The Kansas City Southern Railway Company which would not be needed to retire and convert the stock and bonds of the old companies sought to be unified, to pay off and discharge all of the floating debts and other unsecured obligations of all of the old companies, including those of the Kansas City Suburban Belt Railroad Company. That said syndicate was formed and enough of the securities of The Kansas City Southern Railway Company were sold to said syndicate to provide money to satisfy and discharge all of the floating and unsecured debts and obligations of all of said companies so sought to be united under the ownership and control of The Kansas City Southern Railway Company, including those of the said Kansas City Suburban Belt Railroad Company and the said Philadelphia Committee, and the said The Kansas City Southern Railway Company, which it controls, have wrongfully withheld said money and have unlawfully and fraudulently failed and refused to apply the same to the purposes for which it was raised, to-wit, to the payment of the floating and unsecured debts and obligations of the Kansas City Suburban Belt Railroad Company, and the other old companies so amalgamated as aforesaid under said plan of reorganization.

This defendant further states and shows that one Max Pam, of Chicago, Illinois, was and is a member of the said Philadelphia Committee, and was and is also a member of the Board of Directors of the said The Kansas City Southern Railway Company, and a member of its Executive Committee; that said Max Pam was and is the General Counsel and legal adviser of the said Philadelphia Committee and the General Counsel and legal adviser of the said The Kansas City Southern Railway Company, and the General Counsel and legal adviser of the said Kansas City Suburban Belt Railroad Company, and the General Counsel and legal adviser of The Union Terminal Railroad Company, and the General Counsel and legal adviser of the Kansas City & Independence Air Line, and the General Counsel and legal adviser of the Consolidated Terminal Railway Company, and as such had and has the general supervision, direction and control of the affairs and legal proceedings of the said Philadelphia Committee and of all of the said last

named railroad companies, including the question as to which of their debts, if any, they should pay, and which of their debts they should avoid or escape the payment of, and of the legal proceedings necessary to accomplish the avoidance and escaping of the payment of such debts.

That C. W. Lucas, who entered the appearance of the Kansas City Suburban Belt Railroad Company, The Union Terminal Railroad Company, the Consolidated Terminal Railroad Company, and the Kansas City & Independence Air Line in this cause, and who on their behalf consented to the appointment of receivers for their properties, is an appointee of the said Max Pam, as an assistant attorney for the said Kansas City Southern Railway Company and for all of the other said railroad companies, and his salary is fixed by and is dependent upon the wishes and word of the said Pam, and that his said action in appearing for the said defendants and consenting to the appointment of receivers was in obedience to the direction of the said Max Pam, and in accordance with the wishes, and for the furtherance of the fraudulent purpose wrongfully and wickedly conceived by the said Philadelphia Committee and the said Kansas City Southern Railway Company, and the said Kansas City Suburban Belt Railroad Company whom they control to avoid and escape the payment of the unsecured debts of the said Belt Company by means of the said four foreclosure suits, and by means of this suit so simultaneously and collusively instituted as aforesaid.

This defendant denies that prior to the year 1887, or at any other time, it conceived or entered upon the plan and purpose to construct, or cause to be constructed a large number of railroads in and about Kansas City, as alleged in the bill of complaint. Denies that it was a part of its plan and purpose to cause railroads to be constructed and operated by various corporations to be organized by this defendant and officered by its agents and representatives so as to absolutely dominate and control the actions of said railroad companies and their directors and officers, as alleged in the bill of complaint. Denies that it was a part of any such plan of this defendant to organize a large number of auxiliary corporations either in the way of construction companies to build railroads or companies to hold legal titles to lands, buildings or other structures necessary to be used by such railroad companies, as alleged in the bill of complaint. Denies that it so officered such construction and auxiliary companies with its own officers and agents so as thereby to enable it to dominate the actions of such construction and auxiliary companies, and of their several officers and directors, as alleged in the bill of complaint. Denies that it was a part of any plan or purpose of this defendant to utilize and employ any one or more of such railroad companies or auxiliary companies to act for or on behalf of this defendant in carrying out the various portions of the general plan as alleged in the bill of complaint, or for the purpose or plan of carrying out any other plan or purpose, so as to gather to itself the profits and advantages accruing from any of their transactions. Denies that this defendant at any time organized any railroad corporation or other

corporation, with the purpose and intent on its part to un-
51 dertake to foist upon such railroad Company or other cor-
poration, or upon those who might become interested therein as creditors or otherwise any loss, burden or other liability which might result from any of their transactions as alleged in the bill of complaint. Denies that in carrying out any of its plans and purposes as alleged in the bill of complaint the defendant assumed the position and duty of trustee and agent in managing and disposing of the bonds, stocks, funds and other assets of said railroad companies and auxiliary companies in trust, and for the use and benefit of the parties who might become interested therein, as alleged in the bill of complaint; and denies that as a consequence of any such alleged position the relation of this defendant to any of such railroad companies and auxiliary companies in any wise became or was as principal bound and charged with the duty to indemnify or protect any such railroad or auxiliary company in any transaction against any loss, burden or liability, as alleged in the bill of complaint. Denies that it became the duty of the defendant, as to persons becoming interested in any of said railroad companies or auxiliary companies as creditors, to dispose of the stock, bonds funds or other assets of any such railroad companies or auxiliary companies for the use and benefit of the persons interested therein, or who might become interested therein as creditors or otherwise, as alleged in the bill of complaint.

This defendant further answering states and shows that in the management and discharge of its business as a trust company it accepted the trusteeship in a number of mortgages given by some of said railroad companies to secure bonds issued by them, and as such trustee did certify the bonds, and in some cases did underwrite and purchase some of said bonds, and in some cases did act as agent for said railroad companies in the sale and disposition of their bonds to others, and in some cases acted as the agent of said railroad companies, and other companies, in the sale and disposition of their stocks, and in some cases subscribed to some of the stocks of other corporations, all of which, in so far as it affects the matters and things referred to in the bill of complaint will be more definitely and particularly hereinafter stated

The defendant denies that in pursuance of the alleged plans and purposes, or otherwise, it did, on or about the first day of January, 1887, or at any other time, cause the corporation to be formed known as the Kansas City Suburban Belt Railroad Company for the stated and avowed purpose of building a belt line of railroad to encircle the cities of Kansas City, Missouri and Kansas City, Kansas, as alleged in the bill of complaint, or for any
other purpose. Denies that it caused said Suburban Com-
52 pany to build a portion of its projected line, as alleged in
the bill of complaint, and denies that it caused the said Suburban Belt Company to place a mortgage upon its property to secure an issue of its bonds aggregating a million dollars, and to issue and deliver the sa-d bonds to this defendant as alleged in

the bill of complaint. Denies that it thereupon proceeded to sell and dispose of the said bonds as alleged in the bill of complaint. Denies that there has been, or is, any default in the payment of any interest heretofore accruing upon any of said bonds, and denies that the principal of any of the said bonds has been declared to be due and payable according to the terms and provisions of the mortgages securing the same, as alleged in the bill of complaint. It admits that a bill to foreclose said mortgage has been filed and is now pending in this court.

This defendant states and shows that all, or substantially all, of the said bonds have been taken up and are now in the possession of and held by the persons who own and control all the stock of said Suburban Company, and who have possession and management of its property, and who control and operate its property and railroad and receive all of the income and earnings thereof, and that said persons have attempted and pretended to make a default in the payment of the interest on said bonds and have attempted and pretended, by reason of said fictitious default to declare the principal of said bonds due, and have caused the said foreclosure suit to be instituted, which alleged default and pretended declaring of the principal due on account thereof, and the suit to foreclose the mortgage by reason thereof, were all made, done and instigated by the persons whose duty it was to pay whatever might be due on any of said bonds for the fraudulent purpose of cutting out all the unsecured creditors of said Belt Company, by means of such foreclosure.

This defendant denies that it caused various of its officers, agents and employes to be elected and constituted the officers and directors of the said Suburban Belt Railroad Company, and denies that by means thereof it did dominate and control the affairs and actions of the said Suburban Belt Company continuously until its consolidation, as alleged in the bill of complaint. Denies that instead of carrying out and completing the projects and purposes for which the said Suburban Company is alleged in the bill of complaint, to have been formed, and in order to benefit this defendant, it caused the consolidated Terminal Railway Company to be incorporated for the purposes stated in the bill of complaint, or for any other purpose whatever. Denies that it caused the said Consolidated Terminal Railway Company to place a mortgage upon its prop-

53 erty, as alleged in the bill of complaint, to secure the issue of its bonds aggregating Seven Hundred and Fifty Thousand Dollars. Denies that it caused said company to issue and deliver said bonds, or any of them, to this defendant.

The said Consolidated Terminal Railway Company did execute and deliver to this defendant, as trustee, a mortgage on its said road and property to secure an issue of bonds aggregating Seven Hundred and Fifty Thousand Dollars, but this defendant denies that it at any time proceeded to sell or dispose of any of said bonds except as agent for the Kansas City Suburban Belt Railroad Company, as will hereafter be more particularly stated, and

denies that said bonds are now outstanding. Denies that default having occurred in the payment of installments of interest heretofore accuring upon said bonds, the principal of said bonds has been declared to be due and payable in accordance with the terms and provisions of said mortgage.

This defendant states and shows to the court that all or substantially all of the said bonds have been taken up and are now held by the persons who own all of the stock of the said Consolidated Terminal Company, and who own, manage, control and operate all of its property, including its railroad, and who collect and receive all of the earnings and income thereof, and who are charged with the duty of paying whatever may be due on any of said bonds; that the said persons assert and claim that there has been a default in the payment of inter-st on the said bonds and have pretended to have the principal of said bonds, declared due on account of such fictitious default, and have procured a foreclosure suit to be brought which is now pending in this court, but this defendant states and shows that the alleged default, and the pretended declaring of the principal due on account thereof, and the subsequent institution of the foreclosure suit, were all made, done and instigated by the persons who own said bonds, and who practically own the property which is mortgaged to secure them and who are chargeable with the duty of paying whatever may be due on any of said bonds, and that the said foreclosure suit was brought at their instigation for the fraudulent purpose of hindering, delaying and defrauding the unsecured creditors of the Belt Company, particularly this defendant.

This defendant denies that it caused various of its officers, agents and employes to be elected as officers and directors of the said Ter-

minal Company, and denies that it thereupon proceeded to
54 dominate and control the action of said company and its officers and directors continuously until its consolidation as alleged in the bill of complaint, and denies that instead of completing the said line of railroad of said Terminal Company specified and mentioned in its articles of incorporation, this defendant caused only a part thereof to be built, as alleged in the bill of complaint. Denies that in further pursuance of its alleged plans and purposes, or in any other way, it did, on [*of*] about the 30th day of December, 1891, or at any other time, cause the Union Terminal Railroad Company to be incorporated as alleged in the bill of complaint, and for the purposes stated in the bill of complaint or for any other purpose whatever. Denies that it thereupon caused the said Union Terminal Company to place a mortgage upon the railroad proposed to be built by it, and upon its property, to secure an issue of bonds, aggregating Two Million Dollars, as alleged in the bill of complaint, and denies that it caused the said Union Terminal Company to issue and deliver the said bonds to this defendant. Denies that it caused the said Union Company to build a part of the line specified in the articles of association, as alleged in the bill of complaint. Denies that this defendant did thereupon sell and dispose

of said bonds, and denies that the same are now outstanding. Denies that default having occurred in the payment of various installments of interest heretofore accruing upon said bonds, the principal has been declared to be due and payable according to the terms and provisions of said mortgage. Admits that a suit to foreclose said mortgage has been brought and is now pending in this Court. Denies that it caused various of its officers, agents and employes to be elected as the officers and directors of said Union Company, and denies that by means thereof it did continuously until about the month of April, 1900, dominate and control the action and affairs of said Union Terminal Company and its officers and directors. Denies that by means of such alleged control and domination or otherwise, this defendant caused the said Kansas City Suburban Belt Railroad Company to endorse upon each of the bonds of the Union Company its guaranty for the payment of principal and interest thereof and denies that by reason of its domination and control, as alleged, did, on or about the 25th day of July, 1892, or at any time, cause the said Suburban Company, and the said Terminal Company, to be consolidated in accordance with the provisions of the statutes of the State of Missouri, as alleged in the bill of complaint. This defendant states that it is true that the said Suburban Company and the said Terminal Company were duly consolidated in accordance with the statutes of the State of Missouri, but that such consolidation was not the result of any domination or control on the part of
55 this defendant, and denies that this defendant caused various of its officers, agents and employes to be elected as the officers and directors of the said Belt Company, and by means thereof, continuously until the month of April, 1900, completely dominated and controlled the actions and affairs of said Belt Company and its officers and directors.

This defendant states and shows that the Union Terminal Railroad Company did duly execute and deliver to this defendant, as trustee, a mortgage upon the railroad proposed to be built by it, to secure an issue of bonds aggregating Two Million Dollars; that all, or substantially all, of the said bonds have been taken up and are now held and owned by the same persons who own and hold all of the stock of The Union Terminal Railroad Company and who own, control and manage its property, and who control and operate its railroad, and collect and receive all the earnings and income thereof, and who are charged with the duty of paying anything that may be due on any of said bonds. The said persons have pretended that there was a default in the payment to them of some of said interest, and on account of said fictitious default have undertaken to declare the principal of said bonds due, and have procured a foreclosure suit to be brought in this court on account thereof, but this defendant states and shows that the alleged default and pretended declaring of the principal due on account thereof, and the institution of said foreclosure suit were all made, done and instigated by the said persons who practically own the property sought to be foreclosed, for the fraudulent purpose of hindering, delaying and defrauding un-

secured creditors of the Belt Company and particularly this defendant.

This defendant denies that in furtherance of its alleged plans and purposes, it caused the Kansas City & Independence Air Line to be incorporated on or about the 23rd day of January, 1891, or at any other time, for the purpose of building a line of railroad described in the bill of complaint, or for any other purpose. Denies that it caused said Air Line to place a mortgage upon its property to secure an issue of bonds aggregating Three Hundred Thousand Dollars, and to issue and deliver the said bonds to this defendant. Denies that it thereupon sold and disposed of the said bonds, and denies that the same are now outstanding. Denies that default having occurred in the payment of various installments of interest heretofore accruing upon said bonds, the principal thereof has been declared to be due and payable according to the [term-] and provisions of the mortgage securing the same. Admits that a suit to foreclose said mortgage has been brought and is now pending in this Court. Denies that it caused various of its officers,
56 agents and employes to be elected as officers and directors of the said Air Line, so to absolutely dominate and control the affairs of said company, and the actions of its officers and directors, and denies that this defendant did cause the various lines of railroad of said Suburban, Union Terminal and Belt Companies, respectively, and of the said Air Line, to be operated as constituting one entire allied continuous system of railroad. It is true that *that* said railroads were so operated as constituting on- entire allied continuous system of railroad, but it was not the result of the domination, direction or control of this defendant.

This defendant states and shows that said Air Line Company did execute and deliver to this defendant, as trustee, a mortgage on its property to secure an issue of Three Hundred Thousand Dollars of bonds; that all, or substantially all, of said bonds have been taken up and are now held and owned by the same persons who hold and own all of the stock of said company, and who have the possession, management and control of all of the property of said company, and who manage and operate the railroad of said company, and collect and receive all of the income and earnings thereof, and who are chargeable with the duty of paying anything that may be due upon any of said bonds; that the said persons have pretended to assert that there was a default in the payment of some of the interest on said bonds, and have pretended to have the principal of said bonds declared due on account of such alleged and fictitious default of interest, and have procured the said foreclosure suit to be brought on account thereof, and this defendant states and shows that the said alleged default and pretended declaring of the principal to be due and the institution of said foreclosure suit, were all made, done and instigated by the persons who own, possess, control and manage the property covered by the said mortgage, and which is sought by said suit to be foreclosed for the fraudulent purpose of hindering, delaying and defrauding unsecured creditors of the Belt Company, particularly this defendant.

This defendant denies that at all times until the said month of April, 1900, or during any part of said time, it caused all, or substantially all of the shares of the capital stock of the said several railroad companies to be issued to and held and voted either by some one or more of said railroad companies so alleged to be controlled or dominated by it, or by or in its own name, or by or in the name of some one or more of its officers, agents and employes, for and on its behalf, so as to serve its alleged plans and purposes and to enable it to effectuate the same, and its absolute control of
57 and domination over said railroad companies, and each of them, and their respective properties, actions and affairs as alleged in the bill of complaint.

This defendant denies that the total cost of the lines of the said Suburban and Terminal Companies, consolidated into the Belt Company as aforesaid, was not to exceed $1,700,000.00. Denies that there were issued and delivered to this defendant by the said last named railroad companies bonds and stocks aggregating over Five Million Dollars, and denies that this defendant claims that it has applied the excess of such securities over the actual cost of such properties in the payment of its own commissions and services in the premises, and by way of allowance of said discounts in the sale and disposal of said securities as alleged in the bill of complaint. Denies that the cost of the railroad and other property of the said Union Terminal Company did not exceed $865,000.00 and denies that this defendant received into its possession the bonds and stocks of said Union Company to the amount of Four Million Dollars, as alleged in the bill of complaint, and denies that it claims that it has applied the excess of the amount of said bonds and stocks over the said cost, in payment of its own services and commissions in the premises and in the way of an allowance of discounts in the sale and disposal of said securities as alleged in the bill of complaint, and denies that the cost of said Air Line did not exceed $200,000.00 and denies that this defendant received into its possession bonds and stocks of the said Air Line to the amount of $850,000.00 and denies that it claims that it has applied the excess of said securities over the cost of said railroad in payment of its own services and commissions in the premises, and in the allowance of discounts in the sale and disposal of said securities as alleged in the bill of complaint.

This defendant denies that it has ever been requested to make an accounting of its alleged trusteeship in respect to the sale and disposal of any of said bonds and stocks, and has hitherto failed and still fails and refuses to make such accounting, as alleged in the bill of complainant, and denies that the complainant, or any of the persons representing it, or any of the persons who brought and are prosecuting this suit in its name, as aforesaid, ever had any information or belief that any such request for an accounting had been made and refused as alleged; and denies that the facts in respect to the sale and disposal of said securities, and the application of the proceeds thereof are peculiarly and solely within the knowledge of this defendant, and denies that the complainant was or is unable to state

the account between this defendant and the said Belt Com-
58 pany. Denies that upon a correct and proper accounting between the parties this defendant owes said Belt Company a large sum of money, or any amount whatever, and states that even if this defendant did owe the Belt Company anything on an accounting, the complainant is not entitled in this proceeding to subject the same to the payment of its said judgment, for the reason that this suit is not brought in good faith for that purpose, but is collusive and brought for the fraudulent purpose aforesaid.

This defendant further states and shows that at all times since the beginning of its connection with the affairs of said Belt Company, up to the time that the securities of the Belt Company and its property changed hands by reason of the reorganization herein referred to, being a period of over ten years, commencing in 1889, and ending about April, 1900, the said Belt Company and all of its officers, directors and stockholders had full knowledge and information as to everything which this defendant then was doing or had done in respect to any of said bonds or stocks, and as to the true state of the account between the Belt Company and this defendant, and at all times fully approved of, consented to and ratified the same, and that the said Belt Company, and also all of its present officers, directors and stockholders, who brought and are now prosecuting this suit in the name of the complainant, as aforesaid, since they succeeded to the powers, duties and rights of their predecessors and assignors, by reason of such reorganization, have at all times since about the first day of April, 1900, had the means and the full opportunity of knowing all about all of the transactions between this defendant and the said Belt Company, during the said ten years, and have on divers occasions by their expert accountants fully examined all of the papers, books and accounts in any way bearing upon any and all of such transactions, including the books and papers of this defendant, and after such examination, and after having full information and knowledge as to the true condition of the said account, have admitted that the said Belt Company justly owed this defendant large sums of money, aggregating Five Hundred Thousand Dollars, and more, and frequently promised to pay the same.

That this defendant never had any knowledge or information that there was any claim or pretense in any quarter that this defendant owed said Belt Company anything, or that the said Belt Company did not owe this defendant the large sums of money claimed by it, until after the filing of the bill of complaint in this cause. Notwithstanding the fact that the said Belt Company has at all times had full and true accounts and knowledge of all the transactions between it and this defendant as aforesaid; yet,
59 if, for any reason, it desires further accounting or information as to any of the said matters or things, this defendant is ready and willing and hereby offers again to render a full and true account and to furnish all such information, whenever thereunto lawfully and properly requested. But this defendant denies that the complainant under the facts and circumstances of this case, as

hereinbefore and hereinafter set out, is entitled to the accounting prayed for, and denies that the complainant either in good faith desires or needs any such accounting in order to collect its said judgment.

This defendant denies that it contrived the formation of the said Elevator, Amusement, Central and Second Street and Townsite Companies, or either of them, for the uses and purposes, or with the intent alleged in the bill of complaint; and denies that it caused various of its officers, agents and employes to be selected as the incorporators, stockholders, officers and directors of the said so-called auxiliary companies; and denies that it by means thereof dominated and controlled the management of the said so-called auxiliary companies and the actions of the stockholders and Boards of Directors thereof; denies that all or substantially all of the moneys invested in the purchase, improvement or acquisition of the several properties of the said so-called auxiliary companies, or either of them, was paid or supplied by the Belt Company; denies that all of any of the said Companies were mere devices or dummies contrived and provided by this defendant as a means for taking title to such property as might be vested in them for the use and benefit of the Belt Company, and denies that the properties and shares of stock of the said so-called auxiliary companies in equity belong to the Belt Company and are therefore chargeable with the lien of the complainant's said judgment as alleged in the bill of complaint.

This defendant denies that it at any time entered into any contract with the Omaha & St. Louis Railroad Company, the Quincy, Omaha & Kansas City Railroad Company, or the Omaha, Kansas City & Eastern Railroad Company whereby — agreed or bound itself to furnish to either of said companies an entrance into Kansas City, or which in any way necessitated the construction on behalf of this defendant of a line of road from Kansas City to Pattonsburg. Denies that being desirous to gain and reap unto itself the profits and advantages of said alleged contracts, and of relieving itself of the burdens, obligations and losses by reason thereof, did, by means of the alleged domination and control, or by any other means, conclude and contrive that it would cause the said Belt Company to enter into a contract for the construction of said line of railroad from Kansas City to Pattonsburg as alleged in the bill of complaint.

60 Denies that this defendant did cause to be formed the corporation known as the Kansas City and Northern Connecting Railroad Company for the purpose of holding title to said last mentioned line of road, or for any other purpose. Denies that it caused certain of its officers, directors, and agents to become officers and directors of the said Northern Connecting Company so as to dominate and control its management and affairs, and of the action of its officers and directors, as alleged in the bill of complaint.

Denies that in pursuance of said alleged plans and to accomplish the alleged purpose and designs of this company, it caused the said Belt Company, on or about the — day of — 1896, or at any other time, to go through the form of entering into a contract, or to make a contract, with the said Northern Connecting Company for the

construction, in the name of said Belt Company, but as agent for the use and benefit of this defendant, of the said line of railroad to Pattonsburg, and denies that it dominated and controlled the said Connecting Company and the said Belt Company in and about the making of any such contract with the intent and for the purposes alleged in the said bill of complaint, or for any other purpose or intent. Denies that it caused the Northern Connecting Company to issue its certain bonds and stocks for the purpose of paying for the said construction, though it is true that the said Northern Connecting Company did issue its certain bonds and stocks for the purpose of paying for the construction of its said railroad. Denies that this defendant caused the said stocks and bonds to be delivered partly into its possession and control, and partly into the possession and control of the Belt Company, but on the contrary states that the said Northern Connecting Company did deliver all of its said stock and bonds to the said Belt Company in payment for the construction and completion of its said line of railroad. It is true that this defendant did undertake to charge, and did charge to the account of the Belt Company all the money expended by this defendant by way of advance to the Belt Company for the purpose of constructing the said line of railroad, and did give the said Belt Company credit for all property and moneys which came into the hands of this defendant as the proceeds of the sale of any of said stocks and bonds of said Northern Connecting Company, or of any other property of the Belt Company, less proper and reasonable commissions for this defendant's services in the premises, as hereinafter will be more particularly stated. That the making of said charges, and the giving of said credits were in no sense mere matters of form and pretense, as alleged in the bill, but represented actual and proper transactions. This defendant denies that the result of the
61 construction of said Northern Connecting Railroad was a loss of over $300,000.00, or of any other sum. Denies that there was any loss incurred by the Belt Company in carrying out its contract for the building of said road. Denies that this defendant in any way, in fact or in law, became principal in the building of said Northern Connecting Road through the instrumentality of the Belt Company, as its agent or otherwise, or that this defendant in any way became liable for any losses that might have occurred, or entitled to any profits that accrued from the building of said road, but that upon the contrary whatever losses might have been incurred would have been properly chargeable to the Belt Company and all profits belonged to it alone.

This defendant denies that the said Belt Company was without lawful power to make the said contract with the Northern Connecting Company for the building of the latter's road. Denies that the same was without the power of the Belt Company, under its charter and laws of the state.

This defendant states and shows that the Belt Company purchased all the steel rails which it put into the Northern Connecting road from the complainant, and the complainants sold the said rails to the Belt Company knowing the uses and purposes for which they

were bought, and to which they would be put; that the note on which the complainant procured its said judgment was given by the Belt Company for part of the purchase price of said rails; that the complainant ought not to be allowed to claim that the contract of the Belt Company with it for the purchase of rails necessary to carry out its said contract is valid and binding, and at the same time assert that the contract which the Belt was carrying out with the knowledge and consent of the complainant was invalid because ultra vires. If the making of the contract to build the road was ultra vires, the purchasing of material to fulfill the contract would also be ultra vires, but this defendant states and shows that the said contract was within the power of the Belt Company and that it was entered into and fully carried out without any loss, and that the said contract has long since been fully executed, carried out and completed by both of the parties thereto.

This defendant further answering denies that in pursuance of any of the general plans or purposes alleged in the bill of complaint, or otherwise, it caused to be organized the corporation known as the Kansas City, Pittsburg & Gulf Railroad Company, for the purpose of constructing a road from Kansas City to the Gulf of Mexico, for the use and benefit of this defendant, as alleged in the bill
62 of complaint. It is true that the Kansas City, Pittsburg & Gulf Railroad Company did make a mortgage to secure an issue of bonds therein specified, but the defendant denies that it caused the said Kansas City, Pittsburg & Gulf Railroad Company to make said mortgage. It is true that there were issued and outstanding prior to the first day of April, 1899, Twenty Three Million Dollars of bonds of the said Kansas City, Pittsburg & Gulf Railroad Company secured by its said mortgage; that default was made in the payment of the interest due on said bonds, and that the said Kansas City, Pittsburg & Gulf Railroad Company became and was insolvent. It is true that a bill to foreclose the said mortgage was thereupon filed, and that the property of the said Kansas City, Pittsburg & Gulf Railroad Company passed in to the hands of receivers appointed by this Honorable Court. It is true that such proceedings were thereafter had, which upon their face appear to show that a foreclosure of such mortgage was decreed and the property of the said Kansas City, Pittsburg & Gulf Railroad Company sold under the terms thereof.

This defendant denies that it was at any time aware, or had knowledge of the fact that the default, receivership and foreclosure of the Kansas City, Pittsburg & Gulf Railroad Company's property would cause or result in the default of the payment of any of the installments of interest accruing on the several mortgages of the Belt Railroad and its operated lines, or of the said Northern Connecting Company, or that it would cause any of the said companies or any of the said auxiliary companies, to become insolvent or to be unable to conduct their respective operations and pay their liabilities as the same matured; that upon the contrary thereof said default, receivership and foreclosure of the Kansas City, Pittsburg & Gulf Railroad Company's property had no such effect. Denies that this de-

fendant on account of such alleged knowledge contrived and planned to gather unto itself the stocks and bonds and other assets of the property of the said railroad and auxiliary companies, including the Belt Company, with any such intent or for any such purposes, as are alleged in the bill of complaint. Denies that this defendant under any fraudulent pretense caused to be delivered to it any of the securities or property of any of said companies, or of said Belt Company, for the purpose of securing any alleged false and unfounded claim made and advanced by this defendant, but it states and shows that it did receive from the Belt Company certain property and securities as collateral security to secure the payment of the just demands which this company had and still has against the Belt Company.

63 That the execution and delivery by the Belt Company to this defendant of the promissory note mentioned in the bill of complaint, and the pledge by the Belt Company of the stocks and bonds and property as collateral security for the payment of said notes, were all done in good faith for the purpose of evidencing and securing just debts due to this defendant from the Belt Company, and were not made or pledged for the fraudulent purposes alleged in the bill of complaint, or for any other purpose than that of justly evidencing and securing this defendant's debt due it from the Belt Company. Denies that the defendant dominated and controlled the Belt Company to go through the form of executing the said notes and delivering said collateral security for the purpose of hindering and delaying the complainant in the collection of its debt, for the purpose of hindering or delaying any other creditor of the Belt Company, or for any other unlawful or fraudulent purpose, but that the Belt Company, as in justice and good conscience it ought to have done, did execute and deliver the said notes and pledge the said collateral to this defendant in all respects as it did execute and deliver to the complainant during the same time, and pledge property as security therefor, the promissory note which the complainant has made the basis of this suit, namely for the purpose of properly securing its creditors, and not otherwise. This defendant admits that the bill of complaint in so far as it undertakes to definitely specify the notes executed by the Belt Company to this defendant has correctly stated them, but states that some of them had been sold and rediscounted prior to the institution of this suit, and that one of them has since been paid, and that in addition to the notes specifically mentioned and described in the bill of complaint, this defendant holds two other notes executed and delivered by the Belt Company to it, one of which is dated on the 11th day of June, 1900, for the sum of $10,400.00 due October 11th, 1900, the other of which notes was dated on the 25th day of May, 1900, due on the 25th day of September, 1900, for $25,000.00; that both of these notes had been sold and rediscounted by this defendant prior to the institution of this suit.

This defendant further answering states that it is true that the Belt Company delivered to this defendant as collateral security for the payment of said indebtedness, among other things, 19,997 shares of capital stock of The Union Terminal Railroad Company, and

4,994 shares of the capital stock of the Kansas City & Independence Air Line but denies that this defendant has heretofore undertaken to sell and dispose of the said last named securities, although it had the lawful right to do so had it chosen, but this defendant states and shows that it, on the 14th day of June, 1900, released the said shares of stock of The Union Terminal Company, and the
64 said shares of stock of the said Air Line Company to the Belt Company upon its request and upon the payment to this defendant of $25,000.00 which was duly credited on said note, and the said Belt Company now still has and holds such shares of stock. This defendant admits that the Belt Company assigned to it as a collateral security for the said indebtedness a quantity of new steel rails to-wit, about Three Hundred and Forty Four tons, and not Six Hundred tons as alleged in the bill of complaint, and it is true that this defendant has sold said Three Hundred and Forty Four tons of steel rails and credited the proceeds of the sale upon the Belt Company's said indebtedness to it. This defendant denies that it has appropriated fraudulently or otherwise, unto itself, without consideration or right, all or any of the capital stock of the Second Street Improvement Company or a large number of, or any, of the shares of stock of the Central Improvement Company or all or any of the capital stock of the Northern Townsite Company, or all or any of the other property, stocks, bonds, notes, claims or choses in action of the Belt Company, as alleged in the bill of complaint. That this defendant has in its possession and under its control none of the stocks and bonds and property of the said Belt Company except as hereinbefore stated, which it holds as collateral security duly pledged for the Belt Company's indebtedness to it, as aforesaid.

This defendant, further answering, denies that it was, or is insolvent; denies that it has outstanding a large number of matured obligations, the holders of which are pressing this defendant for payment. Denies that this defendant is unable to meet all of the demands against it. Denies that this defendant has ceased the active conduct of business and denies that its affairs are in process of liquidation, but on the contrary states and shows to the court that it is worth Two Million Dollars and more over and above its debts and liabilities, that it has no outstanding matured obligations whose holders are pressing for payment; and none which are not amply and satisfactorily secured; that this defendant is actively engaged in the prosecution of its legitimate and proper business for which it was incorporated, and is perfectly solvent and able to meet and satisfy any judgment which the Belt Company or the complainant might obtain against it by reason of the facts set out in the bill of complaint.

This defendant denies that it was or is threatening to sell the said notes which it holds against the Belt Company, or the property which it holds as collateral thereto, to the end or for the purpose
65 that the creditors of the Belt Company, including the complainant, might be hindered, delayed or defrauded in their just rights and remedies, as alleged in the bill of complaint.

This defendant further answering states that it is true that on or before the first day of September, 1900, this defendant served notice upon the Belt Company that it would at a time therein specified sell certain of the said collateral securities, a copy of which said notice is filed with the bill of complaint and marked "Exhibit 1", all of which this defendant was in law and equity entitled to do.

This defendant further answering admits that the property held in the name of the Elevator Company consists among other things, of three elevators, known as the Star, Eclipse and Diamond, but denies that said elevators, or any other property in the name of the Elevator Company is held for and on behalf of the Belt Company, except in so far as the Belt Company holds stock of the Elevator Company which is represented by certificates duly issued to it. This defendant denies that the property of the said Elevator Company, or any part of it, is indispensable or even convenient in the operation of the Belt Company's property, though it is true that the proximity of said elevators to the line of the Belt Railroad enables the Belt Company to make greater earnings than it would otherwise do.

This defendant admits that the property held in the name of the Central Improvement Company consists of various [tracks] of real estate in Kansas City, Missouri, some of which are convenient and necessary for the use of the Belt Company, and which are now being occupied and used by it; but denies that any of the property standing in the name of the Central Improvement Company is held in trust for the Belt Company, and denies that the Belt Company has any interest therein except as a stockholder, as aforesaid, by certificates of stock duly issued to it by the said Central Improvement Company, and except as before stated, the said Belt Company is occupying and using a part of the lands of the said Central Improvement Company, but inasmuch as this defendant holds and owns three promissory notes aggregating the principal sum of Five Thousand Dollars, which are secured by a deed of trust in the nature of a mortgage on some of the property of the said Central Improvement Company, to-wit: Lots 31, 47 and 48 in Hurck's Subdivision of Guinotte Bluff, an addition to Kansas City, on which notes the Central Improvement Company fails and refuses to pay interest long since due, and in as much as this defendant holds promissory notes of the said Missouri, Elevator & Terminal Company, aggre-
66 gating the sum of $32,000.00, which are secured by separate deeds of trust on the said three elevators and property pertaining thereto, on which said notes the said Missouri Elevator & Terminal Company refused to pay interest long since due and payable; and in as much as this defendant also holds a majority of the stock of the said Central Improvement Company, and the said Missouri Elevator & Terminal Company as collateral security duly pledged to it as such for the securing of debts other than the said notes last above mentioned, and in as much as the said Belt Company is not paying any rent for the use of the property of the said Central Improvement Company, so occupied and used by it, this defendant does not object to the appointment of a receiver for the

property of the said defendants the Central Improvement Company and the Missouri Elevator & Terminal Company, provided an impartial receiver, not in any way connected with or influenced by the said Belt Company, or by the said The Kansas City Southern Railway Company be appointed, and when appointed shall be directed by this Court to collect rents from all companies or persons who occupy or use any of the lands or property of the said Central Improvement Company and the Missouri Elevator & Terminal Company and hold the same to be paid out under the order of this Court to whomsoever may be found to be entitled thereto.

This defendant admits that the property held in the name of the Second Street Improvement Company consists of certain tracts of real estate in or near Kansas City, Missouri. Denies that the said Second Street Improvement Company holds title to any of its property in trust for or for the use and benefit of the Belt Company. Denies that the Belt Company has any interest in any of the property of the Second Street Improvement Company, as a stockholder or otherwise, except that it occupies and uses certain tracts of land as a lessee and others as a licensee of said Second Street Improvement Company. This defendant denies that the property and assets the title to which is held by the said Fairmount Amusement Company and the said Townsite Company are in any way essential or necessary to the successful operation of the property of the said Belt Company and denies that the said Belt Company has or ever had any other rights or interest in any of said property, except such as arises from the fact that it is a stockholder in each of said companies, together with other stockholders, except that the said Townsite Company holds the title to certain tracts of land for the Belt Company as stated in the answer of said Townsite Company filed herein. This defendant denies that it is necessary to the protection of the interests of the complainant, or of any of the creditors of the Belt Company for the alleged reasons assigned in the bill of com-
67 plaint to appoint a receiver for any of the said auxiliary companies, or to restrain this defendant as prayed for in the bill, but admits that a receiver might properly be appointed for the property of the Central Improvement Company and the Missouri Elevator & Terminal Company.

This defendant further answering, denies that the officers, agents and representatives of the Belt Company prior to the month of April, 1900, were in this month displaced by reason of the election then held by the stockholders of the Belt Company as alleged in the bill of complaint, but avers and shows that upon the taking effect of the said plan of reorganization, whereby the present owners of the stock and bonds of the Belt Company became entitled to the possession of its railroad and to the management and control thereof enough of the former directors and officers of the Belt Company voluntarily resigned and persons representing the present owners and holders of the stock of said Belt Company were chosen by the remaining directors to fill the vacancies thus occasioned

This defendant denies that the complainant brought this bill of complaint for itself, or for any creditors of the Belt Company simi-

larly situated, and states and shows that the said bill of complaint was collusively brought in the name of the complainant at the instance and request of the said Belt Company and of the persons in charge and control thereof, for their own benefit and purposes as aforesaid. That this defendant is informed and believes and upon such information and belief states and avers the fact to be that the Belt Company since its reorganization has paid off and satisfied all its notes and bills payable and debts which were given and created prior to its said reorganization except those of this defendant and that of the complainant, and that the Belt Company was ready and able to pay the complainant's said note, and would have done so but for the fact that the complainant collusively consented to allow its said note to be used as a basis for this proceeding, for the fraudulent purpose aforesaid, and that the complainant can still collect and receive the full amount of its said debt, whenever it in good faith insists upon the payment thereof by the Belt Company.

This defendant denies that the complainant was without an adequate remedy at law, for the collection of its said debt, inasmuch as it could lawfully have sold the property of the Belt Company which was in its hands as collateral therefor, as aforesaid, and inasmuch as it could and would have received payment of its debt if it had in good faith demanded the payment thereof by the Belt Com-
68 pany; so that this defendant says that the complainant should not be allowed to use a Court of Equity in the collection of its said debt when it has an adequate remedy at law to collect the same.

Further answering unto the said bill of complaint, and to the several parts thereof, to the end that this Honorable Court may have a connected statement of the substantive and controlling facts which constitute the history of the various transactions extending over a period of ten years, which are now sought to be called in question by the bill of complaint, this defendant states and shows:

That it had nothing whatever, either directly or indirectly to do with the creation or incorporation of the said Kansas City Suburban Belt Railroad Company; that the said Kansas City Suburban Belt Railroad Company was formed and incorporated more than two years before the formation and incorporation of this defendant. That said Kansas City Suburban Belt Railroad Company was incorporated under the laws of the state of Missouri on the 8th day of January, 1887, with a capital stock of Five Hundred Thousand Dollars, and with nine directors, for the purpose of building a belt railroad around Kansas City, to be used as a switching and terminal road; that is to say, for the purpose of transferring cars, loaded and empty, from one trunk line to another and from the several trunk lines entering said city to the various warehouses, elevators, factories and other industries in the city and back again, for the usual switching charges, and also to furnish to such of the trunk lines then reaching Kansas City as might desire to avail themselves of it, improved terminal facilities and to others which might afterwards come the means of getting into the business portions of the city under favorable conditions for a compensatory rental.

That the said proposed use of the said Belt Railroad was of such a nature that in order to reap the fullest fruits of the enterprise it would be desirable to so build its road as to connect directly with all of the trunk lines entering the City, and also to have its tracks reach all of the important warehouses, elevators, factories and other industries that received and discharged their commodities in car load lots, and to aid and encourage the construction of other roads that would use its tracks and terminal facilities and pay rental therefor.

That the said Kansas City Suburban Belt Railroad Company has at all times covered by the transactions referred to in the bill of complaint been directly interested in so building and extending its roads and branches as to meet these conditions and in inducing other lines to use its tracks either by building out to meet
69 them or by aiding them to build in, and that some of the railroad companies which are charged in the bill of complaint to have been created and dominated by this defendant for its own profit, use and benefit, namely, the Consolidated Terminal and the Northern Connecting Company, were in truth and in fact created and controlled by officers of the Belt Company for its profit, use and benefit, so as to extend its usefulness and increase its earnings, and the said Belt Company afterwards became as it was originally intended it should become, the owner of all of the capital stock of each of the said companies and still owns and holds the same, and also became the owner and holder of the most of the bonds of the said companies, most, if not all of which it subsequently sold and disposed of.

This defendant has an authorized capital stock of Two Million, Five Hundred Thousand Dollars, and was incorporated on February 14th, 1889, with twenty-one directors, under the laws of the state of Missouri providing for the incorporation of Trust Companies, and as such had the power to buy and sell stock and bonds and other commercial securities either on its own account or as agent for others, and to act as trustee and financial agent for others.

That the said Suburban Belt Company for the first two years of its existence had done considerable preliminary work in the way of procuring franchises to use certain streets of Kansas City along which to build its railroad, making surveys and locating its line, and did some work in the way of constructing its roadbed, but it had been unable to make any arrangement whereby it could dispose of its securities or otherwise raise money to build and complete its road or any considerable portion of it; being in that condition, it did, about April or May, 1889, apply to A. E. Stilwell, who was one of the Vice-Presidents of this defendant Trust Company, and who then did not have and never prior thereto had had any connection with or interest whatever in the said Suburban Belt Company, but who had an extended and favorable acquaintance with men of capital and had great skill in soliciting and procuring capitalists to subscribe to and invest in ventures which he would propose, and who had but recently procured all of the subscribers to all of the large capital stock of this defendant and procured its incorporation, all of which was known to the said Belt Company, its officers and managers.

Knowing these things the said Belt Company did about April or May, 1889, apply to the said Stilwell and request him to use his efforts to procure the money with which to build the said Belt Railroad from a point on Second Street near Broadway in Kansas
70 City to Cecil Station on the Missouri Pacific Railway, a distance of about four and one-half miles. That negotiations were then had [be-en] the said Belt Company and the said Stilwell which resulted in a contract between the said Belt Company and the said Stilwell, whereby the said Belt Company agreed to issue and deliver to said Stilwell Four Hundred and Fifty Thousand Dollars of its first mortgage bonds, out of the total issue then contemplated of Five Hundred Thousand Dollars, and Nine Hundred Thousand Dollars of its capital stock, if the said Stilwell would build or cause to be built the said portion of the said railroad; that the said contract was duly authorized by the Board of Directors of the Belt Company at a meeting lawfully called, and by its stockholders at a stockholders' meeting duly called and convened on May 31st, 1889.

That at the time of making the said contract, none of the directors or stockholders of the said Suburban Belt Company except E. L. Martin had any connection with or interest in this defendant, and none of the directors, officers or stockholders of this defendant, except E. L. Martin, had any interest in or connection with the said Suburban Belt Railroad Company. That the said contract was made at arms' length between the said parties, free of any domination, direction or control whatever on the part of this defendant.

That a large majority of the Board of Directors of the said Suburban Belt Company continued to be composed of persons wholly disconnected with this defendant until the said portion of said railroad was completed and paid for in accordance with the terms of said contract.

That the said Stilwell thereupon procured subscribers to the stock of and the incorporation of a Construction Company, known as the Kansas City Terminal Construction Company, under the laws of the State of Missouri, which did the work of carrying out said contract which the said Belt Company made with the said Stilwell.

That upon the completion of said contract the said Four Hundred and Fifty Thousand Dollars of bonds and Nine Hundred Thousand Dollars of stock were delivered to the said Construction Company and distributed by it to its stockholders in proportion to their holdings therein, and that then and thereby the persons who were stockholders in the said Construction Company became the owners and holders of the said Four Hundred and Fifty Thousand Dollars of bonds and the said Nine Hundred Thousand Dollars of stock, which was a majority of the stock of the said Kansas City Suburban Belt Railroad Company, and afterwards, as such stockholders, they, together with their fellow stockholders, elected directors of
71 their own choice, as they had a right to do, which choice fell upon persons, a majority of whom were also directors of this defendant; but it is in no sense true, as alleged in the bill of complaint, that this defendant caused its directors and officers to be chosen as directors and officers of the Belt Company, but they were

chosen by the stockholders of the Belt Company, as aforesaid, without any domination, control or influence on the part of this defendant, and were so chosen because the persons who had subscribed to the stock of said Construction Company and had thereby become stockholders in the Belt Company, had previously become stockholders in this defendant, and were willing to trust the persons so chosen by them as Directors of the Belt Company, to look after and properly care for their interests as stockholders thereof.

This defendant is informed and believes, and upon such information and belief states the fact to be that the said Suburban Belt Company delivered to its old directors and Officers, or to some of them, Fifty Thousand Dollars of its said Bonds, and Eighty Four Thousand, Five Hundred Dollars or more of its capital stock in compensation and payment for their services rendered in and about its business and for moneys expended by them in its behalf prior to the time of the making of the said contract with said Stilwell. That during the progress of the work covered by the said contract with said Stilwell, the said Suburban Belt Company determined upon immediate extension of its said line of road some six miles further to the South.

That after paying its said contract price to said Stilwell, and compensating its former officers and directors for moneys laid out and expended by them as aforesaid, the said Belt Company had in its Treasury, Five Hundred Thousand Dollars of an increased bonded indebtedness, and Five Hundred Thousand Dollars of its increased capital stock, with which to build its said extension to Brush Creek; that the Belt Company did this work itself, and requested this defendant to sell and dispose of the said Five Hundred Thousand Dollars in bonds to raise the money for building the same; that on account of the incomplete condition of the property and the uncertainty of its outcome this defendant was unable at that time to sell and dispose of the said bonds without great sacrifice, and this defendant, having faith in the enterprise bought the said Five Hundred Thousand Dollars of Bonds from the Suburban Belt Company and paid it therefor at the rate of Nine Hundred and Thirty Dollars for each One Thousand Dollar bond, which was a full, fair
72 and liberal price therefor; that this defendant held said bonds for two or three years without being able to sell them at a profit, and did finally sell them at the same price which it paid therefor.

That the Belt Company thus exhausted all of its one million dollars of bonds and stock in the building of its railroad from a point on Second Street near Broadway, to a point South of Kansas City, on the Missouri Pacific, now known as Belt Junction.

That the Belt Company found it necessary in order to increase its business and its earnings to extend its road from Second and Wyandotte Streets into what is known as the West Bottoms, so as to reach the packing houses and other large industries in that locality; it had no money with which to do it, and had already encumbered its property with a mortgage for one million dollars, hence that company conceived the idea of organizing a new company to be called the Consolidated Terminal Railway Company to build a railroad

from a point on Second Street near Walnut in Kansas City, Missouri, in a Westerly direction to the State Line, between Kansas and Missouri. This corporation was organized on the 16th day of May, 1891, with a capital stock of Seven Hundred and Fifty Thousand Dollars, and eight directors, a majority of whom were at that time directors of the said Suburban Belt Company; that said Consolidated Company was conceived and organized by the Suburban Belt Company and for its purposes, for the purpose of *the* building what was practically an extension of the Suburban Belt Company's railroad which it was unable to build without the organization of a new company. That the said Consolidated Terminal Company afterwards authorized the issuance of Seven Hundred and Fifty Thousand Dollars in bonds and secured the same by a mortgage made to this defendant, as Trustee; that at the request of the Belt Company this defendant undertook to sell and dispose of said bonds and of the capital stock of the said Consolidated Terminal Company for the purpose of raising money with which to build the said extension of road, and to act as its financial agent in financeering the building of its extension, and to assist in procuring the necessary franchises for the use of public highways; and the Belt Company promised to pay this defendant therefor a sum equal to twelve per cent of such of the said Seven Hundred and Fifty Thousand Dollars of bonds as this defendant might sell, three fifths of which amount was to be paid in cash out of the proceeds of such sales, and the other two fifths to be paid in the stock and bonds of the said company at the same price at which they were disposed of by this defendant to other people;

73 that this defendant did sell seven hundred of the bonds of the said Consolidated Company at and for the price of eight hundred dollars each with eight shares of stock as a bonus to each bond. That the price at which the said bonds were sold was the best that could be obtained after persistent and diligent efforts to sell them, and the commissions which the Belt Company promised to pay this defendant for its services in that behalf out of the proceeds of the sale of the said securities was a just, fair and reasonable commission and compensation, but this defendant did not receive the full commission and compensation promised, but received less than six per cent of the par value of the securities so sold by it.

That the complainant sold to the said Suburban Belt Company, and to the said Consolidated Terminal Railroad Company, prior to the time of their consolidation, nearly all, if not all, of the rails and other steel used in the construction of their respective roads in the years 1889, 1890 and 1891, and the complainant was fully paid therefor.

That all of the transactions of whatsoever nature had between this defendant and the said Suburban Belt Company, and between this defendant and the said Consolidated Terminal Railway Company, including the transactions concerning the sale and disposition of their respective stocks and bonds, and the application of the proceeds thereof, and the compensation and commission paid this defendant therefor, were fair, open and public and were fully known and consented to and ratified and approved by all of the officers, di-

rectors and stockholders of each and both of said companies, more than eight years prior to the institution of this suit, hence by the statute of limitations of the state of Missouri any attempt to inquire into the same is barred, and this defendant now pleads said statute in bar of the complainant's suit.

That in July, 1892, after the railroad of the Suburban Belt Company had been completed from Second & Broadway to Belt Junction, on the Missouri Pacific Railway, a distance of about twelve miles, and after the road of the said Consolidated Terminal Railroad had been completed from Second and Walnut Streets to the State Line between Missouri and Kansas, a distance of about two miles, and after all of the transactions between this defendant and each of said companies had been fully completed, approved and ratified as aforesaid, the said Suburban Belt Company and the said Consolidated Company, without any domination or direction by this defendant, duly united themselves together by a formal consolidation under the statutes of the State of Missouri, thereby forming a new company under the name of the Kansas City Suburban
74 Belt Railroad Company, called in the bill of complaint the Belt Company; that it was this new, or resulting company which five years afterwards became indebted to the complainant for steel rails purchased to be used in the building of said Kansas City & Northern Connecting Railroad, which indebtedness is made the basis of the creditors bill in this cause.

That the building of the Kansas City & Northern Connecting Railroad from Kansas City to Pattonsburg by the said Belt Company in 1897 and 1898, in connection with which the complainant became a creditor of the said Belt Company, was not contemplated or thought of by this defendant, or any one else, prior to the time of the said consolidation of the said two constituent companies in 1892, so that there was and could have been no intent or purpose on the part of this defendant in connection with any of its said transactions with either of the said two constituent companies to hinder, delay or defraud the complainant in respect of its said debt, which was contracted more than five years thereafter, and in connection with a matter that was then thought of or contemplated as aforesaid. That at the time of said consolidation the complainant had no interest in or connection with, either of the said constituent companies, as a creditor or otherwise, and has had none since. So this defendant says that the complainant's attempt to inquire into said transactions had between this defendant and either of said constituent companies, and to compel this defendant to render an account thereof, is an unwarranted and impertinent meddling with affairs in which the complainant has no legitimate or proper concern and is collusively made for the fraudulent purpose of hindering, delaying or defrauding this defendant in the collection of its said debt from the said Belt Company as aforesaid.

That on December 29th, 1891, at the suggestion and by the procurement of the said Suburban Belt Railroad Company, the said The Union Terminal Railroad Company was duly incorporated under the laws of the State of Kansas with a capital stock of Two Million

Dollars, and with nine directors, a majority of whom were also directors and officers of the said Suburban Belt Company, for the purpose of building an extension from the State Line between Missouri and Kansas, where the said road built by the said Consolidated Railroad Company ended, through Kansas City, Kansas, and on to Argentine, in said State of Kansas, so as to connect with the trunk lines coming in from the West, and so as to reach the packing houses, foundries, factories, elevators and other like industries located in the Kaw Valley, to be used when built as an extension of the Suburban Belt road. The organization of The Union Terminal Railroad Company was necessitated by the fact that none but a
75 Kansas corporation could exercise the power of eminent domain within the state of Kansas.

That the said the Union Terminal Railroad Company did issue its bonds to the amount of Two Million Dollars, and secured the same upon its road by a mortgage which was executed to this defendant and another as trustees, that this defendant accepted the trust and was employed by said Union Terminal Company to sell and dispose of its said bonds and stock, or enough thereof to build its said road; that this defendant, for and on behalf of said Union Terminal Company, did afterwards from time to time sell certain of the stock and bonds of said company, aggregating at the par value thereof, about Two Million Dollars and did duly account to said company for the proceeds thereof, less proper and reasonable charges and commissions for its services, which were agreed upon, and which aggregated less than six per cent for the par value of the said securities so sold; that any and all sales which this defendant made of any of the securities of the said Union Terminal Company were made at a fair and at the best obtainable price, and the commissions and compensation which this defendant charged therefor were reasonable and fair, and all of the transactions between this defendant and the said The Union Terminal Railroad Company, of whatsoever nature, including all acts and transactions concerning the sale and disposition of any of the stocks and bonds of said company, the application of the proceeds thereof, and the compensation and commissions paid this defendant, therefor, were open, public and fair, and were fully known and perfectly satisfactory to, and were ratified and approved by all of the officers, directors and stockholders of the said Union Terminal Company and were fully carried out, completed, settled and fully known, ratified and approved as aforesaid more than five years before the institution of this suit and hence any attempt by any one who might otherwise have been entitled to ask for an accounting in respect thereof is barred now by the statute of limitations of both the states of Missouri and the State of Kansas, which statutes the defendant now pleads in bar of this suit.

That whilst it is a fact that the complainant sold to the Union Terminal Railroad Company all, or nearly all, of the rails and steel used in the construction of its said road, yet it is also a fact that the said company long since fully paid the complainant therefor, and the complainant never since has had any connection with the

said Union Terminal Company as creditor or otherwise, nor has it any interest therein now as a creditor of otherwise, and its attempt to criticise and inquire into any of its transactions, business or affairs in connection with this defendant, or any one else,
76 is purely gratuitous and without any right or claim of right, but is impertinently made in collusion with the said Belt Company and those who control its affairs for the collusive and fraudulent purposes aforesaid.

That on the 23rd day of January, 1891, at the suggestion and by the procurement of the said Suburban Belt Company the Kansas City and Independence Air Line Company was incorporated under the laws of the State of Missouri, with a capital stock of one hundred and fifty thousand dollars, and with eleven directors, a majority of whom were directors of the said Suburban Belt Company, for the purpose of building a railroad from a point on the line of the Suburban Belt Company's road near the mouth of Blue River in Jackson County, to the City of Independence, a distance of some six or eight miles; that the said Air Line Company soon afterwards increased its capital stock to Three Hundred Thousand Dollars and issued its bonds to the amount of Three Hundred Thousand Dollars and secured the same by a mortgage to this defendant, as Trustee; that the said Independence Air Line afterwards entered into a contract with the Kansas City Terminal Construction Company for the building and completion of its said road, the terms of which contract were fair and reasonable and that said road was fully built and completed by the said Construction Company.

That this defendant acted as the financial agent and Trustee for said Air Line and rendered it valuable services in procuring franchises for using public highways for its tracks and received in full compensation therefor stocks and bonds of said Air Line of the then value of $13,100.00 which was a fair and reasonable charge.

That all of the transactions between the said Air Line and the said Construction Company, and between the Air Line Company and this defendant, were fair, open and public, and were all known to, and ratified and approved by, all of the officers, directors and stockholders of the said Air Line Company more than eight years prior to the institution of this suit; hence any attempt to inquire into the same is barred by the statute of limitations of the state of Missouri, which statute this defendant now pleads in bar of this suit.

That whilst it is true that the complainant did sell to the said Construction Company, all, or nearly all, of the rails which were used in the construction of the said Air Line road, yet it is also true that the complainant was fully paid therefor; that the complainant is not, and never has been, interested in the said Air Line Company, as a creditor or otherwise; that its attempt to
77 inquire into the transactions between this company and said Air Line Company is without right or claim of right, and is an unwarranted meddling with the affairs in which the complainant has no legitimate or proper concern, but is collusively made for the fraudulent purposes aforesaid.

That, as hereinbefore stated, it is untrue, as alleged in the bill

of complaint, that this defendant entered into a contract with the Omaha & St. Louis Railroad Company, the Quincy, Omaha & Kansas City Railroad Company, and the Omaha, Kansas City & Eastern Railroad Company whereby this defendant bound itself to furnish those railroads an entrance into Kansas City, by building a railroad from Kansas City to Pattonsburg, Missouri.

This defendant states and shows that the facts connected with the building of the said railroad from Kansas City to Pattonsburg known as the Kansas City and Northern Connecting Railroad, were and are as follows:

Prior to 1895, the Omaha & St. Louis Railway extended from Council Bluffs, Iowa, to Pattonsburg, Missouri, and the Quincy, Omaha & Kansas City Railroad extended from Quincy, Illinois, to Trenton, Missouri, so that the building of a railroad from the Western terminus of the Quincy, Omaha & Kansas City Railroad at said town of Trenton, to the eastern terminus of the Omaha & St. Louis Railway at the said town of Pattonsburg, a distance of about thirty miles, would make a continuous line of railroad from Quincy, Illinois, to Council Bluffs, Iowa.

That a syndicate was formed, composed of Gilman, Son & Company of New York, this defendant and its associates, and John Lowber Welsh and E. T. Stotesbury, of Philadelphia, the said Welsh and Stotesbury between them taking one third interest in said syndicate, for the purpose of acquiring, uniting and improving the said properties and the said syndicate entered into contracts which entitled them to become the owner of the said Quincy, Omaha & Kansas City Railroad, and they then caused a corporation to be formed under the laws of the state of New York, with a capital stock of Three Hundred Thousand Dollars, called the Missouri Railway Construction Company, to buy the Omaha & St. Louis Railway, and to build in the link of thirty miles between Trenton and Pattonsburg; that said John Lowber Welsh and the said E. T. Stotesbury between them took one third of the capital stock of the said Missouri Railway Construction Company, the said Gilman, Son & Company taking one third, and this defendant and its associates taking the remainder thereof.

78 That the said Missouri Railway Construction Company then made a contract with the said Omaha & St. Louis Railway Company which entitled said Construction Company to become the owner of and entitled to a conveyance to a railroad company to be formed by it, of all of the property of the said Omaha & St. Louis Railway Company, and also entered into a contract to build and equip the thirty miles of railroad between Trenton and Pattonsburg with the Omaha, Kansas City & Eastern Railroad Company which it caused to be formed for the purpose of taking the legal title thereto, and did build and equip the said thirty miles of railroad in pursuance of said contract and took all of the stock and bonds of the said Omaha, Kansas City & Eastern Railroad Company in payment therefor, so that by reason of said contracts of the said syndicate and of the said Missouri Railway Construction Company, the said John Lowber Welsh and the said E. T. Stotesbury

practically became the owners of or entitled to the ownership of a one third interest in all of the property of the said three railroad companies, and of their united and continuous lines of railroad from Quincy, Illinois, to Council Bluffs, Iowa, a distance of something over three hundred miles.

That it was largely to the interest of the owners of the said line of railroad from Quincy to Council Bluffs, that the said Road should have a direct connection with and an entrance into Kansas City.

That the said Missouri Railway Construction Company by its said contract with the said Omaha & St. Louis Railway Company, and as a part thereof did promise, bind and obligate itself to build or cause to be built a railroad which would furnish such an entrance into Kansas City, which necessitated the construction of the said Kansas City and Northern Connecting Railroad from Pattonsburg to Kansas City.

That during the time covered by the making and carrying out of the said contracts of said syndicate and the said construction company, and in the building of the said Kansas City and Northern Connecting Railroad, the said John Lowber Welsh was and still is a large stockholder in and a director and Vice President of the complainant, the Cambria Steel Company, and as such was and is actively engaged in the management, direction and control of its business and affairs, and the said E. T. Stotesbury then was and still is a large stockholder in and a director of the said complainant, and as one of the managers of the large banking house of Drexel & Company, or Drexel, Morgan & Company of Philadelphia and New York, was and is the financial adviser and banker of the said complainant, and that the said E. T. Stotesbury was during all
79 of the said time and still is a director of the said Kansas City Suburban Belt Railroad Company against whom the complainant collusively obtained its said judgment and execution as aforesaid; that the said John Lowber Welsh and the said E. T. Stotesbury were during said time the holders of a large amount of the stock and bonds of the said Belt Company and of its said allied and operated lines and they and the complainant were largely interested in having the said Belt Company make profits and increase its earnings.

That with the consent of the said Missouri Railway Construction Company and with the knowledge and consent of the complainant, the said Kansas City and Northern Connecting Railroad Compa-y, was, on May 28th, 1895, at the instance and by the procurement of the said Belt Company duly incorporated under the laws of the State of Missouri, with power to build the said railroad from Kansas City to Pattonsburg, with seven directors, a majority of whom were directors and officers of the said Belt Company.

That it was to the interest of the said Belt Company to have the said Kansas City and Northern Connecting Railroad Company so located and built that it would when completed connect with the tracks of the Belt Company and use its said tracks and terminal facilities, as an entrance into Kansas City, and thereby largely in-

crease the earnings of the Belt Company by way of rentals and switching charges.

That it was also supposed that the Belt Company would make a large profit by building the said Northern road and taking its stock and bonds in payment therefor.

That afterwards, to-wit, on or about the 30th day of June, 1896, for the purpose of reaping the said profits and permanently increasing its income and earnings, the said Belt Company with the full knowledge of the complainant, duly entered into a contract with the said Kansas City and Northern Connecting Railroad Company to build and complete the said road from Kansas City to Pattonsburg, in consideration of the stock and bonds of the said Northern Connecting Company, a copy of which contract is herewith filed and marked "Exhibit A"; and also entered into a contract whereby the Northern Connecting Company bound itself when built to use the Belt Company's tracks as its Kansas City Terminals, and to pay a very profitable rental therefor.

That the said Northern Connecting Company then issued its first mortgage bonds to the extent of Twenty Thousand Dollars per mile of its said road, and secured the same by a mortgage to this defendant, as Trustee and also issued its second mortgage
80 income bonds, to the extent of Fifteen Thousand Dollars per mile of its said road, and secured the same by a second mortgage to this defendant as Trustee.

That the said complainant with full knowledge of all of the facts aforesaid, and for the purpose of enabling the said Belt Company to carry out its said contract for the building of the said Northern Connecting Road, and with full knowledge of this defendant's connection with the said Northern Connecting Company, and with the said Belt Company, in respect to the building of said road, did sell to the said Belt Company all of the rails and other steel necessary to be used in the construction of said Northern Connecting Road, well knowing the purpose for which they were sold and where and under what contract they were to be used; that in selling the said rails and other steel to the said Belt Company, the said complainant gave credit to the said Belt Company alone, and that the said Belt Company afterwards paid to the complainant by far the larger part of the purchase price of the said rails and other steel and gave the complainant its note for the balance thereof, which is the note on which the complainant recovered a judgment as aforesaid in this court, which judgment is now made the basis of its bill of complaint in this cause.

That the said contract between the said Northern Connecting Company and the said Belt Company for the building of the said road had long prior to the filing of the bill of complaint herein been fully carried out and consummated by both of the parties thereto.

That at the request of the said Northern Connecting Company and the said Belt Company, this defendant acted as their financial agent in the sale and disposition of so much of the said stock and bonds of the said Northern Connecting Company as was necessary to supply the Belt Company with the money needed to build and

complete the said road under its said contract; that as said financial agent this defendant did sell and dispose, of approximately Two Million, Five Hundred and Fifty Two Thousand Dollars of the first and second mortgage bonds of the said Northern Connecting Company, and charged and received as its commissions therefor and in compensation for other services as financial agent and Trustee, $70,803.55, being less than three per cent of the par value of the securities so sold and disposed of by and through this defendant. That the said bonds and stocks were sold and disposed of at and for the price and sum of Seven Hundred and Fifty Dollars for each first mortgage bond, and that with each said first mortgage bond were sold Three Hundred and Fifty Dollars of second mortgage bonds, and five shares of stock. That the price at which said
81 securities were so disposed of was the best obtainable price, after the exercise of due diligence by this defendant to sell them, and no greater amount could have been procured therefor, and this defendant duly and fully accounted to the said Northern Connecting Company and to the said Belt Company therefor, and the remainder of said stock and bonds were duly delivered to the said Belt Company all of which was duly ratified and approved by all of the officers, directors and stockholders of the said Belt Company long prior to the institution of this suit, and all of which was fully known to and acquiesced in by the complainant.

That the said Belt Company did not sustain any loss in carrying its said contract for the building of the said Northern Connecting Railroad to completion; that its profits therein were not as much as expected at the time of making the said contract, but this was due to the fact that the stock and bonds which it received were greatly depreciated in their market value by the happening of subsequent events which were not and could not have been foreseen.

That the said Belt Company has been since the completion of the said contract and still is receiving largely increased earnings on account thereof, to-wit Fifteen Hundred Dollars and more per month, by way of rentals and switching charges from the said Northern Connecting Railroad Company and other railroads now using its tracks as an entrance into Kansas City.

This defendant further states and shows that the said John Lowber Welsh, and the said E. T. Stotesbury, being connected with and interested in the complainant, the Cambria Steel Company, as aforesaid, in order to better secure for the complainant large and valuable contracts for the sale and furnishing of rails and other steel for the said Belt Company and its operated lines, and for the Kansas City and Northern Connecting Railroad Company, and for the purpose of keeping the complainant at all times advised as to the business and financial condition of each and all of said railroad companies, caused the said E. T. Stotesbury to be elected as director of the said Belt Company, and the said John Lowber Welsh, and the said E. T. Stotesbury as directors of the said Kansas City, Pittsburg & Gulf Railroad Company, and that said Stotesbury and Welsh were directors in said companies respectively, for six years

and more prior to the institution of this suit, and still are directors in each of said companies.

That said Stotesbury and said Welsh are intimately connected in various business enterprises and meet together and consult several times every day, and by reason of their connection with the said Belt Company, and the said Kansas City, Pittsburg & Gulf
82 Railroad Company, they secured for the complainant, the Cambria Steel Company, contracts for the sale of rails, and other steel that went into the various railroads hereinbefore named, of the amount and value of several millions of dollars. That by reason of their said connection with said railroads, the said complainant, the Cambria Steel Company, was at all times fully informed as to all of the contracts and business of the said Belt Company, and of all the transactions and dealings of this defendant with said company and consented thereto.

This defendant further states and shows that from and after the first day of January, 1898, continuously up to the first of April, 1900, at divers and frequent times, this defendant loaned and advanced to the said Belt Company, at its instance and request, large sums of money, aggregating more than half a million dollars, for the purpose of making necessary improvements on its road and paying its operating expenses, and meeting its interest charges and also for the purpose of encouraging and securing the location of industries along its line to the end that its earnings and income might be increased; that all of said facts were fully known to the complainant at the time, and acquiesced in by it.

That the said Belt Company from time to time repaid to this defendant parts of the money loaned and advanced by it as aforesaid, but left unpaid about five hundred thousand dollars thereof, for which the said notes which this defendant now holds against the said Belt Company were duly given, and secured by the collateral deposits aforesaid. That the said notes were all given for so much money loaned and advanced by this defendant to said Belt Company, since the first day of January, 1898.

This defendant further states and shows that it is ready and willing, if in the judgment of this court it ought and should do so, to render a full, true and correct accounting of all of its transactions with any and all of the said companies; but this defendant says that by reason of the premises, this defendant should not now be compelled to make such an accounting at the instance and suit of said complainant.

All of which matters and things hereinbefore stated this defendant is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that the temporary restraining order heretofore issued against this defendant in this cause be dissolved, and that the receivers appointed herein by this court of the property of the said Kansas City Suburban Belt Railroad Company, said The Union Terminal Railroad Company, and the said Kansas City
& Independence Air Line be discharged, and that this de-

83 fendant be dismissed with its reasonable costs and charges in that behalf most wrongfully sustained.

GUARDIAN TRUST COMPANY,
By WING & CHADBOURNE,
TRIMBLE & BRALEY,
Its Solicitors.

THOS. L. CHADBOURNE,
J. McD. TRIMBLE,
Of Counsel.

STATE OF MISSOURI,
County of Jackson, ss:

E. L. Martin, of lawful age, being duly sworn, upon his oath states that he is one of the vice-presidents of the above named defendant, the Guardian Trust Company; that he has read the above and foregoing answer and knows the contents thereof, and that the allegations and averments therein made are true except that as to such matters and things as are therein stated and alleged on information and belief, he believes them to be true.

E. L. MARTIN.

Subscribed and sworn to before me this 5th day of November, 1900. My commission expires May 25, 1904.

[SEAL.] FLORENCE APPLEGATE,
Notary Public in and for
Jackson County, Missouri.

EXHIBIT "A".

This Agreement, made and entered into this 30th day of June A. D. 1896, by and between the Kansas City & Northern Connecting Railroad Company, a corporation organized and existing under and by virtue of the laws of the state of Missouri, and hereinafter called the Northern Company, party of the first part, and the Kansas City Suburban Belt Railroad Company, a railroad corporation organized and existing under and by virtue of the laws of the state of Missouri, and hereinafter called the Belt Company, party of the second part,

Witnesseth: That whereas, the Northern Company is authorized under and by virtue of its articles of association and charter to build, construct, complete, equip and operate a line of railroad from a point at or near Kansas City, Missouri, in a general northerly direction to and into the state of Iowa, and is desirous at the present time of constructing, or causing to be constructed, so much of its railroad as extends from a point at or near Kansas City, Missouri, in a general northerly direction to a point at or near Pattonsburg, Missouri, a distance of about seventy (7-) miles, and

84 Whereas, the said Northern Company has not in its treasury sufficient funds with which to build, construct and operate said portion of its road, and proposes, for the purpose of said con-

struction, to issue its first mortgage five per cent gold bonds on its railroad, at the rate of twenty thousand dollars ($20,000) per mile for each mile of main line and yard tracks, its second mortgage five per cent gold bonds at the rate of fifteen thousand dollars ($15,000) per mile for each mile of its main line and yard tracks, and to issue its capital stock at the rate of thirty-five thousand dollars ($35,000) per mile; and

Whereas, the Belt Company, the party of the second part, has, through its officers, made a proposition to procure all of the right of way, pay the costs of organization, attorney's fees and fully construct, at its own expense, the first party's railroad for a distance of not less than seventy (70) miles at and for $20,000 of the first mortgage bonds, $15,000 of the second mortgage bonds and $35,000 in capital stock each per mile for each and every mile of main line and yard tracks by it constructed for the said Northern Company; and

Whereas, the directors of the parties hereto, at special meetings held for that purpose on June 27th, 1896, duly authorized the respective presidents and secretaries of both of said parties to execute a contract substantially upon the above and foregoing terms.

Now, therefore, it is hereby agreed between the parties hereto, as follows:

Article 1. First. In consideration of the sum of one dollar to the Northern Company paid by the said Belt Company, the receipt whereof is hereby acknowledged, and in consideration of the promises and agreements of the said Belt Company to furnish and supply all money for said Northern Company which may be needed to procure the right of way and to construct, complete and improve said portion of said Northern Company's railroad, the said Northern Company has this day sold, assigned and set over unto the Belt Company, its successors and assigns, and does hereby sell, assign and set over unto the Belt Company, its successors and assigns, for each and every mile of main line and yard track, so constructed by said Belt Company, three hundred and fifty shares, subject to the deduction hereinafter stated, of the said Northern Company's capital stock each of the par value of one hundred dollars ($100) and without any liability for calls and assessments and hereby agrees to cause proper certificates of stock to be issued for said shares and delivered to the said Belt Company, its successors or assigns, whenever demanded, so as to give the absolute evidence of ownership of said stock in said Belt Company, its successors and assigns, with the right, however, reserved to exchange share for share the stock of the Northern Company for the stock of a new company to be formed by the consolidation of the Quincy, Omaha and Kansas City Railway, the Omaha & St. Louis Railroad Company and the Kansas City & Northern Connecting Railroad Company, hereinafter called the Consolidated Company. It is understood, however that there shall be deducted from the total amount of shares of stock due the Belt Company, under the provisions hereof, the entire amount of capital stock already outstanding and issued to officers and others for services in organizing said Northern Company.

Second. For the consideration aforesaid, the said Northern Company has this day sold, assigned and set over and does hereby sell, assign and set over unto the said Belt Company, its successors and assigns, all the right, title and interest which the said Northern Company now has and such as it may hereafter acquire, in and to any and all moneys, lands, bonds, chattels, choses in action and donations donated or granted to the Northern Company or to any other person or persons for it, for its projected railroad, except such land and grants as may be needed and used for depot grounds, shops, switch yards, and rights of way for the said railroad, and the Northern Company does hereby sell and assign to the Belt Company, its successors and assigns all its rights of action, which have accrued, as well, as also, those which may yet accrue, arising out of any of said donations or grants, so the Belt Company may institute and maintain suits to enforce the performance of any or all contracts or promises made by any person or persons with the Northern Company, to give, donate or grant to it any money, lands, property, bonds, or other thing in aid of said projected railroad, or bring and maintain suits to recover damages for the breach of any of said contracts or promises, either in the name of the Northern Company or in the name of the Belt Company, as may be by law required. It is the intention of this agreement to fully assign, transfer, and convey to the Belt Company, its successors and assigns, all the land, choses in action, bonds, grants and donations of whatever kind, character or description, that have been granted, made or promised, and which may hereafter be granted, made or promised, to the Northern Company, or any other person or persons for it in aid of said projected railroad, as fully as if each grant, chose in action and donation were separately and specifically described (except the right of way, lands for depots, shops and yards, as aforesaid) and it is the intention of this agreement to fully authorize and
86 empower the Belt Company, its successors and assigns, to sue for, receive and receipt for any and all lands, choses in action, and donations as fully as the Northern Company could or might do, and when recovered and received to have and to hold the same unto it, the said Belt Company, its succesors and assigns forever.

3rd. And for the consideration herein stated and set forth the said Northern Company has this day sold, assigned and set over and agreed to deliver, and does hereby sell, assign and set over and agree to deliver, as soon as executed, unto the said Belt Company, for each and every mile of main line and yard track constructed by said Belt Company, twenty of its first mortgage coupon bonds, payable thirty years from the date thereof, at the financial agency of the company wherever it may be established, each bond to be of the denomination of one thousand dollars ($1,000) and to bear interest at the rate of five per cent per annum, as per semi-annual coupons attached, secured by a first mortgage on all the property and franchises of said Northern Company now owned, or which may hereafter be owned by it, as more fully set forth or to be set forth in said mortgage to which reference is hereby made for further description of said bonds and mortgage; said bonds, however, being subject to

the right of retirement on the part of the Northern Company by exchanging them and each of them for an equal amount of like bonds in the Consolidated Company.

And as a further consideration, the said Northern Company has this day sold, assigned, set over and agreed to deliver unto, and does hereby sell, assign, set over and agree to deliver unto said Belt Company, for each and every mile of main line and yard track so constructed by it, fifteen of its second mortgage coupon bonds, numbered from one consecutively, bear- date of January 1st, 1897, and payable thirty years after date thereof, at the financial agency of the Northern Company, wherever it may be established, each of the denomination of one thousand dollars ($1,000) bearing interest at the rate of five per cent per annum, as per semi-annual coupons attached, and secured by a second mortgage on all the property and franchises of said Northern Company now owned or which may hereafter be owned by it, as more fully set forth in said second mortgage to which reference is hereby made for a further description of said bonds and mortgage, with the right, however, to retire or exchange said bonds for an equal amount of the bonds of said Consolidated Company.

Article II. In consideration of the said shares of stock so, as aforesaid sold, assigned, transferred and to be delivered by
87 said Northern Company to the said Belt Company, and of the sale, transfer and assignment of said grants, donations, lands and bonds hereinbefore set forth, and of the sale and transfer of *of* the said first and second mortgage bonds by said Northern Company, to said Belt Company, and of the other promises and agreements of the Northern Company herein set forth, the said Belt Company has this day promised, agreed and covenanted, and does hereby undertake, promise, agree and covenant to and with said Northern Company as follows:

First. To furnish and supply to said Northern Company, at the cost of said Belt Company, and without any further liability on the part of said Northern Company, all moneys necessary to procure a right of way for said Northern Company's said line of railroad from a point at or near Kansas City, Missouri, on the north bank of the Missouri River, to Pattonsburg, in the state of Missouri, and such ground as may be necessary for the depots, station houses, side tracks, and yard and terminal tracks.

Second. To build and construct, or cause to be built and constructed, at its own cost and expense, and without an further liability on the part of the said Northern Company, a first class, single track standard gauge railroad over the whole line of said railroad from a point on the north bank of the Missouri River, at or near Kansas City, Missouri, to Pattonsburg, Missouri, together with the necessary side and yard tracks, and to furnish at its own cost and expense, and without any further liability on the part of the said Northern Company all the labor and material necessary to construct and complete the same ready *of* operation, including all tunneling and bridging between the points mentioned.

Third. To build or cause to be built, at its own cost and expense and without any further liability on the part of the said Northern

Company, all depots, bridges, station houses, and round houses, which may be necesary along the line of said Northern Company.

Fourth. To release and fully discharge the said Northern Company from all obligations and liabilities arising from advancements made or obligated to be made by it, the said Northern Company, on account of debts and obligations incurred by said Northern Company, in and since its incorporation.

Fifth. To assume the payment of and pay and discharge all the obligations and liabilities incurred by the said Northern Company in the preparation, issuance and recording of the said first and second mortgage bonds of said Northern Company, and the mortgages given to secure the same.

88 Article III. The work of building the said railroad shall begin and continue in such manner and to such extent from time to time as the said Northern Company may advise and notify said Belt Company, in writing, and the said Belt Company may sublet or assign such portions of said work and this contract as it may see fit.

Article IV. To the end that the said Northern Company may be fully and effectually secured in the performance by said Belt Company, its successors and assigns, of its promises, undertakings and agreements herein set forth, and each and all of them, it is hereby expressly agreed and covenanted that the said Belt Company shall only be entitled to the delivery of said stock and bonds upon the completion of said railroad or portions thereof, as may be properly certified as having been fully completed, by the chief engineer of the said Northern Company, said delivery of stock and bonds to be made in the following manner.

First. The trustee or trustees in the first and second mortgages upon the statement and certificate from time to time of the Northern Company, executed by its president or vice-president, and chief engineer, that said Belt Company has completed the number of miles or fractional parts thereof, of single main or yard track, which may be designated in said statement or certificate, shall certify and deliver to the Belt Company, an amount of bonds equal to twenty first mortgage bonds and fifteen second mortgage bonds for each and every mile of main line and yard track so certified to have been completed. The bonds to be delivered from time to time as aforesaid by said trustee or trustees, shall be in regular and numerical order beginning with the lowest number of said bonds, as aforesaid.

Second. In case said Belt Company, at the request of the Northern Company, shall legally acquire or purchase, (instead of constructing any part or portion of said Northern Company's railroad, which right is hereby given to said Belt Company at the request of the Northern Company), then and in that case, the said trustee or trustees shall deliver such an amount of said bonds to said Belt Company or to such other person or corporation, as may be designated upon the statement and certificate of said Northern Company, executed by its president, or vice-president and chief engineer, as aforesaid, as would be apportioned to the number of miles so acquired and purchased by it, instead of being constructed, subject, however to the

same restrictions and limitations as in said division first of this article as to the number of bonds per mile; or in case said certificate and statement request the delivery of such bonds to persons or corporations, other than the said Belt Company, then the said
89 statement, certificate and request shall be approved by the said Belt Company, in writing, such approval to be executed by the president or vice-president of the said Belt Company.

Third. Whenever, or as often as the said Belt Company shall have completed ten miles of railroad in accordance with its contract with the said Northern Company, it shall be entitled to receive all of the first and second mortgage bonds apportioned to said ten miles, as well as for each and every mile so constructed and so completed and so certified by the chief engineer of the Northern Company, $35,000 par value of the common stock, less the present outstanding and issued stock of said Northern Company.

Article VI. Said Belt Company may assign this contract or any part thereof, to any other person or corporation, and thereafter the assignee of this contract or portion thereof, shall be entitled to the same rights and benefits and to receive said bonds and stock from said Northern Company and any trustee in said mortgage under like circumstances and conditions as herein provided, with respect to said Belt Company, party of the second part.

In witness whereof, the said Northern Company and Belt Company have caused their respective names to be hereunto signed by their respective presidents and their corporate seals to be hereunto affixed, attested by their respective secretaries, or assistant secretaries, the day and year first above written.

KANSAS CITY & NORTHERN CONNECTING RAILROAD COMPANY.

[SEAL.] By A. E. STILWELL, *President.*

Attest:

C. A. BRALEY, *Secretary.*

Attest:

[SEAL.] J. T. NORTHENUS, *Secretary.*

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY,

By E. L. MARTIN, *President.*

Afterwards, to-wit, on the 5th day of November, 1900, the Answer of Central Improvement Company was filed. Said Answer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

90 2468. In Equity.

CAMBRIA STEEL COMPANY, Complainant,
vs.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, THE UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Answer of the Defendant, Central Improvement Company, to the Bill of Complaint of the Cambria Steel Company, Complainant.

This defendant, now and at all times hereafter, saving and reserving to itself all benefit and advantage of exceptions which can or may be had or taken to the many errors and uncertainties and other imperfections in the said bill contained, for answer thereto, or to so much and such portions thereof as this defendant is advised it is material or necessary for it to answer unto, answering says:

That this defendant admits that the complainant is a corporation and citizen of the state of Pennsylvania, and that the defendants are all corporations and are all citizens of the state of Missouri, and inhabitants of the Western Division of the Western District of Missouri, as alleged in the bill of complaint, except the defendant, The Union Terminal Railroad Company, which is a citizen of Kansas, and an inhabitant of the First Division of the District of Kansas, as alleged in the bill of complaint.

This defendant admits that the defendant, the Kansas City Suburban Belt Railroad Company, became indebted to the complainant, prior to the institution of this suit in a large sum, for steel rails purchased by said Belt Company from the complainant, but this defendant has not sufficient knowledge or information to enable it to form a belief as to whether or not the amount of said indebtedness was about One Hundred Thousand Dollars, nor as to whether the said steel rails were so purchased by the said Belt Company between the first day of November, 1897, and the first day of March, 1898, as alleged in the bill of complaint.

This defendant admits that a suit was brought in the name of the complainant, upon the obligation given it by the said Belt Company evidencing the balance due upon said indebtedness, and this defendant avers the fact to be that said obligation consisted of a promissory note executed and delivered by the defendant, the Kansas City Suburban Belt Railroad Company to the com-
91 plainant, on January 15th, 1900, for Ninety Eight Thousand, Seven hundred and Forty Four and 23/100 Dollars ($98,744.23) which note was a renewal in whole or in part of

former notes executed by the said Belt Company to the complainant, for the purchase price of steel rails.

This defendant admits that a judgment was recovered in this Honorable Court, on the said note, in the name of the complainant, on the sixth day of September, 1900, against the said Belt Company, for the sum of One Hundred Thousand, Nine Hundred and Sixty Two and 91/100 Dollars ($100,962.91) but this defendant has no knowledge or information sufficient to enable it to form a belief as to whether or not any part of said judgment has been paid, hence demands proof of the complainant's allegation that no part of the same has been paid.

This defendant admits that an execution was issued on said judgment, directed to the Marshal of the Western District of Missouri, and against said Belt Company, and that the said Marshal did make return of said execution, which return, as written, shows upon its face that the execution was wholly unsatisfied for want of property of the said Belt Company upon which to levy the same, but this defendant state and avers the fact to be that suit on said note was instituted in this Honorable Court on the said sixth day of September, 1900; that by a prearrangement the said defendant Belt Company entered its appearance on the same day and consented to said judgments being rendered against it, which was done on the same day and hour, and that counsel appearing as the attorneys for the complainant in that suit, without any purpose, or desire of collecting said judgment, did, on the same day, go through the form of causing an execution to be issued on said judgment, and wrote a pretended return of nulla bona thereon, and placed said execution in the hands of said Marshal, solely for the purpose of having him sign the said pretended return which had been so written for and prepared for him, and the said Marshal, without making any search for property on which to levy said execution, and without making any demand on the said Belt Company for the payment thereof, and without in any way attempting to collect the same, did on the same day, without leaving his office, at the request and direction of those persons who appeared as attorneys for the plaintiff in said execution, through one of his deputies, sign said pretended return of nulla bona which had been previously written and prepared for his signature, as aforesaid.

This defendant denies that the said defendant, Kansas City Suburban Belt Railroad Company was or is insolvent, and denies that it had or has no property subject to be reached by legal
92 process to be issued upon the said judgment so secured by the complainant, as aforesaid, as alleged in the bill of complaint; but this defendant states and shows that on the contrary the truth is that the Belt Company then had and still has ample money and means provided and at its command to pay the said debt of the complainant and all its other liabilities, which was fully known to the complainant prior to and at the time of the institution of the said suit on said note, and at all times since.

This defendant further states and shows to the Court that in addition to the fact that the said Belt Company had and has ample

money and means provided and at its command to pay the complainant's said debt, as aforesaid, the complainant, itself, ever since the execution of the said note, has held and still holds in its own hands a large amount of valuable property of the said Belt Company as collateral security to secure the payment of the said note, duly pledged by the said Belt Company to the complainant for that purpose. This defendant does not know the exact amount or description of the said personal property so pledged to and held as collateral security by the complainant, but avers that it was and is of sufficient value upon foreclosure to pay a large part, if not the whole of the complainant's said debt; that a part of said collateral security consists of one hundred and fifty-four (154) First Mortgage, Thirty Year, Five Per cent Gold Bonds of the Kansas City and Northern Connecting Railroad Company, of the denomination of One Thousand Dollars ($1,000) each, which are secured by a first lien on about one hundred miles of first class, standard guage railroad, between Kansas City and Pattonsburg, Missouri, at the rate of Twenty Thousand Dollars in bonds to each mile of said railroad; that said bonds could have been and can now easily be subjected to the payment of the complainant's debt and to the satisfaction of a large part thereof, but the complainant has made no attempt whatever to collect its debt in any way, but has failed and refused to even appropriate, as it lawfully might and could have done, that part of the Belt Company's property which was and is in its own hands for that express purpose.

This defendant further answering unto that part of the complainant's bill of complaint which refers to the recovery of the said alleged judgment against the said Belt Company, and the alleged issuance and return of execution thereon, states and shows that the said suit was not instituted and the said judgment was not recovered, and the said execution was not issued in good faith for the purpose of collecting the complainant's said debt, but that upon the contrary,

93 the said Belt Company, and its attorneys, agents and officers, and The Kansas City Southern Railway Company, who completely dominates and controls them, and certain other persons having the charge and control of some of its business and financial affairs, hereinafter called the Philadelphia Committee, whose personnel and connection with the Belt Company and its affairs will be more definitely hereinafter stated, unlawfully conceived the fraudulent purpose and design of hindering, delaying and defrauding the creditors of the said Belt Company in the collection of their just debts by procuring the appointment of receivers at the hands of this Honorable Court, to take possession of all of the property of the said Belt Company, and by procuring restraining orders and injunctions from this Honorable Court preventing such creditors, except the complainant from in any way subjecting any of the assets or property of the Belt Company to the payment of their debts, upon the false and fraudulent pretense that the appointment of receivers and the granting of said restraining orders and injunctions against such creditors, were necessary to the protection of the interests of said creditors, and further by seeking to foreclose cer-

tain mortgages on separate parts of the Belt Company's property on the false and fraudulent pretense that there had been a demand for and default in the payment of certain installments of interest thereon, so as to cut out by foreclosure and defeat the unsecured creditors of said Belt Company, in the collection of their debts; that in pursuance of said fraudulent purpose and design, the said Belt Company in connection with and through the said The Kansas City Southern Railway Company and the said Philadelphia Committee, approached the complainant and requested it to allow them to bring a suit in its name on said note and recover a judgment thereon against the Belt Company and afterwards to allow them to bring this suit, in its name, so as to make it falsely appear that a bona fide judgment creditor was diligently and in good faith attempting to enforce the collection of its debt through the instrumentality of this creditor's bill and its accompanying receivership or receiverships, whilst in truth and reality it would be and was intended to be in substance and effect the Belt Company suing for and obtaining a judgment and execution against itself, and procuring the appointment of receivers for its own property for the fraudulent purpose aforesaid.

That this defendant is informed and believes, and upon such information and belief avers the fact to be that the said Belt Company, the said The Kansas City Southern Railway Company, and the said Philadelphia Committee promised and agreed with the complainant that if it would allow them to bring the said suit in its name, they would see to it that its debt was fully paid, and would indemnify and save it harmless against any and all
94 costs and expenses on account of said suits so to be conducted in its name; that the complainant, with full knowledge of the said fraudulent purpose and design, and participating therein, for the purpose of carrying the same out, did consent that they might institute, conduct and prosecute in its name the said suits; that the said Belt Company and the said The Kansas City Southern Railway Company and the said Philadelphia Committee then employed counsel, whether in their own name or not or in the name of the complainant, this defendant does not know, and has no pre-sent means of ascertaining, to institute and prosecute the said suit on said note to judgment and execution and to present this bill of complaint based thereon; but whatever form may have been used in the employment of said counsel, that the fact is that the said Belt Company, the said The Kansas City Southern Railway Company and the said Philadelphia Committee are the real employers and are by agreement to bear the expense thereof.

That in the further prosecution of their said fraudulent purpose and design of hindering, delaying and defrauding the unsecured creditors of the said Belt Company, they, the said Belt Company, the said The Kansas City Southern Railway Company, and the said Philadelphia Committee, requested and procured the Provident Life & Trust Company of Philadelphia, who, at their instigation was and still is claiming and asserting itself to be the trustee in four certain mortgages which are liens or apparent liens on

separate portions of the property heretofore operated by the Belt Company, but now operated by the said The Kansas City Southern Railway Company, to institute four suits for the foreclosure of the said mortgages in this Honorable Court, on the false pretense that there had been a default in the payment of the interest on the bonds in said mortgages described. That the person who owns and holds all or substantially all of the bonds described in all of the said mortgages, to-wit, The Kansas City Southern Railway Company, is the same person who controls and directs the business and affairs of all the companies that executed said mortgages and who owns and holds all or substantially all, of the capital stock of all of said companies, and is the same person who has the possession and management of the property of all of said companies, and who controls and operates all of the railroads covered by said mortgages, and who collects and receives all of the earnings and income thereof, so that the same person who holds or owns substantially all of said bonds, is the same person who is equitably charged with the duty of paying whatever may be lawfully due on any of said bonds, if anything.

95 That said foreclosure suits were brought at the instance and request of those persons only who are so responsible for the alleged default and were fraudulently and collusively brought to sell said property for the fraudulent purpose aforesaid of cutting out and defeating the unsecured creditors and not for the purpose of enforcing the payment of said bonds.

That the said suit in the name of the complainant to recover judgment on said note, and this bill of complaint in this cause, and each of the said four suits brought in the name of the Provident Life & Trust Company to foreclose said mortgages, were all brought against the Belt Company, and its property, at the solicitation and request of the Belt Company, and of those said persons who dominate and control its action; that they were all drawn and prepared simultaneously by the same counsel and were all instituted at the same time by the same counsel, and the Belt Company, together with all of the other defendants which it controls were present in court at the time of the filing of all of the said suits and voluntarily entered their appearance therein, and fraudulently and collusively consented to the relief sought in each case, but the defendants who were not controlled by the said Belt Company were not present and were not notified. That each and all of the said suits are parts of one and the same transaction, collusively and fraudulently contrived and instituted by the Belt Company and those said persons who control its action, with the fraudulent purpose and intent of hindering, delaying and defrauding all of its unsecured creditors excepting the complainant.

This defendant prays leave to refer to and use upon any hearing of this cause, any and all of the files and records in any and all of said causes as fully as if they were set out herein and made a part of the record in this cause.

This defendant further states and shows that on April 1st, 1899, and prior thereto, the Kansas City, Pittsburg & Gulf Railroad

Company, a Missouri corporation, was operating a railroad from Kansas City, Missouri, to Port Arthur, Texas, and under a rental contract was using the lines, tracks, station houses, yards and depots of the said Belt Company and its associated lines as its Kansas City terminals, and was using the canal of the Port Arthur Channel & Dock Company in Texas as its southern terminals, so as to get its freight to and from the open sea.

That on April 1st, 1899, the said Kansas City, Pittsburg & Gulf Railroad Company defaulted in the payment of the interest on its mortgage bonds and a suit to foreclose its mortgage on
96 account of said default was instituted in this Honorable Court on the 6th day of April, 1899, and receivers were appointed and operated the railroad pending the foreclosure.

That a certain number of persons about that time got together and appointed themselves as a committee herein called the Philadelphia Committee to reorganize the Kansas City, Pittsburg & Gulf Railroad Company and readjust its securities so that it would be thereafter burdened with a less interest charge and one clearly within its ability to earn.

That said Philadelphia Committee, after some resignations, and substitutions was composed of Wm. F. Harrity, A. Heckscher, Herman Sielcken, William Edonborn, Max Pam, Samuel R. Shipley, Silas Pettit and Winthrop Smith.

That the said Philadelphia Committee in pursuance of said purpose, adopted and published a plan and agreement for the reorganization of the said Kansas City, Pittsburg & Gulf Railroad Company and the said Terminal Companies, which provided, among other things, for the formation of a new railroad company which would issue its bonds and stocks in exchange for the bonds and stocks of the said Kansas City, Pittsburg & Gulf Railroad Company and in exchange for the stock and bonds of the Kansas City Suburban Belt Railroad Company, The Union Terminal Railroad Company, the Consolidated Terminal Railway Company of Kansas City, the Kansas City & Independence Air Line and the Port Arthur Channel & Dock Company, in order, as stated in said published plan, "to merge these three corporate managements into one so that the system shall be capable of operation as a whole, under one management, from Kansas City to the ships' side at Port Arthur," so that said new railroad company which would after the reorganization own the main line and property of the said Kansas City, Pittsburg & Gulf Railroad Company, and also own the bonds and capital stock of the Kansas City Suburban Belt Railroad Company and its operated lines at Kansas City, and of the Port Arthur Channel & Dock Company, in Texas, and that thereby "all three properties would be under one corporate ownership, management and control."

That the Provident Life & Trust Company, complainant in said four foreclosure suits filed simultaneously with this suit, was a party to the said plan and agreement of reorganization, and its President, Samuel R. Shipley, was a member of the said Philadelphia Committee.

97 That the said Philadelphia Committee in furtherance of its said plan of reorganization, caused the proposed new railroad company to be incorporated under the laws of the state of Missouri, under the name of The Kansas City Southern Railway Company and placed three of its members on the Board of Directors of said new company, and two others of its members, one of whom is the said Samuel R. Shipley, President of the said Provident Life & Trust Company, as aforesaid, on a Board of Voting Trustees, who were to be and are vested with the absolute and unlimited power of voting all of the stock of The Kansas City Southern Railway Company for the next five years.

That the said Philadelphia Committee, for and on behalf of the said The Kansas City Southern Railway Company, as well as on its own account, did invite and request the owners and holders of the stock and bonds of the Kansas City, Pittsburg & Gulf Railroad Company, the Port Arthur Channel & Dock Company, and the said Kansas City Suburban Belt Railroad Company, and its operated lines at Kansas City, to deposit their said stock and bonds with the said Provident Life & Trust Company and to receive in payment therefor the stock and bonds of said The Kansas City Southern Railway Company at a ratio prescribed in said published plan.

That in response to said invitation and request, the respective owners and holders of the stock and bonds of all of the said companies, and particularly of the Kansas City Suburban Belt Railroad Company and its operated lines at Kansas City, for the purpose of converting them into the stock and bonds of The Kansas City Southern Railway Company, to the end that the said purposes of said reorganization plan might be carried out, did deposit all or substantially all of their stock and bonds so as to enable the said Philadelphia Committee to consummate its said plan of reorganization, and the same was thereupon declared effective and carried out as proposed.

That after the said plan of reorganization had been declared effective, and the said The Kansas City Southern Railway Company had thereby acquired substantially all of the stocks and bonds of the Kansas City Suburban Belt Railroad Company, and its operated lines at Kansas City, to-wit, on or about the first day of April, 1900, a majority of the then directors and officers of the Kansas City Suburban Belt Railroad Company resigned their respective offices and persons who were then directors, officers and agents of the said The Kansas City Southern Railway Company were chosen in their stead, so that from that time ever since, the said The

98 Kansas City Southern Railway Company, and the said Philadelphia Committee have had and exercised full and unrestrained control, direction and management of all of the corporate affairs of the said defendant, the Kansas City Suburban Belt Railroad Company.

That on or about the said first day of April, 1900, the said The Kansas City Southern Railway Company in furtherance of said plan of reorganization took actual possession of all of the railroad, tracks, shops, depots, station houses, rolling stock and other equipment

and appurtenances of the Kansas City Suburban Belt Railroad Company and its operated lines at Kansas City, and has ever since that time been and still is managing, controlling and operating the same and receiving and collecting all of the earnings and income thereof.

That it was a part of the said plan and agreement of reorganization that the said Philadelphia Committee should cause a syndicate of capitalists to be formed who would buy enough of the stock and bonds of the said The Kansas City Southern Railway Company which would not be needed to retire and convert the stock and bonds of the old companies sought to be unified, to pay off and discharge all of the floating debts and other unsecured obligations of all of the old companies, including those of the Kansas City Suburban Belt Railroad Company. That said syndicate was formed and enough of the securities of The Kansas City Southern Railway Company were sold to said syndicate to provide money to satisfy and discharge all of the floating and unsecured debts and obligations of all of said companies so sought to be united under the ownership and control of The Kansas City Southern Railway Company, including those of the said Kansas City Suburban Belt Railroad Company, and the said Philadelphia Committee and the said The Kansas City Southern Railway Company, which it controls have wrongfully withheld said money and have unlawfully and fraudulently failed and refused to apply the same to the purposes for which it was raised, to-wit, to the payment of the floating and unsecured debts and obligations of the Kansas City Suburban Belt Railroad Company, and the other old companies so [analoga-ted] as aforesaid under the said plan of reorganization.

This defendant further states and shows that one Max Pam, of Chicago, Illinois, was and is a member of the said Philadelphia Committee, and was and is also a member of the Board of Directors of the said The Kansas City Southern Railway Company, and a member of its Executive Committee; that said Max Pam was and is the General Counsel and legal adviser of the said Philadelphia
99 Committee, and the General Counsel and legal adviser of The Kansas City Southern Railway Company, and the General Counsel and legal adviser of the said Kansas City Suburban Belt Railroad Company, and the General Counsel and legal adviser of The Union Terminal Railroad Company, and the General Counsel and legal adviser of the Kansas City & Independence Air Line, and the General Counsel and legal adviser of the Consolidated Terminal Railway Company, and as such had and has the general supervision, direction and control of the affairs and legal proceedings of the said Philadelphia Committee, and of all of the said last named railroad companies, including the question as to which of their debts, if any, they should pay, and which of their debts they should avoid or escape the payment of, and of the legal proceedings necessary to accomplish the avoidance and escaping of the payment of such debts.

That C. W. Lucas, who entered the appearance of the Kansas City Suburban Belt Railroad Company, The Union Terminal

Railroad Company, the Consolidated Terminal Railroad Company, and the Kansas City & Independence Air Line in this cause, and who on their behalf consented to the appointment of receivers for their properties, is an appointee of the said Max Pam, as an assistant attorney for the said Kansas City Southern Railway Company, and for all of the other said railroad companies, and his salary is fixed by and is dependent upon the wishes and word of the said Pam, and that his said action in appearing for the said defendants and consenting to the appointment of receivers, was in obedience to the direction of the said Pam, and in accordance with his wishes, and for the furtherance of the fraudulent purpose and wrongfully and wickedly conceived by the said Philadelphia Committee and the said The Kansas City Southern Railway Company, and the said Kansas City Suburban Belt Railroad Company which they control, to avoid and escape the payment of the unsecured debts of the said Belt Company by means of the said four foreclosure suits, and by means of this suit so simultaneously and collusively instituted as aforesaid.

This defendant further answering avers the fact to be that the railroads of the Kansas City Suburban Belt Railroad Company, The Union Terminal Railroad Company, and the Kansas City & Independence Air Line extend in and around Kansas City, Missouri, and Kansas City, Kansas, and in and to the city of Independence, Missouri, and are what are known as terminal railroads; that they depend largely for their revenue upon charges received for switching cars from one railroad to another and from and to industries along their lines to and from other railroads which have a connection with the roads of said company. That their business increased from year to year and in order to accomplish the purposes for which they were respectively organized it was necessary that they acquire from time to time additional terminals and lands upon which to place terminal tracks.

That afterwards the said Belt Railroad Company, and The Union Terminal Railroad Company caused to be incorporated this company, the Central Improvement Company, for the purpose of purchasing and holding lands which might be desired for various railroad companies hereinbefore mentioned, and also for the Kansas City, Pittsburg & Gulf Railroad Company, whose property has now been acquired by The Kansas City Southern Railway Company. That in purchasing said lands it was necessary in many instances to give to the sellers, deeds of trust back upon the lands for part of the purchase price for the reason that the Kansas City Suburban Belt Railroad Company did not have funds in its treasury with which to buy all of the additional lands that the Kansas City Suburban Belt Railroad Company, and said The Union Terminal Railroad Company, and the Kansas City & Independence Air Line might desire to carry on their business; that the Central Improvement Company was thereupon organized at the instance of the Kansas City Southern Belt Railroad Company, The Union Terminal Railroad Company and the Kansas City & Independence Air Line, with a capital stock of One Hundred Thousand Dollars; that subsequently,

the capital stock thereof was increased to Two Hundred Thousand Dollars, but all of the capital stock was not paid in on said increase, and the Guardian Trust Company was requested by the Kansas City Suburban Belt Railroad Company to act as Trustee for the stock which had not been taken by the various railroad companies hereinabove mentioned.

That the method of conducting the business of the said Central Improvement Company, was as follows:

Whenever the said railroad companies, or either of them desired to purchase a tract of land, the Kansas City Suburban Belt Railroad Company would advance the money with which to purchase and pay for a sufficient number of shares of stock of this company to enable it to purchase the land, and this company would issue to the said Belt Company, fully paid stock of the Central Improvement Company, or it would furnish the said money for the purchase of said stock and have it issued to The Union Terminal Railroad Company, or the Kansas City & Independence Air Line, whenever the land purchased with the proceeds of the said stock was located
101 along the line of those roads, and that this defendant avers and admits, as stated in the bill of complaint, that all of the money for said stock issued to the Kansas City Suburban Belt Railroad Company, The Union Terminal Railroad Company and the Kansas City & Independence Air Line was furnished by the Kansas City Suburban Belt Railroad Company and that the stock is actually the stock of Kansas City Suburban Belt Railroad Company.

This defendant in further answering states that in following out the said plan, there has been issued to the Kansas City Suburban Belt Railroad Company 810 shares of the stock of the Central Improvement Company, and to the Kansas City & Independence Air Line 22 shares of the stock of said Company, and to The Union Terminal Railroad Company 334 shares of stock of the said Central Improvement Company, and that it, the said Central Improvement Company holds said lands so purchased for the benefit of the stockholders in said Central Improvement Company.

And the defendant, the Central Improvement Company, in further answering states that among the properties so held by the Central Improvement Company are several tracts of land in Jackson County, Missouri, and Wyandotte County, Kansas, more particularly described and set forth in Exhibit "A" a copy of which is hereto attached and made a part hereof.

This [a] defendant further states that all of the said Two Hundred Thousand Dollars of capital stock has been issued except Fifty Eight Thousand, Six Hundred Dollars, or 586 shares thereof, which is still held by a Trustee and which in accordance with the arrangements and custom of doing the business as hereinabove described will be issued to the several railroad companies as fast as they advance money for stock the proceeds of which is to be used to pay for lands already purchased or to be purchased.

This defendant further answering avers and states that there has been served upon said company a notice by the Guardian Trust Company that it holds 1120 shares of the capital stock of said com-

pany as collateral security for the payment of the indebtedness due the said Guardian Trust Company by the Kansas City Suburban Belt Railroad Company and the said Guardian Trust Company has requested the said Central Improvement Company to at once demand from the said Kansas City Suburban Belt Railroad Company, The Union Terminal Railroad Company, and the Kansas City & Independence Air Line, as well as The Kansas City Southern Railway Company, that they and each of them shall pay into the treasury of the Central Improvement Company large sums of money that are due the said Central Improvement Company for rentals of
102 lands already earned, and that they be requested and compelled to pay rental for the use of land used by said railroad companies and belonging to this defendant.

This defendant further answering states that all of the books of the said Central Improvement Company, and all of its property are now unlawfully in the possession and under the control of the Kansas City Suburban Belt Railroad Company, the Union Terminal Railroad Company, and the Kansas City & Independence Air Line, and their receivers the Honorable S. R. Knott, and E. F. Swinney, and that the said railroad companies and the said receivers have been requested to surrender the books of said company to the proper officers thereof, and have refused, and that they and each of them have so refused to surrender the books and property of the said Central Improvement Company to the officers thereof, and that they, the said railroad companies, and the receivers thereof, have refused to pay into the treasury of the said Central Improvement Company, and to the officers thereof any rent or money for the use of said lands and property so owned by this defendant.

And further answering this defendant state that it is advised that the Kansas City Suburban Belt Railroad Company denies the right of the said Guardian Trust Company, co-defendant herein, to hold said stock as collateral security, and avers that it is necessary for the interests of the stockholders of this defendant and the creditors thereof, that all of the property and the books of this company be taken out of the possession of the said Kansas City Suburban Belt Railroad Company, The Union Terminal Railroad Company, and the Kansas City & Independence Air Line, and the receivers of said companies, and that an impartial receiver who shall have no connection whatever with any of said railroad companies or with any party interested in or connected with said companies, be appointed by this Honorable Court, to take possession of all of the said property and to demand and collect all moneys that may be due this defendant from said railroad companies or any other person, and under and pursuant to the orders of this court, to sell to said railroad companies, or to other persons, the real estate of said company, and to convert all of its property into cash, and pay the same to the stockholders thereof, or to the persons who may be entitled thereto.

This defendant further answering denies that it and its officers are controlled and dominated by the Guardian Trust Company, and denies that it, as a corporation, was a dummy contrived and

provided by the said Guardian Trust Company. And fur-
103 ther answering avers the fact to be that the said Central Improvement Company owes certain amounts of money to various persons from whom it purchased portions of said land, the payment of which is secured by deeds of trust upon said property; that the said Kansas City Suburban Belt Railroad Company, The Union Terminal Railroad Company, and the Kansas City & Independence Air Line, and the receivers thereof, although using said lands and all of the same for their own individual benefit, have refused to pay the taxes due on said lands, or to pay the amounts due on the various tracts of land, although the fair rental value of said property would be much more than sufficient to pay all of the taxes and incumbrances as they fall due, and further answering this defendant avers that the fair rental value of the *of the* said lands is at least the sum of Twenty Thousand Dollars per annum.

This defendant further answering denies any and all manner of unlawful combinations, domination or control, over its affairs with or by the said Guardian Trust Company, wherewith this defendant is by said bill of complaint charged, without this, that there is any other matter or thing in said complainant's bill of complaint contained relating to this defendant and material or necessary for this defendant to make answer unto and not herein or hereby well and sufficient- answered, confessed, or traversed and avoided, or denied, is true, to the knowledge or belief of this defendant, all of which matters and things this defendant is willing to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays that a receiver may be appointed for the reasons set forth in this answer and herein contained.

CENTRAL IMPROVEMENT COMPANY,
By TRIMBLE & BRALEY,
WING & CHADBORNE.
Its Solicitors.

C. A. BRALEY,
Of Counsel.

STATE OF MISSOURI,
County of Jackson, ss:

C. A. Braley, being first duly sworn, upon his oath deposes and says that he is one of the solicitors and counsel for and also president of the defendant the Central Improvement Company; that he has read the above and foregoing answer of the said defendant, and knows the contents thereof, and that the allegations therein contained are true, except such as are therein alleged to be on information and belief, and as to those matters, he believes them to be true.

C. A. BRALEY.

104 Subscribed and sworn to before me this 20th day of October, 1900.

My Commission expires May 25, 1904.

[SEAL.] FLORENCE APPLEGATE,
Notary Public in and for Jackson County, Missouri.

Exhibit "A",

List of Property of Central Improvement Company.

The Union Terminal Railroad Company.

1. Commencing at a point in the South line of Cheyenne Avenue, in Kansas City, Kansas, thirty feet west of North and South one half section line through the center of section twenty-two, township eleven, range twenty five, in Wyandotte County, Kansas; thence west along the south line of Cheyenne Avenue, 37′ feet; thence in a southwest direction on a straight line, forming an angle of 54 deg. 9′ with said South line of Cheyenne, Avenue, 680 feet more or less to the northerly boundary of a tract of land owned by the Chicago, Milwaukee & St. Paul Railway Company; thence in a Northeasterly direction along said northerly boundary line (the same being a curved line to the left) 775 feet, more or less to a point in the west line of a sixty foot street (the center line of which street is the North and South one half section line through the center of Section 11, Township 11, Range 25) thence along the west line of said street 197 feet to the place of beginning, and containing an area of 1.65 acres.

This tract of land cost $4,400.00 April 23rd, 1895.

2. A certain strip or piece of land situated partly in the Southeast Quarter of Section twenty-one, and partly in the Southwest Quarter of Section twenty two, Township eleven, range twenty five, in Wyandotte County, Kansas, and bounded and described as follows:

Beginning at a point in the south line of the right of way of The Union Terminal Railroad as said right of way is described in a deed from the sellers to the Union Terminal Railroad Company, recorded in Book 204, at page 418 and following, where said south line would be intersected by the prolongation or extension southerly of the east line of Tenth Street, Formerly Twentieth Street, in Kansas City, Kansas; thence in an easterly direction along said line of right of way, 2178 feet; thence south 208.3 feet; thence in a westerly direction on a line parallel to the south line of said right of way of The Union Terminal Railroad, and at the uniform distance
105 of two hundred feet from *said* 2178 feet to a point in the east line, extending southward of the aforesaid Tenth Street in Kansas City, Kansas; thence North along said line two hundred feet to the place of beginning, containing ten acres.

This land was purchased at a cost of $20,000.00.

3. All of a certain lot or piece of land, situated in the Northeast Quarter of section twenty two, township eleven, range twenty five, in Wyandotte County, Kansas, bounded and described as follows:

Beginning at a point in the east line of Railroad Street in Kansas City, Kansas, 1336.85 feet in a southwesterly direction measured on the line of said street, from the south line of Osage Avenue; thence east along the south line of a tract of land now or formerly owned by the Western Dressed Beef Company, 270 feet more or less; to a

point in the west line of the right of way of The Union Terminal Railroad; thence in a southwesterly direction, along said line of right of way to the point where the same intersects or coincides with the east line of Railroad Street; thence in a Northeasterly direction along the line of said street 390 feet more or less to the place of beginning, and containing an area of .48 acres.

This tract of land originally cost $1,008.00.

4. Beginning at a point in the West line of the Northeast Quarter of the Southwest Quarter of section twenty, township eleven, range twenty five, in Wyandotte County, Kansas, 854 feet south of the Northwest corner of same, said point being also the southwest corner of land of John O'Connor; thence north 414 feet to a point in the south line of the right of way of The Union Terminal Railroad Company; thence south 71 deg. 40′ East, along said line 603.5 feet to a point in the west line of land of M. O'Connor; thence south along same 161.4 feet; thence south 63 deg. 37′ west, 139.5 feet to a point in the south line of the land of the said John O'Connor; thence west along said south line, 447.58 feet to the place of beginning, containing 4.1 acres.

This land originally cost $3,275.00.

5. Lots 14, 15, 16, 17, and 18, in Loomis' Riverside Addition; Lots 25, 27, and 28, Clifton Place Addition; Lots 2, 3, 5, 31, and 32 in Block B, F. J. Baird's Addition to Armourdale, now a part of Kansas City, Wyandotte County, Kansas.

Originally cost $8,110.00.

106 *Kansas City Suburban Belt Railroad Company.*

6. All lots numbers 1, 45 and 46 in Block 2 in Modern Mutual Place, an addition to Kansas City, Missouri, as the same appears of record upon the recorded plat thereof, and so much of lots numbered 2 and 44 in Block 2, and so much of lots numbered 6, 7, and 8 in Block 1 in said addition, as lie north and northwest of a line parallel to and 20 feet south of the center line of the most southerly track of the Kansas City Suburban Belt Railroad Company, or the Kansas City and Independence Air Line, as the same is now located across said lots, which said center line is described as follows:

Beginning at a point in the west line of Lot 8 in Block 1 of said addition 65.1 feet south of the northwest corner of said lot; thence in a northwesterly direction upon the line of a curve to the right of 550.8 feet radius, 210 feet more or less to a point in the west line of Lot 44 in Block 2 of said addition, 3.3 feet south of the northwest corner thereof; thence continued on said curve to the right with a radius of 550.8 feet, 198.8 feet to a point in the East line of Lot 1 of Block 2 of said Addition, 2.1 feet south of the Northeast corner of said Lot.

This land cost $1,000.00, in 1895.

7. All interest in and to the following described real estate, to-wit:

Lots 31, 47 and 48 in Burck's Subdivision of the Guinnottee Farm, as the same are marked and designated on the recorded plat thereof on file in the office of the recorder of deeds in and for the County of Jackson in the state of Missouri.

Except such parts of said lots as lie in the Missouri River.

This land cost in 1895 $13,551.68.

8. Lot 4 in Block 5 Lykin's Addition to Kansas City, Missouri.

This land cost in 1895, $1,100.00.

9. Lot 7 in Block 4, Lykin's Addition to Kansas City, Missouri.

This land cost in 1895, $1,100.00.

10. Part of the Southeast Quarter of Section 33, Township 50, range 32, beginning 4.30 feet east of the southeast corner of the N. W. ¼ of the S. E. ¼ of Section 33, thence west with the one
107 half quarter section line 417.72 feet; thence north and parallel with the one half quarter section line and east thereof 271.12 feet; thence east 417.72 feet; thence south 271.12 feet to the beginning, containing 2.60 acres.

The east 35 feet of the South 31.6 feet of Lot 7 Block 80, East Kansas Addition.

Part of Lots 7, 8, and 9, Block 80, East Kansas Addition, beginning at the southeast corner of Lot 9, thence westerly along the southern line of lots 9 and 8, 75 feet; thence northerly, at right angles to said southern line of lot 8, 31.6 feet; thence westerly, parallel with the southerly line of lots 8 and 7 60 feet to a point 15 feet easterly from and right angled from the west line of Lot 7. Thence northerly parallel with said west line of lot 7 to the southerly line of the right of way of the Kansas City Suburban Belt Railroad; thence northeasterly on a line forming an angle of 65 deg. 20′ with the last mentioned line, and along the southerly side of the said right of way, 122 feet; thence easterly on the external concave line of a curve 66.7 feet radius 26 feet, to east line of said lot 9; thence southerly along said east line of lot 9, 82.2 feet to beginning.

Parts of Lots 7, 8, and 9 of said Block 80, beginning at the southwest corner of lot 7; thence easterly along the south line of lot 7 fifteen feet; thence northerly parallel with the west line of lot 7 to the south line of the right of way of the Kansas City Suburban Belt Railroad; thence northeasterly along said south line of right of way 122 feet; thence easterly on the external concave line of a curve of a radius 661.7 feet, 26 feet to a point on the east line of lot 9, 82.2 feet northeasterly from the southeast corner of said lot 9; thence northerly along said east line of lot 9 to the northeast corner of said lot; thence westerly along the northerly line of lots 9, 8 and 7, 150 feet to the northwest corner of said lot 7; thence southerly along the west line of said lot 7 to place of beginning.

11. A tract of land in the N. W. Quarter of Section 6 Township 49, Range 33, Kansas City, Jackson County, Missouri, bounded and described as follows: Bounded on the north by a line parallel with and 22 feet north of the center line of the main line of the Kansas City Suburban Belt Railroad as now constructed on trestle north of Jacob Dold Packing Company's plant in Kansas City, Missouri; on the east by the east line of the Ferrier tract, extended

north to said north line; on the west by the east line of Wyoming Street extended north to the said north line, and on the south by the north line of the right of way of the Kansas City, Ft.
108 Scott & Memphis Railway, which north line is 121½ feet north of and parallel with the north line of said right of way, which said center line of said right of way is described as follows: Beginning at a point on the east line of Wyoming Street in said City, 543.2 feet north of the north line of 9th street in said city; thence in a straight line to a point on the east line of the Ferrier tract, 118 feet north of the north line of 8th street, extended.

12. Lot 21 Block 9 of Centropolis, Jackson County, Missouri.

This land cost $100.00 in 1896.

13. Lot 124, in Block 12, Old Town, Kansas City, Jackson County, Missouri.

This land cost $3,000.00 in 1896.

14. A tract of land described by metes and [bo-nds] as follows: Beginning at the northeast corner of lot 16 in Block 16, in that part of Kansas City, Missouri, known as Extension of West Kansas Addition number one, thence west along the north line of said block 16, 72 feet to the northwest corner of lot 14 in said block; thence in a northerly direction on the prolongation or extension of the west line of said lot 14 62.1 feet to a point 22 feet measured at right angles north of the center line of the main track of the Kansas City Suburban Belt Railroad as located and constructed upon the ground; thence in an easterly direction on a line parallel to the center line of said main track, and at the uniform distance of 22 feet from said center line 184 feet to a point in the northerly extension or prolongation of a line parallel with and four feet east of the east line of lot 2 Block 15, West Kansas Addition number one; thence South on said line 73.1 feet to a point in the north line of said Block 15, four feet east of the northeast corner of said block 52 feet to the northwest corner of Lot 1 of said Block; thence south along the east line of Mulberry Street, 13 feet more or less to a point 6 feet north of the center line of the most northerly switch track of the Kansas City Ft. Scott & Memphis Railway; thence in a westerly direction on a line parallel with the center line of said switch track and at the uniform distance of 6 feet from the north of said center line 60 feet to a point in the west line of said street; thence north along said line 18 feet more or less to the place of beginning.

This land cost in 1896 $3,000.00.

15. A certain lot or piece of land situated in that part of Kansas City, Missouri north of and adjoining what is known as the Extension of West Kansas Addition Number One, bounded and described as follows:
109 Beginning at the Northwest corner of Lot number 1 in Block number 15 of said Extension of West Kansas Addition No. 1, thence north along the prolongation of the east line of Mulberry Street to the Missouri River, thence easterly along the Missouri River to a point where the prolongation of the east line of lot Number 8 in said block and addition meets the Missouri River; thence southerly along said prolongation to the east line of said lot 8 to

the north line of lot number 15; thence westerly on the north line of said block 15 to the place of beginning.

Also a certain lot or piece of land comprising parts of lots, 1, 2, 3, 4, and 5, of Block No. 15, in said Extension of West Kansas Addition Number One, described as follows:

Beginning at the northwest corner of said block; thence east along the north line of same 99 feet more or less to a point 6 feet measured at right angles north of the center line of the most northerly switch track of the K. C. Ft. S. & M. R'y; thence in a southwesterly direction on a line parallel to said center line and at the uniform distance of six feet from the same one hundred feet more or less to a point in the East line of Mulberry Street; thence north along said line 13 feet more or less to the place of beginning, all in Jackson County, Missouri.

This land cost in 1896 $1,700.00.

A certain piece of land situated in that part of Kansas City just north of and adjoining what is known as Extension of West Kansas Addition number one, and bounded as follows:

Beginning at the Northwest corner of Lot Number 3 in Block number 15 of said West Kansas Addition, thence along the north line of said block twenty feet; thence north on the northerly extension or prolongation of a line parallel to the east line of said lot number 3 73.1 feet to a point 22 feet measured at right angles north of the center line of the main track of the Kansas City Suburban Belt Railroad as located and constructed on the ground; thence in an easterly direction on a line parallel to the center line of the main track of the said Suburban Belt Railroad and at the uniform distance of 22 feet from the said center line 140.2 feet to a point in the northerly extension or prolongation of the east line of lot number 8 in said Block number 15; thence southerly along the said line to the northeast corner of said lot number eight; thence west along the north line of said lot 15 to the place of beginning, and also any *and* title that the said Charles W. Watson might have in any land adjoining the above described land on the East, West or South thereof.

Also all of a tract of land beginning at the northwest corner of lot number 1 in Block 15 of the Extension of West Kansas Addition number one, an addition to Kansas City, Missouri; thence north along the prolongation of the east line of Mulberry Street about 71 feet to a point 22 feet measured at right angles from the center line of the main track of the Kansas City Suburban Belt Railroad Company as at present constructed; thence easterly on a line parallel to said center line and at the distance measured at right angles, of 22 feet from the said center line 192.2 feet to the prolongation of the east line of lot 8 in said block and addition; thence southerly on said prolongation of said east line of lot 8 to the north line of said block 15; thence westerly on the north line of said block 15 to the place of beginning, in Jackson County, Missouri.

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16. A tract of land bought from W. B. Richards in 1897, for $2,100 situated just west of Salmons Mattress factory.

17. Lots 139 and 140, 320 and 319 Old Town, purchased at a cost of $12,000.00 in 1897.

18. A triangular piece of ground in the north west corner of block 3 in Coates & Hopkins' Addition to the City of Kansas City, now Kansas City, Missouri, bounded as follows:

Beginning at a point on the west side of said Block 3 which is 16 feet from the northwest corner thereof, running thence northerly along said west side 16 feet to said corner; thence, easterly along the north side of said block 3, 70 feet; thence southwesterly to the place of beginning, containing about 560 square feet, or .0013 acre.

Also a part of Block 7 in said Coates & Hopkins' Addition, which is bounded as follows:

Beginning at a point on the east side of said Block 7 which is 252.4 feet from the northwest corner of 8th & Henning Streets thence northerly 46 feet along said east side to the northeast corner of said Block 7; thence northwesterly along the northerly side of said block 7, 144.7 feet to the northwest corner thereof; thence south along the west side of said block 7, 84 deg. and 4. included angle, 244.3 feet; thence northeasterly 35 deg. 20′ included angle, 118.1 feet; thence northeasterly 187 deg. 15′ included angle 67.5 feet; thence northerly 188 deg. 26′ included angle 68.7 feet to the point of beginning containing 21,215 square feet, or .487 of an acre.

This land cost $18,000.00 in 1898.

19. All of the Southeast Quarter of the Southeast Quarter of Section 28, Township 50, Range 33, lying south of the Missouri River, except the right of way of the Kansas City Suburban Belt Railroad.

111 20. All of lot 32 Hurck's subdivision of Guinnottee Farm between the right of way of the Kansas City Suburban Belt Railroad and the Missouri River.

This land cost $800.00 in 1898.

21. All that part of lot numbered 41 in Hurck's Subdivision of Guinnotte Farm, sometimes called Lot 41 of the lands of Joseph Guinnotte in Kansas City, as shown upon the recorded plat thereof, and more particularly described as follows:—

Beginning at a point on the west line of said lot 41, 55 feet south of the Northwest corner of said lot; thence south on said west line 88 feet; thence east on a line parallel to the north line of said lot, 150 feet; thence north on a line parallel to the West line of said lot, 88 feet; thence westerly 150 feet to the place of beginning.

This land cost $813.00 in 1898.

Kansas City & Independence Air Line.

22. Beginning at the northwest corner of the S. W. Quarter of the S. E. Quarter of Section 33, Township 50, North Range 32 West thence north along the one half section line, 588 feet; thence east 383.45 feet, thence south 568 feet; thence west 383.45 feet to the point of beginning containing 5 acres.

Also beginning at a point 383.45 feet east of the Northwest corner of the S. W. Quarter of the S. E. Quarter of Section 33, Town-

ship 50, North Range 32, West thence North 568 feet; thence east 230.1 feet thence south 568 feet; thence west 230.1 feet to the place of beginning, containing 3 acres more or less.

This land cost in 1895 $3,434.11.

23. The following tract of land, situated in Jackson County, Missouri:—

Beginning at the Southwest corner of the Southeast Quarter of section 33 Township 50, Range 32, thence north along the west line of said Southeast quarter in section 33, 986.7 feet; thence east and parallel to the south line of said section 33, 750.42 feet; thence south parallel with the West line of said southeast quarter of section 33, 986.7 feet to the south line of said section, thence west along said south line 750.42 feet to beginning, less easement in Independence Avenue, containing 17 acres, more or less.

This land cost $5,500.00 in 1895.

24. The following land in Jackson County, Missouri. All of the N. W. 1/4 of the S. E. 1/4 of Section Thirty three, Township
112 Fifty, Range 32, except 8 acres out of the Southwest corner thereof, and also excepting 2.6 acres out of the southeast corner of said quarter section; said 2.6 acres being described in deed recorded in Book 172, at page 235.

This land cost $11,600.00.

Kansas City and Northern Connecting Railroad Company.

25. The undivided one half of the following described property situated in section 26 Township Fifty, Range 33, Jackson County, Missouri, to-wit:—

Beginning at a point at the intersection of the north line of the right of way of the Kansas City Suburban Belt Railroad Company with the land of the Chicago, Milwaukee & St. Paul Railway; thence in a northwesterly direction along the Chicago, Milwaukee & St. Paul Railway Company's right of way, 82 feet; thence in a southeasterly direction parallel to and 25 feet distant from the center line of the Kansas City and Northern Connecting Railroad Company's connection (being a seven degree 30′ curve) 210 feet on the intersection of the Kansas City Suburban Belt Railroad Company's right of way; thence west along said right of way line 148 feet to the place of beginning, containing .9 acres.

Kansas City, Pittsburg & Gulf Railroad Company.

26. All of lots 1, 2, 3, 4, 5, 6, and 7, in Block 14, West Kansas Addition number 1 of the City of Kansas City, Jackson County, Missouri. Also commencing at the northwest corner of said lot, thence running due north to the Missouri River; thence east following the meanderings of said river to a point due north of the northeast corner of said lot 5 thence due south to the north east corner of said lot 5; thence west to the place of beginning.

Also commencing at the southwest corner of lot 11 in said Block 14, thence west along the east line of Santa Fe Street, 86.67 feet

to the northwest corner of lot 8 in said block 14; thence east along the north line of said lot 8, 98.2 feet; thence southwest making an interior angle with the last described line of 50 deg. 35′ and running 112 feet to the south line of lot 11, being the north line of Eighth Street, at a point on said line 26.2 feet east of the east line of Santa Fe Street; thence west along the south line of lot 11, and the north line of Eighth Street, 26.2 feet to the place of beginning.

This land was purchased in 1895, at a cost of $34,000.00.

Afterwards, to-wit, on the 7th day of November, 1900, an order was filed in words and figures as follows:

113 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

CAMBRIA STEEL COMPANY, Complainant,
vs.
KANSAS CITY SUBURBAN R. R. Co. et al., Defendants.

Order.

Defendants having this day filed herein their answer, which is for the first time seen by complainant's counsel, and both parties desiring to submit evidence in support of their respective pleading;

It is ordered that the complainant have twelve (12) days hereafter within which to file affidavits and take testimony in support of its application for a temporary injunction herein; the defendants shall have five (5) days thereafter in which to file affidavits and take testimony against said application; and complainant have thereafter five (5) days in which to take and file affidavits and testimony in rebuttal.

Shannon C. Douglas is appointed special master, before whom any testimony herein may be taken. Should the complainant in the preparation of its affidavits and testimony desire to examine the books and papers of defendants on material issues, the defendants shall submit the same therefor under the supervision and regulation of the Special Master.

It is further ordered that the temporary restraining order heretofore issued herein shall continue in force until the further hearing before the Court on the application for a temporary injunction.

It is further ordered that upon the completion of said affidavits and testimony, that the respective counsel herein appear before the Court when the Court shall set the hearing down for a day certain.

(Signed) JNO. F. PHILIPS, *Judge.*

Afterwards, to-wit, on the 3rd day of December, 1900, the following Replication to Separate Answer of Guardian Trust Company was filed:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

114 In Equity.

CAMBRIA STEEL COMPANY, Complainant,
vs.
THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, THE UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator and Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Replication to Separate Answer of Guardian Trust Company.

This replicant, Cambria Steel Company, saving and reserving unto itself all and — manner of advantages of exception which may be had and taken to *be* manifold errors, uncertainties and insufficiencies of the answer of the defendant Guardian Trust Company, for replication thereunto sayeth:

That it doth and will aver, maintain and prove that its said bill is true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without *that* that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or evaded, traversed or denied is true; all of which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct, and humbly prays, as in and by its said bill it hath already prayed.

L. C. KRAUTHOFF,
FRANK HAGERMAN,
Solicitors for Complainant.

Afterwards, to-wit, on the 3rd day of December, 1900, a Replication to Separate Answer of Central Improvement Company was filed. Said Replication is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

115

In Equity.

CAMBRIA STEEL COMPANY, Complainant,
vs.
THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, THE UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator and Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Replication to Separate Answer of Central Improvement Company.

This replicant, Cambria Steel Company, saving and reserving unto itself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant, Central Improvement Company, for replication thereunto sayeth:

That it doth and will aver, maintain and prove that its said bill is true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without *that*, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or evaded, traversed or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct, and humbly prays as in and by its said bill it hath already prayed.

L. C. KRAUTHOFF,
FRANK HAGERMAN,
Solicitors for Complainant.

Afterwards, to-wit, on the 20th day of November, 1901, an Ancillary Bill of Complaint was filed wherein Stuart R. Knott et al. are complainants and the Cambria Steel Co., et al., are defendants.

Said Ancillary Bill is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

116

In Equity.

CAMBRIA STEEL COMPANY, Compainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

STUART R. KNOTT and EDWARD F. SWINNEY, as receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, and FRANCIS M. Black, its receiver; Missouri Elevator & Terminal Company and Wash Adams, its Receiver; Central Improvement Company and Wash Adams, its Receiver: Second Street Improvement Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

Ancillary Bill of Complaint.

To the Judges of the United States Circuit Court for the Western Division of the Western District of Missouri, in the Eighth Circuit, sitting in equity.

Your orators, Stuart R. Knott and Edward F. Swinney, as receivers of the Kansas City Suburban Belt Railroad Company and the Kansas City Suburban Belt Railroad Company, bring this their ancillary bill of complaint against the Guardian Trust Company and Francis M. Black, its receiver, Missouri Elevator and Terminal Company, and Wash Adams, its receiver, Central Improvement Company, and Wash Adams, its receiver, Second Street Improvement Company, and Fairmount Amusement — each and all of which said corporations, both complainant and defendants, are corporations organized under and by virtue of the laws of the State of Missouri, and citizens and residents of said state, and each of them having their principal office and place of business at Kansas City in said state, and each of them being an inhabitant of the Western Division of the Western District thereof except the Cambria Steel Company, which is a corporation duly created and existing under the laws of the state of — and a non-resident of the state of Missouri.

117 Your orators state that on November 30th, 1900, in the suit of W. W. Bierce, et al., complainants, against the Guardian Trust Company, defendant, then pending in the United States Circuit Court for the Western District of Missouri, Francis M. Black was appointed receiver of the defendant Guardian Trust Company; and is now the duly qualified and acting receiver of said Company; that, in this suit, Wash Adams has heretofore been appointed receiver for the Missouri Elevator and Terminal Company, and also receiver for the Central Improvement Company, and he is now the duly qualified and acting receiver of said companies; that said Francis M. Black and Wash Adams are each a citizen and resident of the Western Division of the State of Missouri.

And, thereupon, your orators complain and say that the above-named complainant, the Cambria Steel Company, heretofore exhibited to this Honorable Court its bill of complaint against the Kansas City Suburban Belt Railroad Company, a defendant, and the other corporation defendant above named, in and by which said bill of complaint said Cambria Steel Company, as such complainant, set up the recovery of a judgment by it against the Kansas City Suburban Belt Railroad Company for the sum of One Hundred Thousand Nine Hundred Sixty-two 91-100 Dollars, and the issuance and delivery and return unsatisfied of an execution thereon, and in and by said bill of complaint sought to subject to the payment and satisfaction of said judgment certain rights, properties and assets belonging to the Kansas City Suburban Belt Railroad Company and the other defendants above named.

Your orators further show that prior to the filing of said bill of complaint by said Cambria Steel Company, four certain bills of complaint were duly filed in this court by the Provident Life and Trust Company of Philadelphia, two of said bills being filed against the Kansas City Suburban Belt Railroad Company, as the sole defendant; another of said bills was filed against The Union Terminal Railroad Company, a Kansas corporation, and the said The Kansas City Suburban Belt Railroad Company as defendants, and the other of said bills was filed against the Kansas City and Independence Air Line, a Missouri corporation, and the said Kansas City Suburban Belt Railroad Company. Each of said bills sought the foreclosure of a first mortgage upon the certain railroad property described in the said bills of complaint respectively, and which said several described pieces of railroad property, together for a long time have been operated by the Kansas City Suburban Belt Railroad Company as a continuous and allied system, said Kansas City Suburban Belt

118 Railroad Company being also the beneficial owner of said properties by reason of owning the capital stock of said several companies. Upon the same date upon which the said bills of complaint were filed, an application was made for the appointment of a receiver of all the property of said Kansas City Suburban Belt Railroad Company, and on the same day, to-wit: on the 6th day of September, A. D. 1900, an order was duly entered of record in each of said causes, as well as in the above-entitled cause, appointing your orators, Stuart R. Knott and Edward F. Swinney, as re-

ceivers of the said Kansas City Suburban Belt Railroad Company, and vesting your orators, Stuart R. Knott and Edward F. Swinney, as such receivers, with all the rights, title, estate, property and interests of the said The Kansas City Suburban Belt Railroad Company, and authorizing and directing your orators, Stuart R. Knott and Edward F. Swinney, as such receivers to proceed to take such steps and institute such proceedings, legal or otherwise, as might be necessary or requisite to compel a restoration to said the Kansas City Suburban Belt Railroad Company, and your orators, Stuart R. Knott and Edward F. Swinney, as its receivers, of any property rights belonging to it and to compel an accounting from any and all persons, firms or corporations, from whom the said The Kansas City Suburban Belt Railroad Company might be entitled to such accounting; and that your orators, Stuart R. Knott and Edward F. Swinney as such receivers, were also authorized to appear in any and all suits theretofore or thereafter instituted against the said The Kansas City Suburban Belt Railroad Company, in its name or in the names of your orators, Stuart R. Knott and Edward F. Swinney, as the receivers, to defend any and all such suits. Your orators further show unto the court that under and by virtue of the powers and authorities so vested in them as aforesaid, your orators, for and on behalf of said The Kansas City Suburban Belt Railroad Company which is made a defendant to the bill of complaint in the above entitled cause, have appeared and filed their answer to said bill of complaint as will appear of record herein, and having so filed said answer, your orators bring this, their ancillary bill of complaint against the defendants hereinabove named.

Your orators further show unto the court that immediately upon the appointment of your orators, Stuart R. Knott and Edward F. Swinney, as such receivers, they took and have ever since held possession of each and all the property of the said The Kansas City Suburban Belt Railroad Company, and under and pursuant to the orders of the court so appointing them, have been ever since, and are now, operating the railroad and property of said Kansas City Suburban Belt Railroad Company.

119 And your orators further charge and aver that the matters and things mentioned and set forth in this, your orators' bill of complaint, are ancillary to the said suits so pending in this court wherein your orators, Stuart R. Knott and Edward F. Swinney were appointed as such receivers, and are properly cognizable in this court, which has possession of each and all of the property of said The Kansas City Suburban Belt Railroad Company. For convenience, The Kansas City Suburban Belt Railroad Company will be hereinafter referred to as the Belt Company; the Guardian Trust Company will hereinafter be referred to, for convenience, as the Trust Company, the Missouri Elevator and Terminal Company will be hereafter referred to, for convenience, as the Elevator Company, The Central Improvement Company will hereinafter for convenience be referred to as the Central Company, and Second Street Improvement Company will hereinafter for convenience, be referred to as the Second Street Company; the Fairmount Amusement Company

will hereinafter, for convenience, be referred to as the Amusement Company.

Your orators show unto the court that the Trust Company was incorporated under and by virtue of the laws of the state of Missouri, in or about the year 1883, and that until on or about the month of June, 1899, the name of said Trust Company was Missouri, Kansas and Texas Trust Company; but that at said latter date, such proceedings were taken as are provided by the statutes of the state of Missouri in such case made and provided, so that its name was changed to Guardian Trust Company.

Your orators, upon information and belief, further show unto the court that, on or about the first day of January A. D. 1887, a corporation was formed under the laws of the state of Missouri, known as Kansas City Suburban Belt Railroad Company, hereinafter for convenience, called the Suburban Company, for the purpose of building a belt line of railroad to encircle the cities of Kansas City, Missouri, and Kansas City, Kansas. That, as your orators are informed and believe, and so charge the facts to be, said Suburban Company was organized by the said Trust Company, and the servants and employees of said Trust Company were elected as its officers and directors, so that said Trust Company, at all time dominated and controlled the said Suburban Company. That, as your orators are informed and believe, and so charge the fact to be, the said Trust Company, so dominating and controlling said Suburban Company by virtue of holding possession of the offices of its board of directors and officers, caused the said Suburban
120 Company to issue and deliver to it, said Trust Company, each and all of the capital stock of said Suburban Company and also caused said Suburban Company to execute its bonds, secured by a first mortgage upon all of its corporate property then held and to be hereafter acquired, amounting in the aggregate to the sum of One Million Dollars, and that said bonds in like manner, by virtue of the domination and control of said Trust Company, were delivered to said Trust Company, and that said Trust Company thereupon proceeded to sell and otherwise dispose of said bonds and stock and to apply the proceeds thereof, as claimed by it, for the corporate purposes of said Suburban Company, in the construction and operation of its road; but said Trust Company, although often requested so to do, did not at any time, and never has accounted to said Suburban Company for the proceeds realized by it from said bonds and stock, or the manner in which it so expended the same.

Thereafter, as your orators are informed and believe, and so charge the fact to be, the said Trust Company caused to be formed under the laws of the state of Missouri, a corporation known as the Consolidated Terminal Railway Company, for the purpose of building a line of road to connect with the line of road constructed, or proposed to be constructed, by said Suburban Company, although said Suburban Company had full power under its charter to have constructed the said road itself. Said Consolidated Terminal Railway Company is hereinafter referred to, for convenience, as the

Consolidated Company. That, as your orators are informed and believe, and so charge the fact to be, said Consolidated Company was formed in the same manner as said Suburban Company by said Trust Company electing as its officers and directors, the servants and employees of said Trust Company, so that it at all times dominated and controlled said Consolidated Company, and that said Trust Company thereupon caused said Consolidated Company to issue and deliver to it its entire capital stock, and also bonds secured by a first mortgage upon its corporate property, then and to be thereafter acquired, aggregating the sum of Seven Hundred and Fifty Thousand Dollars, and caused all of said bonds to be delivered to said Trust Company, and that said Trust Company thereupon proceeded to sell and dispose of said bonds and stock of said Consolidated Company, so delivered to it as aforesaid, and to apply the proceeds thereof, as alleged by it, for the corporate purposes of said Consolidated Company, in the construction and operation of its road; but the said Trust Company, although often requested so to do, did not and never has accounted to the said Consolidated Company
121 for the disposition made by it of said bonds and stock so delivered as aforesaid, and the proceeds derived therefrom and the purposes for which said proceeds were applied.

Your orators further show unto the court that they are informed and believe, and so charge the fact to be that thereafter and on or about the 25th day of July A. D. 1892, the said Consolidated Company and the said Suburban Company, as authorized by the statutes of the State of Missouri, entered into articles of consolidation, whereby the said two companies became one consolidated corporation thereafter known as the Kansas City Suburban Belt Railroad Company, of which your orators, Stuart R. Knott and Edward F. Swinney were appointed receivers, as aforesaid, and under and by virtue of said articles of consolidation, as well as the statutes of the state of Missouri, in such case made and provided, the said The Kansas City Suburban Belt Railroad Company and your orators, Stuart R. Knott and Edward F. Swinney, as its receivers, have succeeded to each and all of the rights of both said Suburban Company and said Consolidated Company.

Your orators further show unto the court that they are informed and believe, and so charge the facts to be, that at the time of the consolidation of said two companies, as aforesaid, the said Trust Company caused its officers and employes to be elected to the position of officers and directors of said consolidated company, and continued such persons in such positions respectively continuously until about the month of April, 1900, whereby said Trust Company, at all times up to said last mentioned date, completely dominated and controlled the actions of said Belt Company.

Your orators further show unto the court that they are informed and believe, and so charge the facts to be, that some time prior to the said consolidation, and on or about the 30th day of December, 1891, it was found advisable in the course of the construction of the line of road of said Suburban Company to have a corporation formed under the laws of the State of Kansas, for the purpose of

building and holding the title to that portion of the line of road of said Suburban Company, lying within the state of Kansas, and for that purpose, the Union Terminal Railroad Company, hereafter referred to as the Union Company, for the sake of convenience, was by said Trust Company caused to be incorporated under the laws of the state of Kansas, and the said Trust Company, as in the other instances, caused its officers and employes to be elected the officers and directors of said Union Company, and that said Union Company was a
122 corporation organized for the sole purpose of holding the title to the said property of said Suburban Company or Belt Company in the state of Kansas; that the said Trust Company thereupon caused all of the stock of said Union Company to be issued to said Suburban or Belt Company, and also caused said Union Company to execute its first mortgage bonds in the amount of Two Million Dollars, and said bonds were secured by a first mortgage upon all of the property of said Union Company then and to be thereafter acquired; that said bonds were thereupon issued and delivered to said Trust Company for the use and benefit of said Suburban Belt Company; that said Trust Company thereupon immediately proceeded to sell or otherwise dispose of the said bonds and the stock of said Union Company, which had been theretofore delivered to it by said Belt Company, and to apply the proceeds derived from such sale in part to the construction and operation of the road so built for said Belt Company, but held and operated in the name of said Union Company; that said Trust Company thereupon became liable to account to the said Belt Company for the proceeds and disposition of the same derived from all of the said bonds and stock, but although often requested so to do, it always has failed and refused to account to the said Belt Company for the disposition made by it of said bonds, the proceeds derived from such disposition and the manner in which said proceeds were disposed of.

Your orators further show unto the court that they are informed and believe, and so charge the facts to be, that, thereafter, and on or about the 23rd day of January, A. D. 1891, the said Trust Company caused to be incorporated under the laws of the state of Missouri, a corporation known as the Kansas City and Independence Air Line, hereinafter, for convenience, referred to as the Air Line; said Company being incorporated for the purpose of building a line of road connecting the line of said Suburban Company and the City of Independence, Missouri; that the capital stock of said Company was placed at the sum of Five Hundred Thousand Dollars. The said Trust Company immediately caused its officers and employes to be elected directors and officers of said Air Line, and thereupon caused the said Air Line to issue its first mortgage bonds to the amount of Three Hundred Thousand Dollars, secured by a first mortgage upon all of its corporate property then and to be thereafter acquired; that by virtue of the fact that the officers and directors of said Air Line were officers and employes of said Trust Company, it at all times dominated and controlled the said Air Line, up to and until about the month of April, 1900; that, thereafter, the

said Trust Company caused the said Belt Company to acquire each and all of the bonds and stock of said Air Line, the said
123 Belt Company in fact constructing the railroad property of said Air Line, and acquiring the said bonds and stock in consideration therefor; that the said Trust Company thereupon caused the said Belt Company to deliver the said bonds and stock to it, the said Trust Company, and it proceeded to dispose of the same and to apply the proceeds, as it alleged, for the corporate purposes of said Belt Company; but the said Trust Company, although often requested so to do, has never at any time accounted to said Belt Company for the disposition made by it of the said bonds and the proceeds realized by it therefrom.

Your orators further show that they are informed and believe, and so charge the facts to be, that the said Trust Company at all times up to about the month of April, 1900, absolutely and completely dominated and controlled the affairs of said Belt Company, by reason of the fact that the officers and employes of said Trust Company were elected officers and directors of said Belt Company at the behest of said Trust Company, and were simply "dummies" acting as the agents of said Trust Company, that the said Trust Company itself attended to the disbursement of all the moneys which were realized from the sale of the bonds and stock of the several companies hereinabove named, and itself attended to the disbursement of the moneys which were used in the construction and building of the lines of road of said different companies. That your orators are informed and believe, and on such information and belief, state that the total cost of the lines of all of the said companies did not exceed the sum of about Two Million Dollars, but that there was actually delivered to and disposed of by said Trust Company secured bonds and stock aggregating more than Five Million Dollars, and that said Trust Company, nor its said Receiver, has never at any time, but at all times refused to account to said Belt Company or to your orators for the proceeds derived by it from the sale of the said bonds and the disposition made by it of such proceeds, and fraudulently pretends and claims that it is retaining any and all sums of money above the actual cost of said several railroad properties for the purpose of paying for its commissions and services in the matter of the sale and disposition of said bonds and stock.

Your orators further, upon information and belief, charge and aver that on or about the 30th day of June, 1896, the said Trust Company, either in its own name, or in the name of some of its officers or some corporation controlled by it, had entered into a contract whereby it was obligated to construct a line of railroad from Kansas City, Missouri, to Pattonsburg, Missouri, for the pur-
124 pose of connecting at that point with the Omaha and St. Louis Railroad Company, and the Omaha, Kansas City and Eastern Railroad Company; that the said Trust Company thereupon caused to be incorporated under the laws of the state of Missouri, a corporation known as the Kansas City and Northern Connecting Railroad Company, hereinafter for convenience called the Connect- Company, and caused certain of its officers and employes to be

elected officers and directors of said Connecting Company and by virtue thereof at all times dominated and controlled the affairs of said Connecting Company; that said Trust Company, being under the obligation to construct said road as aforesaid, set about to discover a way in which it could cause said railroad to be constructed without incurring any liability itself, and without making itself liable for the possibility of a loss in such construction; that it thereupon conceived the idea of having the said Belt Company undertake the construction of said railroad, in consideration of the issuance of bonds and stock of said Connecting Company; that thereupon, by virtue of the domination and control which said Trust Company exercised over the affairs of both said Belt Company and said Connecting Company, the said Trust Company caused a contract to be entered into between said Belt Company and said Connecting Company, whereby the said Belt Company agreed to construct and did construct said line of railroad for said Connecting Company in consideration among other things, of the issuance to said Belt Company of certain first and second mortgage bonds and stock of said Connecting Company more fully specified in said contract; that said contract so entered into as aforesaid, is set up in exhibit "A" to the answer of the said Trust Company filed in the above entitled cause, to which reference is hereby made. The said line of railroad so built as aforesaid was constructed for the sole use and benefit of said Trust Company and for the purpose of enabling it to comply with its obligation to so furnish the said railroad; that the said railroad so furnished as aforesaid, was not and never has been of any value whatsoever to the Belt Company, and was not necessary or useful to its corporate purposes; that the construction of such road, as aforesaid, by said Belt Company, was the result of said Trust Company, by reason of its said domination of said Belt Company utilizing the said Belt Company to further and consummate its own purposes and ends, and for its own benefit; and the said contract for the construction of said railroad of said Connecting Company was so entered into by it as aforesaid solely by the domination and control exercised over said Belt Company by said
125 Trust Company, and the said Trust Company, in so constructing the said railroad as aforesaid, simply used the said Belt Company as an unwilling agency in the building of the same, and occupied towards said Belt Company the relation of principal; that each and all of the moneys paid out by said Belt Company for the construction of said connecting road, passed through the hands of said Trust Company, and all the bonds and stock which were to have been delivered to said Belt Company under the terms of said pretended contract, in like manner, passed through the hands of said Trust Company and said Trust Company proceeded to sell or otherwise dispose of the same; that said Trust Company never at any time accounted to the said Belt Company for the amount realized by it from said bonds and stock, but has pretended that the construction of said road by said Belt Company resulted in a loss to said Belt Company of about three Hundred Thousand Dollars. Your orators particularly charge and aver that the said Trust Company

in so using the said Belt Company in the construction of said line, is charged in law and equity with the amount of the said loss so claimed to have resulted to said Belt Company, and should be held accountable therefor.

Your orators further show unto the court that they are informed and believe, and so charge the fact to be, that, during the time said Trust Company so dominated and controlled the affairs of said Belt Company it at various times had said Belt Company advance to it, or take out of the earnings and assets of said Belt Company, large sums of money which it pretended to expend for and on behalf of said Belt Company; that by reason of the fact that said Trust Company at all times dominated and controlled the affairs of said Belt Company, and had its own employees and servants elected as officers and directors of said Belt Company, your orators are unable to state the amount of money so appropriated by said Trust Company, and belonging to said Belt Company; and which said Trust Company alleges it expended for the corporate purposes of said Belt Company; but upon information and belief your orators charge and aver that said amount aggregates upward of Five Thousand Dollars; and that the said Trust Company has never at any time accounted for the said money so received by it, nor the manner in which it was expended, although often requested so to do, and that said Trust Company is in law and equity liable to account to your orators therefor.

Your orators further show unto the court that they are informed and believe, and so charge the fact to be, that during the times hereinbefore mentioned, the said Trust Company took upon itself the business of paying out practically all the moneys which were
126 paid out for the benefit of said Belt Company, and of buying for said Belt Company practically all of the property which said Belt Company needed to acquire in its business of operating said road and used the moneys of said Belt Company for that purpose, but instead of taking the title of the property so purchased in the name of said Belt Company, the said Trust Company caused other corporations to be formed -or the purpose of holding the naked legal title to said respective properties, and caused the capital stock of said corporations, so organized as aforesaid, to be issued to said Belt Company and then turned over to said Trust Company, or to be issued to said Trust Company direct, in trust for the use and benefit of the said Belt Company; and that the Trust Company caused its own servants, agents and employes to be elected and continued as the officers of such companies respectively, at all times down to the month of April, 1900, so that said Trust Company in the same manner that it controlled the affairs of said Belt Company, dominated and controlled the actions and affairs of said subsidiary companies, that among the companies so organized by the said Trust Company, in the manner aforesaid, is the Missouri Elevator and Terminal Company, with a capital stock of One Hundred Thousand Dollars, of which forty-two Thousand Dollars has been issued and all of which in truth and in fact belongs to the said Kansas City Suburban Belt railroad Company; that the said company owns two certain elevators in Kansas City along the line of said Belt Company;

and that said Trust Company caused the construction of said elevators, and one other elevator, which has since been destroyed by fire, and in the construction of the same, used the money of the said Belt Company; said money being paid out to said Trust Company upon its request; that no accounting has ever been had between the said Trust Company and the said Belt Company as to the amount of money which it actually expended for the construction of said elevators, or of the manner in which it disposed of the funds received by it from the said Belt Company for the alleged purpose of undertaking such construction, although requests for such accounting have frequently been made upon the officers of said Trust Company; that the said Trust Company caused the said Belt Company to assume all the outstanding debts and liabilities of the said Missouri Elevator and Terminal Company and upon said outstanding debts and liabilities the said Belt Company has paid large sums of money, for which said Belt Company has never been reimbursed; that upon the 8th day of November A. D. 1900, one Wash Adams, Esq., was appointed receiver — the Missouri Elevator and Terminal Company;

127 that at all times subsequent thereto the said Wash Adams has held possession of the property of the said Missouri Elevator and Terminal Company, all of which in truth and fact belong to the Kansas City Suburban Belt Railroad Company; that the said Trust Company also caused to be organized the Central Improvement Company, a corporation organized under the laws of the state of Missouri, with a capital stock of Two Hundred Thousand Dollars, of which, One Hundred and Forty-one Thousand Five Hundred Dolars, has been issued; that said Company was organized for the purpose of holding the title to various pieces of real estate in Kansas City, Missouri, and elsewhere, purchased for the use and benefit of the said Belt Company, and the Kansas City, Pittsburg and Gulf Railroad Company, another Missouri railroad corporation; that the said Improvement Company elected and continued its own servants and employes as officers and directors of the said Improvement Company, down until about the month of April, 1900; that certain pieces of real estate which are of vital importance to said Belt Company are held in the name of the said Improvement Company; and that property upon which is located a portion of the depot buildings belonging to the said Belt Company, is held in the name of the Second Street Improvement Company; that the said Trust Company took upon itself the duty of purchasing the said *prices* of property, and using for that purpose funds of the Belt Company; and various sums of money were, during the period above mentioned, paid out by the said Belt Company to the said Trust Company, for the purpose of purchasing such pieces of real estate, but the said Trust Company has never accounted to the said Belt Company, although often requested so to do, for the sums of money so received by it, and the disposition made by it of such sums of money; that certain shares of stock of the said Central Improvement Company were also, although belonging to said Belt Company, issued to said Trust Company, and it has disposed of the same; but although frequently requested so to do, it has never accounted to the said Belt Company

therefor; that a large amount of property was purchased with money advanced by the said Belt Company, the title to which property, however, was taken in the name of the Central Improvement Company; that all of said property in truth and fact belongs to the said Kansas City Suburban Belt Railroad Company; that said Belt Company has never been reimbursed for the money so advanced as aforesaid; that upon the 8th day of November A. D. 1900, one Wash Adams, Esq., was appointed receiver of the Central Improvement Company, that at all times subsequent thereto said Wash Adams has held possession of the property of the Central Improvement Company, all of which in truth and fact belongs to the Kansas City Suburban Belt Railroad Company that another subsidiary company organ-
128 ized by the said Trust Company was the Fairmount Amusement Company, with a total capital of Twenty-five Hundred Dollars, all of which belongs to the said Belt Company; that said Company was organized, dominated and controlled in the same manner by the said Trust Company as the other corporations hereinabove set forth; that all of the moneys expended by said Fairmount Amusement Company were moneys supplied by the said Belt Company, or supplied by the said Trust Company and charged to the said Belt Company; and the said Trust Company took upon itself the duty of disbursing all of the said funds; that large sums of money were paid by said Belt Company to said Trust Company for that purpose, but said Trust Company has never at any time accounted to said Belt Company for said money so received by it, or the manner in which it expended the same, although often requested to do so; that said Fairmount Amusement Company was organized for the purpose of operating what is commonly known as Fairmount Park along the line of the Kansas City and Independence Air Line road; that during the time that the said Trust Company so dominated and controlled the said Belt Company, it caused said Belt Company to advance to it large sums of money for the purpose of fitting up said Fairmount Park; that the said Trust Company took upon itself the duty of expending said sums of money for the purpose of fitting up said Fairmount Park; that, as your orators are informed and believe, upwards of Three Hundred and Fifty Thousand Dollars was thus supplied to said Trust Company for the purpose of fitting up said Fairmount Park; that said Trust Company has never at any time accounted to said Belt Company for the manner in which it expended said sums of money, although frequently requested so to [—]; that another company, organized by said Trust Company was the Northern Townsite Company a Missouri corporation with an authorized capital of One Hundred Thousand Dollars, of which, Ninety-two Thousand Eight Hundred has been issued. The said Company was organized by the said Trust Company in connection with the construction of the Kansas City and Northern Connecting Railroad for the purpose of acquiring property at and near townsites along the line of said road; that said Trust Company in the same manner as it dominated the other corporations above named, caused it- own servants and employes to be elected and maintained as officers and directors of said townsite company, and at all times dominated

and controlled and still does dominate and control the affairs of the said townsite company, that the said Trust Company caused the said Belt Company to advance to it upwards of Five Thousand Dollars, which it used in the purchase of property which was taken in the name of the said Townsite Company; and your orators are
129 informed and believe, and on such information and belief, state, that substantially all the money with which the property of said Townsite Company was acquired was money advanced by the said Belt Company, and that the said Trust Company, instead of issuing to the said Belt Company all of the capital stock of the said Townsite Company, issued large portions of it to itself or to other persons for its use and benefit, or otherwise disposed of the same; that the said Trust Company has never accounted to the said Belt Company at any time for the money so received by it for the purposes of the said Townsite Company from the said Belt Company, or the manner in which it expended the same, although frequently requested so to do.

Your orators further show unto the court that they are informed and believe, and so charge the fact to be, that the said Trust Company also caused to be organized under the laws of the State of Missouri a corporation known as the Kansas City, Pittsburg and Gulf Railroad Company, for the purpose of constructing a line of railroad from Kansas City to Gulf of Mexico; and that the said railroad was so constructed under the direction of the said Trust Company acting through the said railroad corporation, and for the purpose of acquiring funds with which to construct the said railroad, the said Railroad Company issued its first mortgage, to secure the issue of bonds herein specified, and on or about the first day of April, 1899, there were issued and outstanding bonds to the amount of twenty-three million dollars; that at that time a default was made in the payment of an installment of interest due on the said bonds, and a bill was forthwith filed for the foreclosure thereof, and receivers of said railroad were appointed, and thereafter such proceedings were had that the said railroad was sold under the foreclosure decree.

Your orators further show unto the court that they are informed and believe, and so charge the fact to be, that the said Suburban Belt, Terminal and Air Line Companies, above named, were very largely dependent upon the said Kansas City, Pittsburg & Gulf Railroad Company for their earnings, and an operating contract was in existence between the said Belt Company and the Kansas City Pittsburg & Gulf Railroad Company; so that it was well known to the said Trust Company that if the said Kansas City, Pittsburg and Gulf Railroad Company went into the hands of receivers, it would necessarily and inevitably result in the insolvency of the said Belt and other companies hereinabove named, and would necessitate their ultimately being thrown into the hands of receivers and the
130 mortgages upon the property foreclosed; that the said Trust Company by reason of the domination and control which it exercised over the affairs of the said Kansas City, Pittsburg and Gulf Railroad Company, well knew at and for some time prior to the first day of April, 1889, that said Company would make default in the

payment of the installment of interest due on that date, and that such default would inevitably result in the filing of a bill to foreclose the mortgage and the appointment of a receiver for the said road; and that the said Trust Company thereupon set about to contrive a scheme whereby it might appropriate to itself, before the said Belt Company passed beyond its control, all of the remaining property and assets of the said Belt Company which were in such shape that they could by any possibility be transferred to the said Trust Company; that the said Trust Company thereupon caused to be exhibited to its own officers and employes who were holding the positions of officers and directors of the said Belt Company, various claims and demands which if alleged were due and owing by the said Belt Company to it, and caused such of its own officers and employes who were holding the positions of officers and directors of the said Belt Company to pass upon and approve the said claim and demands; and thereupon caused its own officers and employes so holding the positions of officers and directors in the said Belt Company, between the 31st day of March, 1899, and the 9th day of February, 1900, to execute to said Trust Company various pretended promissory notes and other negotiable instruments, for the alleged purpose of securing to the said Trust Company the payment of the said pretended claims which it held against the said Belt Company, and caused its own officers and employes, so holding the positions of officers and directors of the said Belt Company, to cause to be delivered or transferred to it, various stocks, bonds and accounts and other personal property belonging to the said Belt Company as collateral security for the said pretended indebtedness of the said Belt Company [*Company*] to the said Trust Company.

Your orators further charge and aver upon information and belief that the notes so fraudulently caused to be made in form by the said Belt Company to the said Trust Company, are as follows:

Note dated March 31, 1889, payable on July 2nd, 1899, for $50,000, with interest at the rate of 6% per annum.

Note dated July 26, 1899, payable on demand with 6% interest, for $203,900.

Note dated Sept. 21, 1899, payable on demand, with 8% interest, for $23,056.48.

131 Note dated Oct. 23, 1899, payable on demand, with 8% interest for $7162.40.

Note dated November 7, 1899, due January 9, 1900, with 8% interest, for $25,000.

Note dated Jan. 21, 1900, due May 25, 1900, with 8% interest, for $25,000.

Note dated February 8, 1900, due May 12, 1900, with 8% interest, for $109,500.

Note dated Feb. 9, 1900, due June 11, 1900, with 8% interest for $10,400.

The stocks, bonds and other property which the said Trust Company fraudulently caused its own officers and employes as officers and directors of the said Belt Company to turn over to it, for the

purpose of securing the payment of the said pretended notes, as aforesaid, is as follows:

338 First Mortgage, 30 year 5% gold bonds of the Kansas City and Northern Connecting Railroad Company of the denomination of $1000, dated January 1, 1897, being bonds numbered 1467, 1769 to 1733, both inclusive; 1799 to 1818 both inclusive; 1324 to 1331 both inclusive, 1756 to 1768, both inclusive, 1184 to 1215, both inclusive; 1455, 1359 to 1400, both inclusive; 1431 to 1440, both inclusive; 1609 to 1658, both inclusive, 1659 to 1708, both inclusive; 1819 to 1851 both inclusive; 1774 to 1798, both inclusive; 1301 to 1323, both inclusive, and 76 of said bonds, the numbers of which are not known to your orators.

67 and 9-10 second mortgage, 30 year 5% income bonds of the Kansas City and Northern Connecting Railroad Company, of the denomination of $1000, each dated January 1st, 1897, being bonds numbered 1064 to 1098, both inclusive; 1149 to 1157, both inclusive; 1162 to 1173, both inclusive, 1192 to 1202, both inclusive.

Certificate No. 229, entitling the holder to 250-1000 of said mortgage income bonds.

Certificate No. 227, entitling the holder to 250-1000 of said mortgage income bonds.

Certificate No. 220, entitling the holder to 150-1000 of said second mortgage income bonds.

25 shares of the capital stock of the Fairmount Amusement Company of the par value of $100 each, as evidenced by certificates Nos. 9, 6, 5 and 4.

132 1120 shares of the capital stock of the Central Improvement Company, of the par value of $100, each, as evidenced by certificate- No. 148, 149 and 147.

439 shares of the capital stock of the Northern Townsite Company of the par value of $100, each, as evidenced by certificate No. 11.

425 shares of the capital stock of the Missouri Elevator and Terminal Company, of the par value of $100, each, as evidenced by certain certificates Nos. 36, 34, 37, 40 and 38.

19,997 shares of the 20,000 shares constituting the capital stock of the Union Terminal Railroad Company.

4994 shares of the capital stock of the Kansas City and Independence Air Line.

15 Kansas City and Northern Connecting Railroad Co.'s second mortgage income bonds.

About 600 tons of new steel rails, theretofore purchased by, and then belonging to said Belt Company, and being stored in its yards.

Your orators further charge that the Trust Company also caused the Belt Company to assign to it an account against the Kansas City, Pittsburg & Gulf Railroad Company, in an amount of about $130,000, to secure said alleged indebtedness.

Your orators further charge and aver, upon information and belief, that the said notes were executed, and said account assigned, and the said property above described given as collateral security solely under and by virtue of the domination and control of the

said Trust Company over the said Belt Company, and at the time the said action was pretended to have been taken by the said Belt Company the officers and directors of the said Belt Company so causing said Belt Company to take such action, were either officers and directors, or servants and employes of the said Trust Company, and as such officers and directors, or servants and employes of the said Trust Company, were personally interested in securing to the said Trust Company, all the available assets of the said Belt Company, and that the execution of said Promissory notes and the delivery of the said collateral security under such circumstances, was fraudulent and void as against the said Belt Company, and in law and equity ought to be set aside.

Your orators further charge and aver upon information and belief that the said Trust Company continued to keep its own officers, servants and employes filling the positions of officers and di-
133 rectors of the said Belt Company down to about the month of April, 1900, when the said Kansas City, Pittsburg and Gulf Railroad Company, having been sold under foreclosure decree, and a reorganization of said property joined with said Belt Company having been undertaken, the control of the said Belt Company passed into other hands, and that during all the time until said month of April, 1900, the said Trust Co[illegible]y continuously kept its own officers and employes in the positions of officers and directors of the said Belt Company, so that at no time were there any persons holding the positions of officers and directors of said Belt Company, who were not personally interested in said Trust Company, and desirous of assisting the said Trust Company in every possible way; and at no time was there ever any accounting had between the said Trust Company and the said Belt Company, for or by reason of any of the matters and things hereinabove set — except such an accounting as the officers and employes of the Trust Company, so holding the positions of officers and directors of the said Belt Company pretended to make in looking over and going through the form of approving the accounts and statements rendered to said Belt Company by said Trust Company.

Your orators further show unto the court that ever since the control of the said Belt Company passed out of the hands of said Trust Company, the said Belt Company prior to the appointment of your orators as receivers, endeavored to procure from the said Trust Company an accounting for and by reason of the matters and things hereinabove set forth, for the purpose of determining the true state of accounts between the said Belt Company and the said Trust Company; but all such demands of the Belt Company have been refused by the said Trust Company.

Your orators further charge and aver that the elevator properties owned by the said Missouri Elevator and Terminal Company, hereinabove described, are situated along the line of the road now being operated by your orators; that the said elevator properties are necessary and essential to the operation of the said road, and that it is indispensible to the operation of the said road that the said elevator properties be retained for the use and benefit of the said road. That

the said property of the said elevator company is in truth and in fact as your orators are informed and believe, the property of the said Belt Company, the said Elevator Company being a mere dummy holding the naked title.

That as your orators are informed and believe there is standing in the name of the said Central Improvement Company much
134 valuable property necessary to the operation of the said road; that the said property belongs in truth and in fact to the said Belt Company, and the naked title is held in the name of the said Central Improvement Company.

In consideration whereof, and for as much as your orators are remediless in the premises, except in a court of equity, your orators therefore pray the aid of this court;

(*a*) That an accounting be taken of the various transactions and dealings between the said Trust Company and its receiver, and the said Belt Company; or by the said Trust Company and its receiver for the use and benefit of and as trustee and agent for said Belt Company, and that the said Trust Company and its receiver be required to pay the balance found to be due by it, if any upon such accounting.

That in taking such accounting all claims and demands alleged to be held by the said Trust Company and its receiver against the said Belt Company in Kansas and Missouri where the said Trust Company used the said Belt Company simply as an instrumentality and agency for its own use and benefit, be charged against the said Trust Company, and it be held liable for all losses incurred or claimed to have been incurred by said Belt Company about the same.

(*b*) That the said notes hereinabove described may be found and decreed by this court to have been executed in the fraudulent manner and for the fraudulent purposes above set forth, and without consideration; and that said notes may be by this court directed to be surrendered up and canceled, and that each and all of the stocks, bonds and other securities, including the assigned account above mentioned, fraudulently delivered to the said Trust Company by its own officers and employes in the manner hereinabove set forth, may be ordered by this court surrendered and delivered up or reassigned to said Belt Company.

(*c*) That each and all the property purchased with the money of the said Belt Company and belonging in equity to it, the legal title to which is held in the name of any of the companies hereinabove set forth, may be required by the decree of this honorable court to be conveyed to the said Belt Company, or to its receivers for it.

Your orators further pray that a writ of injunction may issue herein against the said Guardian Trust Company, its agents, servants and employees, and Francis M. Black, its Receiver, restraining and enjoining them and each of them from selling, transferring or in any wise disposing of the said notes above mentioned, and so
135 executed by the said Belt Company to the said Trust Company, and from selling, transferring or in anywise disposing of the said bonds, stocks, accounts and other property hereinabove

described, delivered to said Trust Company as collateral security for said notes.

And may it please your Honors to grant unto your orators the subpœna of the United States of America issuing out of and under the seal of this Honorable Court, directed to the Guardian Trust Company and to Francis M. Black, its Receiver, the Missouri Elevator and Terminal Company and to Wash Adams, its Receiver, the Fairmount Amusement Company, the Central Improvement Company and Wash Adams, its Receiver, the Second Street Improvement Company, the defendants herein respectively, therein and thereby commanding them on a day certain therein to be made, and under a certain penalty, to be and appear before this Honorable Court then and there to answer (but not under oath, an answer under oath being hereby expressly waived) all and singular, the premises to stand and perform and abide by such orders, directions or decrees as may be made in the premises and as shall seem meet and agreeable to equity and good conscience.

And your orators will ever pray.

THOMAS R. MORROW,
Solicitor for Stuart R. Knott and Edward F. Swinney, Receivers.
C. W. LUCAS,
Solicitor for Kansas City Suburban Belt Railroad Company.

H. B. HURD,
Of Counsel.

STATE OF MISSOURI,
County of Jackson, ss:

Stuart R. Knott, being first duly sworn, says that he is one of the Receivers of the Kansas City Suburban Belt Railroad Company, that he makes this affidavit in behalf of himself, his co-receiver, and the Kansas City Suburban Belt Railroad Company, the complainant in the foregoing ancillary bill; that he has read said ancillary bill of complaint and knows the contents thereof; that the allegations therein contained are true so far as they relate to his own acts and the acts of his co-receiver; that so far as they relate to the acts of others, he believes them to be true.

STUART R. KNOTT.

136 Subscribed and sworn to before me this 20th day of November, 1901. My commission will expire Oct. 2nd, 1903.

[SEAL.] HOWARD F. LEA,
Notary Public, Jackson County, Missouri.

Afterwards, to-wit, on the 2nd day of December, 1901, a Stipulation was filed in cause No. 2616, Stuart R. Knott, et al., vs. Cambria Steel Co., et al. Said stipulation is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERMINAL Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company.

Bill.

STUART R. KNOTT and EDWARD F. SWINNEY, as Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY and FRANCIS M. Black, Its Receiver; Missouri Elevator & Terminal Company and Wash Adams, Its Receiver; Central Improvement Company and Wash Adams, Its Receiver; Second Street Improvement Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

Stipulation.

It is hereby stipulated and agreed by and between Stuart R. Knott and others, complainants in the ancillary bill in the above entitled cause, and the defendants the Guardian Trust Company and Francis M. Black, its Receiver, and the Second Street Improvement Company, that the time for filing answers of each of said defendants just named, shall be and is hereby extended to December 9th, 1901, and that the answers of the said defendants when
137 and if filed on or before December 9th, 1901, shall be treated in all respects as if filed on December 2nd, 1901.

STUART R. KNOTT AND
EDWARD F. SWINNEY,
As Receivers of the Kansas City Suburban Belt Railroad Company, and
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, *Complainants,*
By THOMAS R. MORROW, *For Receiver.*
C. W. LUCAS, *For K. C. Sub. Belt,*
GUARDIAN TRUST COMPANY AND
FRANCIS M. BLACK, *Its Receiver, and*
THE SECOND STREET IMPROVEMENT COMPANY, *Defendants,*
By TRIMBLE & BRALEY, *Their Solicitors.*

Afterwards, to-wit, on the 9th day of December, 1901, there was filed in cause #2616, the answer of the Guardian Trust Company, et al., to the ancillary bill of Stuart R. Knott and Edward F. Swinney, Receivers, et al.

Said answer is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

STUART R. KNOTT and EDWARD F. SWINNEY, as Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY and FRANCIS M. Black, Its Receiver; Missouri Elevator & Terminal Company and Wash Adams, Its Receiver; Central Improvement Company and Wash Adams, Its Receiver; Second Street Improvement Company, and Fairmount Amusement Company, Defendants.

138 Ancillary Bill.

Separate Answer of the Defendants Guardian Trust Company and Francis M. Black, Its Receiver, to the Bill Called "Ancillary Bill of Complaint," Filed by Stuart R. Knott and Edward F. Swinney, as Receivers of the Kansas City Suburban Belt Railroad Company, as Complainants.

Now come the defendants, the Guardian Trust Company and Francis M. Black, its Receiver, and now, and at all times hereafter, saving and reserving to themselves all benefit and advantage of exceptions which can or may — had or taken to the many errors, uncertainties and other imperfections in the said bill contained, for their separate answer thereto, or to so much thereof and such portions thereof as these defendants are advised it is necessary or essential for them to answer unto, answering say:

1. That it is true, as alleged in the said ancillary bill, that Francis M. Black was appointed receiver for the Guardian Trust Company,

and that he has qualified and is now acting as such receiver and that the residence and citizenship of the various parties are correctly stated in the said ancillary bill.

2. These defendants admit that the Cambria Steel Company heretofore filed its original bill of complaint in this court against the Kansas City Suburban Belt Railroad Company and the several other defendants named, setting up a judgment which it had on the same day obtained against the Kansas City Suburban Belt Railroad Company, seeking to subject certain alleged rights, properties and assets belonging to the Kansas City Suburban Belt Railroad Company and some of the other defendants, to the payment of its said judgment.

These defendants, further answering, state that it is true that four certain other bills of complaint were duly filed in this court, each by The Provident Life and Trust Company of Philadelphia against the various railroad companies named in the ancillary bill of complaint; the alleged purpose of which said bills of complaint was to foreclose certain mortgages on railroad properties therein described; but this defendant states and shows to the court that the said original bill of complaint of the Cambria Steel Company, and the said four bills of complaint so brought by the said The Provident Life and Trust Company of Philadelphia, were each and all filed at one and the same time by the same counsel, and as separate parts of one and the same transaction, and that all of the said four suits by the Provident Life and Trust Company of Philadelphia, and also the
139 said suit of the Cambria Steel Company, were instituted at the solicitation and request and by collusion with the Kansas City Suburban Belt Railroad Company, for the fraudulent purpose of hindering, delaying and defrauding the creditors of the Kansas City Suburban Belt Railroad Company, and particularly the defendant, the Guardian Trust Company, which was one of said creditors.

It is also true that on the same day on which all of said suits were filed, the said Stuart R. Knott and Edward F. Swinney were appointed in all of said causes, as receivers of the Kansas City Suburban Belt Railroad Company, with the rights, powers and duties alleged in the said ancillary bill.

These defendants deny that the said Kansas City Suburban Belt Railroad Company has ever filed any answer to the said original bill of complaint of the said Cambria Steel Company, and state that if it should file any such answer, the same will be collusive and fraudulent, for the purpose of carrying out the purposes of said suit in hindering, delaying and defrauding the creditors of the said Kansas City Suburban Belt Railroad Company.

3. Further answering these defendants state that the Guardian Trust Company was incorporated under the laws of the State of Missouri, in the year 1889, and not in the year 1883, as alleged in the said ancillary bill; that the said Trust Company was originally incorporated under the name of the "Missouri, Kansas & Texas Trust Company, but afterwards changed its name in the manner provided by statute to "Guardian Trust Company."

4. These defendants state that it is true that in the month of January, 1887, a corporation was formed under the laws of the

State of Missouri, known as The Kansas City Suburban Belt Railroad Company, which is afterwards referred to in the ancillary bill as the "Suburban Company," for the purpose of building a belt line of railroad to encircle the cities of Kansas City, Missouri, and Kansas City, Kansas. These defendants say that it is untrue, and hence they deny that the said Suburban Company was organized by the defendant the Trust Company, but aver the fact to be that the said Suburban Company was organized and incorporated some two years before the said defendant Trust Company was created, and the Trust Company had nothing to do with the organization of the said Suburban Company.

It is also untrue that the servants, employes, officers or directors of the Trust Company in any way became or were the officers or directors of the Suburban Company, for several years after the latter company's incorporation, and it is untrue that the Trust
140 Company at all times or at any time dominated and controlled the said Suburban Company.

These defendants deny that the Suburban Company, by reason of the alleged domination, or for any reason whatever, caused the Suburban Company to issue and deliver to the Trust Company all of its Capital Stock, and deny that the Trust Company caused the said Suburban Company to execute its bonds, in the sum of One Million Dollars, or any other amount, and deny that the Trust Company caused said bonds to be delivered to it, and deny that the Trust Company proceeded to sell or otherwise dispose of said bonds and stock, and to apply the proceeds thereof, except as hereinafter stated. And these defendants deny that the said Trust Company has ever refused or failed to fully account to the said Suburban Company for any property, choses in action, moneys or other things of the said Suburban Company, which may have come into its hands at any time and by any means, but state that the contrary is true, that the Trust Company has frequently, from time to time fully accounted to the Suburban Company for all moneys, property, effects and assets which may, in any way have come into the hands of the said Trust Company, belonging to the said Suburban Company.

These defendants further answering the said ancillary bill concerning the connection of the Trust Company with the said Suburban Company, state and show to the court as follows:

The said Suburban Company was incorporated in January, 1887; that it soon after said date authorized the issuance of $1,500,000.00 of its capital stock; and said Suburban Company for the first two years of its existence had done considerable preliminary work in the way of procuring franchises to use certain streets in Kansas City, along which to build its railroad from a point near Second and Broadway Streets in Kansas City, Missouri, in an easterly direction to a point near Cecil Station on the Missouri Pacific Railway, in what is known as the East Bottoms, being a distance of about four and one half miles; and had also done considerable work in making surveys and locating its said line, and in the way of constructing a portion of its roadbed; but it had been unable to make

any arrangements whereby it could dispose of its securities or otherwise raise money with which to build and complete its road or any considerable portion of it being in that condition it did, about
8
April or May 1899, apply to A. E. Stillwell, who was then one of the Vice Presidents of the defendant Trust Company, and who then did not have and never prior thereto had had any connection with or interest whatever in the said Suburban Company, but who had an extended and favorable acquaintance with men of
141 capital, and was recognized as having skill in soliciting and procuring capitalists to subscribe to and invest in such enterprises. And the said Suburban Company at said time requested him, the said Stillwell, to use his efforts to procure the money with which to build and complete the said portion of its road from Second and Broadway Streets to Cecil Station.

That negotiations were then had between the said Stilwell and the said Suburban Company, which resulted in a contract between the said Suburban Company and the said Stilwell, whereby the said Suburban Company agreed to issue and deliver to the said Stilwell $450,000.00 of its first mortgage bonds, out of a total issue, as then contemplated of $500,000.00, and $900,000.00 of its capital stock if the said Stilwell would build or cause to be built the said portion of the said railroad. That said contract was duly authorized by the Board of Directors of the Suburban Company at a meeting lawfully called, and by its stockholders at a meeting duly called and convened on May 31st, 1889. That at the time of the making of said contract, none of the directors or stockholders of the Suburban Company except E. L. Martin, had any connection with or interest in the Trust Company, and none of the Directors, Officers, and stockholders of the Trust Company, except E. L. Martin, had any interest in or connection with said Suburban Company. That said contract was made at arm's length between said parties, free from any domination, direction or control whatever on the part of the Trust Company, and that a large majority of the Board of Directors of the said Suburban Company continued to be composed of persons wholly disconnected with the Trust Company, until the said portion of said railroad was completed and paid for in accordance with the terms of said contract.

That the said Stilwell thereupon procured subscribers to the stock of and the incorporation of a construction company, known as the Kansas City Terminal Construction Company, under the laws of the State of Missouri, which did the work of carrying out the said contract which the said Suburban Company had made with him, the said Stilwell.

That, in order to comply with the said construction contract on its part, and to build additional portions of its road, the said Suburban Company duly authorized the issue of $1,000,000.00 of bonds and authorized the execution of a mortgage upon all of its property then owned or subsequently to be acquired, to secure the payment of said bonds, and appointed the defendant as Trustee under said mortgage.

That upon the completion of the said contract for the con-
142 struction of the said portion of said road between Second and Broadway Streets and Cecil Station, the Suburban Company caused to be issued and certified by the Trust Company as Trustee $500,000, of its said first mortgage bonds, all of which the said Suburban Company used in paying the said construction company for its work in building the said portion of said road, and in compensating some of its officers and directors for services rendered and money advanced and expended by them theretofore; but the said Trust Company had nothing to do with or any connection with the said $500,000.00 of bonds except to certify them as Trustee, at the request of the Suburban Company, and to deliver them on its direction. That at the same time, the said Suburban Company issued and delivered to the said construction company and to its said officers and promoters, for their said labor and services 7,000 shares of its capital stock, which capital stock then had no value; but the defendant Trust Company had nothing to do, either directly or indirectly with the disposition of said $500,000.00 in bonds, or the said 7,000 shares of stock.

That when the said Kansas City Terminal Construction Company received said shares of stock, 6,000 in number, under its said contract, as aforesaid, it then held and owned a majority of the outstanding stock of the Suburban Company, and it, the said construction Company distributed the said stock to its own stockholders by way of dividends or as a distribution of its assets, whereby the stockholders of the said construction company became stockholders, and the holders of a large majority of the outstanding stock of the Suburban Company, and thereafter, as such stockholders, they elected directors of the Suburban Company of their own choice, which choice fell upon persons who were mainly either directors, officers or employes of the Trust Company, but it is untrue, as alleged in the said ancillary bill, that the Trust Company had anything to do with causing its officers, directors or employes to be elected as the officers or directors of the said Suburban Company, but the stockholders of the said Suburban Company chose their own directors, and the Trust Company held but little, if any stock of the Suburban Company, and had but little, if any, voice in the choice of such directors. It was in this way, as above stated that the persons who were directors and officers of the Trust Company came to be directors and officers of the Suburban Company, and not othe-wise.

After the Suburban Company had thus disposed of Five Hundred Thousand Dollars of its bonds and 7,000 shares of its stock, it had remaining in its treasury undisposed of Five Hundred Thousand Dollars in bonds, and 8,000 shares of stock, with which to build an extension of its road from said Cecil Station to Brush
143 Creek, Jackson County, Missouri. The Suburban Company desired to build and did build this extension itself, without the intervention of a contractor; and the Suburban Company requested the Trust Company to sell and dispose of the said $500,000.00 of bonds remaining in its treasury and so much of the said stock as might be necessary in order to raise the money for the purpose

of building the said extension. That said stock was wholly without any value, and could not be sold for anything, and that on account of the incomplete condition of the property and the uncertainty of its outcome, the Trust Company was unable at that time to sell and dispose of said bonds without great sacrifice, and, having faith in the enterprise and in its future value, the Trust Company bought the said Five Hundred Thousand Dollars of bonds from the said Suburban Company, at and for a price named at ninety-three per cent, or $930.00 for each $1,000.00 bond, with the understanding and agreement, however that the Trust Company was to have a discount from said price of three per cent on the face of said bonds. The reason of this was that the Suburban Company was perfectly willing to dispose of its bonds at 93 per cent and give to any one who would sell them a commission therefor of 3 per cent, and to give a large amount of stock in addition thereto as a bonus, to any purchaser, because said stock was then without value, and inasmuch as the Trust Company could not find purchasers for the bonds, it was agreed that the Trust Company might itself take the bonds at a price named as 93 per cent, with the said discount of 3 per cent.

That the Trust Company thereupon, for the purpose of enabling the Suburban Company to proceed promptly with its work, did take said bonds at said price, with 2,200 shares of the capital stock of said Suburban Company as a bonus.

That the Trust Company fully paid and accounted to the said Suburban Company for -he total purchase price of said $500,000.00 of bonds and 2,200 shares of stock. That the price paid therefor by the Trust Company was a full and a fair price, and more than could have been obtained from other sources at that time.

The Trust Company carried these bonds for several years, before it was able to sell them, and then sold them at various times and in various amounts and quantities, at about the same price that it had paid for them.

The facts as above stated constitute all of the business transactions by and between the said Suburban Company and the said Trust Company in respect of said stock and bonds prior to and
144 up to the time that the said Suburban Company consolidated with the Consolidated Terminal Railway Company of Kansas City, as stated in the said ancillary bill.

That all of said transactions above referred to occurred more than ten years prior to the filing of this ancillary bill; that all of the facts and transactions above referred to were public, open and were known to, acquiesced in, and ratified and approved by all of the officers, directors and stockholders of the said Suburban Company, more than ten years ago. Wherefore these defendants plead the statutes of limitations, and say that the complainants should not now be allowed to inquire into the transactions closed and approved so long ago.

That about the time or soon after the consolidation above mentioned, the Kansas City Suburban Belt Railroad Company increased its capital stock to $—.

Several years afterwards, and after the consolidation above referred to, and after a large portion of the railroad of said Belt Com-

pany had been completed and was in operation, and had begun to show that it had or soon would have some value as a money earner, the Trust Company bought from the Kansas City Suburban Belt Railroad Company, referred to in the ancillary bill as the "Belt Company," from time to time, certain of its shares of stock, for the purpose of supplying the Belt Company with needed money, and afterwards, from time to time sold, for and on account of the said Belt Company, certain other shares of its capital stock, and the details thereof, are as follows:

On August 29th, 1894, the Trust Company bought from the Belt Company 200 shares of its capital stock, at the price of $18.00 per share, and paid therefor that amount, which the Belt Company received.

On October 10th, 1894, the Trust Company sold to others for and on account of the Belt Company 500 shares of its stock at $19.00 per share, and charged no commission for its services, and the full selling price of said 500 shares of stock was paid to the Belt Company and it received the same.

On December 22nd, 1894, the Trust Company sold to others for and on account of the Belt Company 4000 shares of its capital stock, at $20.00 per share, and charged the Belt Company as a commission therefor $1.00 per share, and paid to the Belt Company the net proceeds of said sale, after deducting said commission, and the Belt Company received the same.

On February 26th, 1895, the Trust Company bought from the Belt Company 221 and a fraction shares of its stock, at $22.00
145 per share and paid the full amount of the purchase price of the Belt Company, and the Belt Company received the same.

On March 5th, 1895, the Trust Company bought from the Belt Company 529 shares of its stock at $27.00 per share, and paid the full purchase price thereof to the Belt Company, which the Belt Company received.

On April 20th, 1895, the Trust Company bought from the Belt Company 1900 shares of its capital stock at $32.00 per share and paid the full purchase price thereof to the Belt Company, which the Belt Company received.

That the price for which the Trust Company bought said stock of the Belt Company, and the price for which the Trust Company sold said stock for and o naccount of the Belt Company as above set forth, and enumerated, were fair and reasonable, and all that the stock was worth, and that the commission charged by the Trust Company for its services in selling portions of said stock, as above stated, was a fair and reasonable commission, and all of said transactions were known to, acquiesced in and ratified by the officers, directors and stockholders of the Belt Company from time to time as the same were had and done.

5. These defendants further answering deny that the Trust Company caused a corporation known as the Consolidated Terminal Railway Company of Kansas City, to be formed for the purposes alleged in said ancillary bill, or for any purpose whatever, and deny that the Trust Company had anything to do with the forma-

tion or organization of the said Consolidated Terminal Railway Company of Kansas City.

These defendants deny that the Trust Company had anything to do with electing or causing to be elected its servants and employees as the officers and directors of the said Consolidated Company, and deny that the Trust Company at all times or at any time dominated or controlled the Consolidated Company; deny that the Trust Company caused the Consolidated Company to issue and deliver to it its entire capital stock, or any part of it, or its bonds aggregating the sum of $750,000.00, or any other amount, and deny that the Trust Company at any time proceeded to sell and dispose of the bonds and stock of the said Consolidated Company, and to apply the proceeds thereof in any manner or to any extent, except as hereinafter stated. And the defendants deny that the Trust Company ever failed or refused to fully and fairly account to the Consolidated Company for any of the property, assets or choses
146 in action of the Consolidated Company which came into the hands of the Trust Company, or for the disposition made thereof by the Trust Company, but state the contrary to be true, that the Trust Company at all times when requested, and without request, fully and fairly accounted to the Consolidated Company for everything that the Trust Company received in which the Consolidated Company had any interest.

These defendants further answering state that the facts concerning the affairs of the said Consolidated Company, so far as these defendants or either of them know or had any concern or connection with, are as follows:

After the Kansas City Suburban Belt Railroad Company had caused its said One Million Dollars of bonds to be exhausted in building and equipping its road from Second and Broadway to Brush Creek, it was without means to build any other extensions or additions to its road; whilst it is true that it had the lawful power, under its charter, to build and construct an extension of its road from Second and Broadway westward to the state line between Kansas and Missouri, yet it did not have the financial ability to do so, and inasmuch as its mortgage previously given covered all property which it then had or might afterwards acquire, it could not in its own name issue any new mortgage on any extension which would be a first lien thereon. For these reasons and because the Belt Company saw it was necessary to extend its road to and connect it with the packing houses and other large shipping industries in the West Bottoms, it found it necessary to extend its road from Second and Broadway to the State Line between Missouri and Kansas, and in order to do this, the Belt Company, itself, through its officers and agents, caused the said Consolidated Terminal Railway Company of Kansas City to be formed and incorporated, and caused it to issue $750,000.00 of stock and $750,000.00 of first mortgage bonds, and to give a mortgage which was a first lien upon all of its property then owned or afterwards to be acquired, to secure said bonds, and made the defendant Trust Company its

Trustee under said mortgage, and caused the officers and employes of the Belt Company to be chosen as the Directors and Officers of the Consolidated Company. That the said Consolidated Company was simply an artificial arm of the Belt Company itself, created for its own purposes, and to build extensions and additions to its road. That the Belt Company was wholly without means to defray the expenses of building said extension or any part thereof and that its only means of raising the necessary money therefor was to dispose of the stock and bonds which it had caused the Con-
147 solidated Company to authorize and issue, and at the instance and request of the Belt Company, the Trust Company undertook to act as the agent of the Belt Company in procuring the necessary franchises and rights of way and in placing the said bonds and stock of said Consolidated Terminal Railway Company, and in advancing money to defray the expenses of the said extension of said road to the State Line.

That the stock which the Consolidated Company was authorized to issue was, of course, without any value at that time, and the said Company authorized the Trust Company to give the said stock to purchasers of the bonds as a bonus, at the ratio of 8 shares of stock with each bond, and the Belt Company promised to pay to the Trust Company in consideration of its services in selling and disposing of the said bonds and stocks and acting as such financial agent for the Belt Company in respect to such bonds and stocks, a sum equal to twelve per cent of such of said $750,000.00 of bonds as the Trust Company might sell, three-fifths of which amount was to be paid in cash out of the proceeds of such sales, and the other two-fifths was to be paid in stocks and bonds of the said company at the same price at which others of said bonds and stock could be disposed of by the Trust Company to other people; which was a fair and reasonable commission and one which the said company could well afford to pay, under the circumstances, in order to raise the money it needed.

That the Trust Company then proceeded to sell said bonds, with said stock as a bonus, and from time to time was able to find purchasers for some of said bonds at that price, but, being unable to sell them fast enough to supply the money necessary to defray the costs and expenses of procuring the right of way and constructing the road, as the same was from time to time needed, it was agreed by and between the said Consolidated Company, and the Suburban Company and the Trust Company, that the Trust Company should itself buy such of said bonds as it was willing to buy, at the same price, namely, at 80 per cent of their face value, with 8 shares of stock with each bond as a bonus, and should in paying and settling therefor, be entitled to deduct twelve per cent of the face of said bonds from the purchase price, and in this way should account to the railroad company for the bonds which the Trust Company might buy in the same way and on the same terms that it was to account for bonds sold by it to others.

That the Trust Company from time to time sold to others 504

of said bonds, at $800.00 each, with which went 3932 shares of said stock as a bonus, which was 8 shares of stock for each of said bonds, the details of which sales are as follows:

148 (The dates given below are the dates when the first payment was made on each sale of bonds. The Trust Company kept no record of the exact date when the sale was made. The Trust Company is unable to give the date of the first sale named below, but the bond record of the Consolidated Company, in the possession of the complainants in this ancillary bill, will show.)

	50 bonds at 80 with	400 shares of stock as bonus.
Aug. 6th, 1891.	10 bonds at 80 with	80 shares of stock as bonus.
Aug. 14th, 1891.	1 bond at 80 with	8 shares of stock as bonus.
Aug. 19th, 1891.	11 bonds at 80 with	88 shares of stock as bonus.
Sep. 17th, 1891.	6 bonds at 80 with	48 shares of stock as bonus.
Sep. 25th, 1891.	1 bond at 80 with	8 shares of stock as bonus.
Oct. 8th, 1891.	1 bond at 80 with	8 shares of stock as bonus.
Oct. 10th, 1891.	5 bonds at 80 with	40 shares of stock as bonus.
Oct. 15th, 1891.	5 bonds at 80 with	40 shares of stock as bonus.
Oct. 16th, 1891.	1 bond at 80 with	8 shares of stock as bonus.
Oct. 19th, 1891.	2 bonds at 80 with	16 shares of stock as bonus.
Oct. 21st, 1891.	2 bonds at 80 with	16 shares of stock as bonus.
Oct. 22nd, 1891.	55½ bonds at 80 with	444 shares of stock as bonus.
Oct. 23rd, 1891.	11 bonds at 80 with	88 shares of stock as bonus.
Oct. 24th, 1891.	31½ bonds at 80 with	252 shares of stock as bonus.
Oct. 26th, 1891.	23 bonds at 80 with	184 shares of stock as bonus.
Oct. 28th, 1891.	40½ bonds at 80 with	324 shares of stock as bonus.
Oct. 29th, 1891.	25 bonds at 80 with	200 shares of stock as bonus.
Oct. 30th, 1891.	2 bonds at 80 with	16 shares of stock as bonus.
Nov. 2nd, 1891.	18 bonds at 80 with	144 shares of stock as bonus.
Nov. 4th, 1891.	9 bonds at 80 with	72 shares of stock as bonus.
Nov. 5th, 1891.	2 bonds at 80 with	16 shares of stock as bonus.
Nov. 11th, 1891.	1 bond at 80 with	8 shares of stock as bonus.
Nov. 13th, 1891.	5 bonds at 80 with	40 shares of stock as bonus.
Nov. 17th, 1891.	2 bonds at 80 with	16 shares of stock as bonus.
Nov. 19th, 1891.	13½ bonds at 80 with	108 shares of stock as bonus.
Dec. 7th, 1891.	1 bond at 80 with	8 shares of stock as bonus.
Dec. 18th, 1891.	10 bonds at 80 with	80 shares of stock as bonus.
Jan. 2nd, 1892.	10 bonds at 80 with	80 shares of stock as bonus.
Jan. 7th, 1892.	5 bonds at 80 with	40 shares of stock as bonus.
Jan. 8th, 1892.	1 bond at 80 with	8 shares of stock as bonus.
Jan. 9th, 1892.	6 bonds at 80 with	48 shares of stock as bonus.
Jan. 11th, 1892.	7 bonds at 80 with	56 shares of stock as bonus.
Jan. 13th, 1892.	5 bonds at 80 with	40 shares of stock as bonus.
Jan. 18th, 1892.	2 bonds at 80 with	16 shares of stock as bonus.
Jan. 25th, 1892.	1 bond at 80 with	8 shares of stock as bonus.
Jan. 30th, 1892.	11 bonds at 80 with	88 shares of stock as bonus.
Feb. 11th, 1892.	3 bonds at 80 with	24 shares of stock as bonus.
Feb. 26th, 1892.	2 bonds at 80 with	16 shares of stock as bonus.
Feb. 29th, 1892.	5 bonds at 80 with	40 shares of stock as bonus.
Mch. 11th, 1892.	6 bonds at 80 with	48 shares of stock as bonus.

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Mch. 14th, 1892.	25 bonds at 80 with 200 shares of stock as bonus.	
Apl. 8th, 1892.	45 bonds at 80 with 360 shares of stock as bonus.	
Api. 10th, 1892.	10 bonds at 80 with 80 shares of stock as bonus.	
Aug. 1st, 1892.	15 bonds at 80 with 120 shares of stock as bonus.	
Total,	504 bonds	3932 shares of stock.

The Trust Company from time to time under the agreement and upon the terms above stated bought 213 of said bonds, with 756 shares of said stock as a bonus; the price paid in one instance being higher than eighty per cent, and the number of shares in one instance which went as a bonus, being less than 8 shares to the bond.

The details of which transactions are as follows:—

Dec. 17th, 1891 The Trust Company bought 31 bonds, at 80 with 248 shares of stock as a bonus.

Nov. 7th, 1892. The Trust Company bought 15 bonds at 85 with 120 shares of stock as a bonus.

Dec. 8th, 1892. The Trust Company bought 167 bonds at 80 with 238 shares of stock as a bonus.

Total 213 Bonds. 756 shares.

The Trust Company in November 1891, took in part payment on its said commission and services 33 of said bonds at 80 with 240 shares of said stock as a bonus.

The above accounts for all of the 750 bonds and 4928 shares of the stock of the said Consolidated Terminal Railway Company of Kansas City. The Trust Company never received or had anything to do with the remaining 2572 shares of the stock of said company, but is informed and believes that the same were converted into stock of the Kansas City Suburban Belt Railroad Company after its amalgamation with the said Consolidated Terminal Railway Company.

In addition to taking the said 33 bonds as aforesaid, in part payment for its said commissions, services and advancements, the Trust Company charged to the account of the said Consolidated Terminal Railway Company therefor, further sums, at divers times, as follows:

October 27th, 1891.....	$30,000.00
December 17th, 1891.....	6,000.00
April 4th, 1892.....	6,000.00
April 25th, 1892.....	7,000.00

That after deducting from the commissions so charged for its said services, by the Trust Company, the amount of advance-
150 ments made by it, the remainder was much less than 12 per cent of the face value of the bonds so disposed of by and purchased by the Trust Company.

That the Trust Company from time to time paid to and paid out for the Consolidated Terminal Railway Company of Kansas City, all of the proceeds of the sale of said bonds and stock, less

such charges for services, commissions and expenditures and the said Consolidated Company accepted and received the benefit thereof, as these defendants have frequently shown, and are now ready and willing to again show to this Honorable Court, in so far as the same may be required.

That all of the charges made by said Trust Company were fair and reasonable, and all of the transactions had between the Trust Company and the said Consolidated Company and the Suburban Company, in relation to the said bonds and stock of said Consolidated Company, as well as in connection with any and all other business between them were fully known to, approved by, acquiesced in and ratified by all of the officers, directors and stockholders of the said Consolidated Company, and of its successor the said Belt Company more than five years prior to the institution of this suit, and these defendants plead the statute of limitations of the state of Missouri in bar of the complainant's suit.

6. These defendants further answering state that it is true that as alleged in said ancillary bill, on or about the 25th day of July, 1892, the said Consolidated Company and the said Suburban Company, entered into Articles of Consolidation under the statutes of the state of Missouri, whereby the said two companies became one consolidated corporation and was thereafter known as the Kansas City Suburban Belt Railroad Company, and called in the ancillary bill the "Belt Company".

These defendants deny that at the time of the consolidation of said two companies, or at any other time, the said Trust Company caused its officers and employes to be elected to the positions of officers and directors of the said consolidated company, but state that the stockholders of the said two companies after their consolidation elected their own officers and directors, without any interference or influence on the part of the Trust Company. It is true, however, that certain persons who were connected with the Trust Company were chosen as some of the directors and officers of the said consolidated company; but these defendants deny that the Trust Company at any time, as alleged in the ancillary bill, dominated or controlled the actions of the Belt Company.

7. These defendants, further answering, admit, as stated in the ancillary bill of complaint, that it was found advisable about
151 the 30th day of December, 1891, to have a corporation formed under the laws of the State of Kansas, for the purpose of building and holding the title to a further extension of the said belt railroad system from the state line westward to Argentine, in the State of Kansas; but these defendants deny that the Trust Company caused the said The Union Terminal Railroad Company to be organized for that purpose or any other purpose, but state the fact to be that the said The Union Terminal Railroad Company was organized for that purpose by the Belt Company.

And these defendants deny that the Trust Company cause its officers and employes to be elected as the officers and directors of the said Union Company, but state that the Belt Company caused the

officers and directors of the said Union Company to be elected, without any interference or domination whatever on the part of the Trust Company.

These defendants deny that the Trust Company caused all of the stock, or any of the stock of the said Union Company to be issued to the said Suburban Company or Belt Company, and deny that the Trust Company caused the said Union Company to execute its first mortgage bonds in the amount of $2,000,000.00 or any other amount; but they admit that the said Union Company did authorize the issuance of $2,000,000.00 of bonds, and executed its first mortgage to secure the same, and made the said Trust Company its Trustee in said mortgage. The said Union Company though being in fact an independent corporate entity, was really organized by the Belt Company for its use and benefit and for the purpose of building the said extension to said belt railroad.

These defendants deny that the said bonds were issued and delivered to the Trust Company for the use and benefit of the Suburban or Belt Company, except as hereinafter stated.

These defendats deny that the Trust Company ever failed or refused, when requested, to fully and fairly account to the said Union Company and the Belt Company for any and all disposition made by it of any of the bonds, stocks or property of either of said companies; but state that upon the contrary, the Trust Company has frequently accounted to both the Union Company and the Belt Company for all property, choses in action, money or assets of whatever nature which came into its hands in which either of said companies had any interest.

That the said Union Company and the said Belt Company were obliged to dispose of the said bonds and stock of the said Union Company for the purpose of raising the money with which
152 to acquire and construct the said extension into the state of Kansas, as they had no other means of raising the money for that purpose. That at the special instance and request of the said Union Company and said Belt Company, the Trust Company undertook and agreed to act as the Trustee and financial agent for them in and about the matter of disposing of said stocks and bonds of the Union Company, and financing said enterprise, and to render such services and advance such moneys as might be necessary to procure the necessary franchises therefor, and to establish, and put in operation warehouses, factories and other like industries along the line of the said Belt Railroad; and the said Suburban Company and the said Union Company agreed to pay the Trust Company a reasonable compensation for its services, advances and responsibilities in that behalf.

That it was impossible to find purchasers for said bonds at a greater price than 82 per cent of their face value, and only then provided considerable quantities of the stock of the said Union Company should go with the bonds as a bonus; but said stock, as a matter of fact, at that time, and for several years after, was without any value. That the Trust Company immediately after the organization of the said Union Company, in pursuance of the request and

agreement above stated, proceeded to finance the said Union Company, and to sell its said bonds and stock, or to buy them when other purchasers could not be found in time to supply the needed money, and to render important and valuable services in connection with the securing of franchises for the building of the road, and advance, from time to time, such moneys as might be needed therefor; and the Trust Company continued to act as such financial agent and to render such services until the said extension of such road of the Union Company was completed, which extended over a period of several years.

That is was understood and agreed between the Trust Company and the said Union Company and the Belt Company, that in case the Trust Company could not find purchasers for said bonds fast enough to supply money needed for the construction of said road, that the Trust Company might itself buy such of said bonds as it was willing to buy, at the same price that like bonds were being sold to other persons, and to deduct from the price thereof a sum equal to what would be a fair commission for selling the bonds to others; that is to say, the Trust Company in case it bought any of said bonds, was to account to the Union Company or the Belt Company for the price of said bonds, in the same manner and upon the same terms as it was to account to them for bonds sold to other people.

153 That the Trust Company from time to time, for and on behalf of the said Union Company and Belt Company, sold to other persons 444 of the bonds of said Union Company, and 3096 shares of its stock, at the times, and upon the terms as shown in the following detailed statement; that is to say the Trust Company sold to others.

In August,	1892,	50 bonds at	82	with 400 shares of stock as a bonus.
In September,	1892,	132 bonds at	82	with 1056 shares of stock as a bonus.
In October,	1892,	36 bonds at	82	with 288 shares of stock as a bonus.
In November,	1892,	12 bonds at	82	with 96 shares of stock as a bonus.
In December,	1892,	22 bonds at	82	with 176 shares of stock as a bonus.
In January,	1893,	10 bonds at	82	with 80 shares of stock as a bonus.
In October,	1897,	82 bonds at	100	with no shares as a bonus.
In August,	1898,	10 bonds at	95	with no shares as bonus.
In September,	1898,	10 bonds at	95	with no shares as bonus.
In October,	1898,	30 bonds at	92½	with no shares as bonus.
In December,	1898,	1 bonds at	92½	with no shares as bonus.
In January,	1899,	11 bonds at	92½	with no shares as bonus.
In February,	1899,	10 bonds at	92½	with no shares as bonus.
In February,	1899,	28 bonds at	90	with no shares as bonus.
July, 23rd,	1894,		1000	shares at $17.50 per share.
Total,		444 bonds	3096	shares of stock.

That being unable to sell and dispose of said bonds to others fast enough to provide the money as it was needed, the Trust Company, under the agreement and arrangement before stated, from time to time, purchased 1496 of said bonds, and 4554 shares of stock of the said Union Company, the dates, prices and details of which appear from the following itemized statement; that is to say the Trust Company bought

Jan. 7th, 1893.	300 bonds at	82	with	2400 shares of stock as bonus.
Jan. 23rd, 1893.	128 bonds at	82	with	504 shares of stock as bonus.
Apl. 5th, 1893.	250 bonds at	95	with	1000 shares of stock as bonus.
Nov. 27th, 1893.	31 bonds at	80	with	300 shares of stock as bonus.
Jan. 20th, 1894.	37 bonds at	70	with	350 shares of stock as bonus.
July 6, 1894.	108 bonds at	75	with	no stock as bonus.
July 16, 1894.	39 bonds at	70	with	no stock as bonus.
Aug. 3rd, 1894.	1 bond at	70	with	no stock as bonus.
Nov. 23rd, 1894.	84 bonds at	75	with	no stock as bonus.
July 22, 1896.	50 bonds at	90	with	no stock as bonus.
June 3, 1897.	18 bonds at	66	with	no stock as bonus.
Nov. 3rd, 1898.	350 bonds at	100	with	no stock as bonus.
Feb. 17th, 1899.	100 bonds at	95	with	no stock as bonus.
Total,	1496 bonds			4554 shares of stock.

On October 21st, 1892, the Trust Company took 60 of said bonds at 82, and 1500 shares of said stock in part payment for its commissions and services rendered in and about the matters aforesaid.

154 On September 25th, 1893, the Trust Company purchased from the Belt Company 200 first mortgage bonds of the Kansas City & Independence Air Line, hereinafter referred to, and in order to induce the Trust Company to purchase said bonds, the Belt Company gave to the Trust Company as a bonus to said bonds 2500 shares of the stock of the said Union Company.

On February 13th, 1894, the Trust Company held promissory notes aggregating $5,000.00, with some accumulated interest, for money expended by it in the establishment of what was known as the Kansas City Fruit Auction Company, on the line of the said Belt Company, all of which was done at the request of the Belt Company and for its use and benefit, and on that lay, to-wit, February 13th, 1894,the Belt Company delivered to the Trust Company in satisfaction of said indebtedness and in payment for the services of the Trust Company in establishing said fruit auction plant, 286 shares of the said Union Company.

The transactions above referred to account for all of the bonds of the said Union Company, and 11,936 shares of its stock. That the

Trust Company never had anything to do or any connection with the remaining 8064 shares of stock of said Union Company, but it is informed and believes that 1,000 shares thereof were, early in the history of the company distributed among a number of persons for the benefit of the Union and Belt companies in the promotion of the said enterprise, and that the remaining 7064 shares were converted into stock of the Belt Company.

That in addition to the taking of the said 60 bonds and the said 1,500 shares of stock in part payment for its said commissions and services and advances, the Trust Company from time to time charged to the account of the said Union Company and Belt Company therefor, divers amounts as follows:

January 13th, 1893	$30,000.00
January 26th, 1893	15,000.00
February 16th, 1893	12,800.00
April 5th, 1893	25,000.00
September 16th, 1898	50.00
October 6th, 1898	100.00
October 18th, 1898	50.00
January 17th, 1899	231.25
January 17th, 1899	277.50

That the Trust Company, from time to time, paid to and paid out for the said Union Company and Belt Company all of the proceeds of the sale or purchase price of said bonds and stock, less
155 said charges for commissions, services and expenditures, and the said Union Company and Belt Company received the benefit thereof, as these defendants have frequently shown and are now ready and willing to again show to this Honorable Court in so far as the same may be required.

That all of the charges made by the said Trust Company for its said services and commissions were fair and reasonable, and all of the transactions had between the Trust Company and the said Union Company and Belt Company with relation to the said bonds and stock of said Union Company, as well as in connection with any and all other business between them, were fully known to, approved by, acquiesced in and ratified by all of the officers, directors and stockholders of the said Union Company and said Belt Company.

8. These defendants further answering deny that the Trust Company on the 23rd day of January, 1891, or at any other time caused a corporation known as the Kansas City & Independence Air Line to be incorporated or formed. Said Air Line was incorporated, however, for the purpose of building a line of railroad connecting with the line of the said Suburban Company and running to the City of Independence, Missouri, the capital stock of said company was after being increased, fixed at $500,000.00. These defendants deny that the Trust Company at any time caused its officers and employes to be elected as the directors and officers of the said Air Line, and deny that the Trust Company caused said Air Line to issue its first mortgage bonds to the amount of $300,000.00, or any other amount, but state that the Air Line did issue its first mort-

gage bonds to that amount, and secured [bye] same by a first mortgage upon all of its corporate property, and made the Trust Company its Trustee under said mortgage. These defendants deny that the Trust Company, at any time dominated or controlled the said Air Line; deny that the said Trust Company caused the said Belt Company to acquire all, or any, of the bonds and stocks of the Air Line, and deny that the Trust Company caused the Belt Company to deliver the said bonds and stock to it, the said Trust Company, and deny that the Trust Company proceeded to dispose of the same and to apply the proceeds thereof, for the corporate purposes of the Belt Company, or for any other purpose except as hereinafter stated; deny that the Trust Company has ever refused upon request to account to said Belt Company for the disposition made by it of any of said bonds or the proceeds realized therefrom, but upon contrary, states the fact to be that the Trust Company has frequently fully and truly accounted to the Belt Company and to the Air
156 Line company for the disposition of all of the properties, assets or chooses in action of either of said companies which in any way came into the hands or under the control of the Trust Company.

These defendants, further answering, state that the facts concerning the Air Line Company and its connection with the Belt Company and the Trust Company are as follows:

That on the 23rd day of January, 1901, at the suggestion and by the procurement of the Suburban Belt Company, the Air Line Company was incorporated with a capital stock of $150,000.00, and with eleven directors, a majority of whom were directors of the said Suburban Company, for the purpose of building a railroad from a point on the line of the Suburban Company's road, to the city of Independence, Missouri, a distance of some six or eight miles, for the use and benefit of the said Suburban Company. That the said Air Line Company soon after increased its capital stock to $500,000.00 and issued its bonds, as aforesaid, to the amount of $300,000.00.

That the said Air Line afterwards entered into a contract with the construction company known as the Kansas City Terminal Construction Company, for the building and completion of its said road, whereby it promised to pay to the said construction company, in consideration of the construction of said road, $250,000.00 of its first mortgage bonds, and 2,000 shares of its capital stock. That said road was built and completed by said construction company under said contract.

That at the request of the Air Line, and said Suburban Company, the Trust Company rendered valuable services in procuring franchises for using public highways for said railroad, and acting as the financial agent and Trustee for said Air Line, and in from time to time advancing it money and selling certain of its bonds and stocks, and in purcha-ing certain other of its bonds and stocks, in order to furnish the money with which to do the work of building the said railroad. That said bonds were not reasonably worth more than

80 per cent of their face value, and the said stock had no market or other value at all.

That when the said Air Line Company came to settle with the said Kansas City Terminal Construction Company, the said construction company accepted in full payment for its work under said contract, a less amount of stock and bonds than was specified in the contract as drawn, that is to say, the construction company accepted $227,375.00 of said first mortgage bonds, and 1,819 shares of stock, which said bonds and stock were delivered to the said con-
157 struction company. This left still in the treasury of the Air Line Company $72,625.00 of its first mortgage bonds, and 3,181 shares of its said stock. That at the special instance and request of the said Air Line and the said Suburban Company, the Trust Company sold for them and for their account $13,000.00 of said bonds, and 104 shares of said stock of said Air Line, at the times and for the prices as follows, to-wit:

Mch. 16th, 1892.	1¾	bonds at	80 with	14 shares of stock as bonus.
Mch. 21st, 1892.	6¼	bonds at	80 with	50 shares of stock as bonus.
Apr. 5th, 1892.	4	bonds at	80 with	32 shares of stock as bonus.
May 27th, 1892.	1	bond at	80 with	8 shares of stock as bonus.
Total,	13	bonds,		104 shares of stock.

That the Trust Company, at the special instance and request of said Air Line and said Suburban Company, from time to time, by reason of the fact that it was unable to sell said bonds and stock to others fast enough to supply money that the said Air Line and the Belt Company needed in connection with the building of said road, bought certain of said bonds and stock for the purpose of furnishing said money, to-wit: $46,625 of said bonds, and 77 shares of said stock, at the times and for the prices as follows:

June 25th, 1892.	9.625	bonds at	80 with 77 shares of stock as bonus.
July 6th, 1892.	15	bonds at	80 with no shares of stock as bonus.
Dec. 8th, 1892.	22	bonds at	80 with no stock as bonus.
Total,	46.625	bonds and	77 shares of stock.

That the said Air Line Company and the Suburban Company delivered to the Trust Company in full for its services as financial agent in connection with said matter, and in procuring franchises and for commissions in the sale of said bonds and stocks, 13 of said bonds at 80, with 500 shares of said stock, which said stock, as aforesaid, was worthless, and of no value.

The facts stated above account for all of the said $300,000.00 of bonds of the said Air Line Company, and 2,500 shares of its stock. The Trust Company never had anything whatever to do with any of the remaining 2,500 shares of stock, and never received the same, nor acquired any interest in or control over the same, or any part

thereof; but these defendants are informed and believe that 500 of said shares were used for the purposes of promotion by being distributed where it was supposed they would do the most good, and that the remaining 2,000 shares of said stock were issued to the Suburban Company and converted into the stock of the Belt Company.

That the Trust Company from time to time paid to and paid out for and on account of the said Air Line and Suburban Com-
158 pany, all of the proceeds of all of the said bonds and stock so sold by it, and also all of the purchase price of all of said bonds and stock so purchased by it, and the said Air Line and Suburban Company accepted and received the benefit thereof, as these defendants have frequently shown, and are now ready and willing to again show to this Honorable Court, in so far as the same may be required.

That the compensation paid to the Trust Company for its said services in connection with said Air Line Company matter, was fair and reasonable, and that, together with all of the transactions had between the Trust Company and the said Air Line and Suburban Company in relation to the stock and bonds any moneys of the said Air Line, as well as any connection with all other business between them, were fully known to, approved by, acquiesced in and ratified by all of the officers, directors and stockholders of the said Air Line Company and of the said Suburban Company, and its successor the said Belt Company, more than five years prior to the institution of this suit, and these defendants plead the statute of limitations of the state of Missouri in bar of the complainants' suit.

9. These defendants, further answering, deny that the Trust Company at all times up to and about the month of April, 1900, or at any other time, in any way dominated and controlled the affairs of the Belt Company by reason of the alleged facts in said ancillary bill, or by any other reason or means whatever; deny that the Trust Company caused its officers, directors and employes to be elected as the officers and directors of the Belt Company, or in any way induced or influenced the stockholders of said Belt Company to choose such persons as its officers or directors; deny that the officers and directors of the Belt Company were mere dummies acting as the agents of the Trust Company, but state that they were chosen by the stockholders of the Belt Company and were acting independently for and on behalf of the Belt Company at all times.

These defendants admit that the Trust Company attended to the disbursement of a large amount of the moneys which were realized from the sale of the bonds and stocks of the said several companies hereinabove mentioned, but deny that they attended to the disbursement of all of said moneys, and state that whatever disbursements of such moneys were made by the Trust Company, were made at the special instance and request of the Belt Company, and for its use and benefit, and were fairly done and fairly and fully accounted for.

These defendants do not know what the total cost of the lines of all of the said railway companies hereinabove named amounted to,

and have no means now of ascertaining the same, as all of
159 the books and papers connected therewith are in the possession of the complainants in the said ancillary bill, and have been for nearly two years.

These defendants deny that there was actually delivered to and disposed of by the Trust Company secured stocks and bonds of said companies aggregating in value more than $5,000,000.00 as alleged in the ancillary bill, (or to any other amount or of any other value than as hereinbefore stated); deny that the Trust Company or its receiver have ever at any time refused to account to the said Belt Company or to its receivers for the proceeds derived by said Trust Company from the sale of any of the said bonds and stocks, or for the disposition made by it of any of the proceeds thereof; but, upon the contrary, state that they have frequently, and at all times duly and fully accounted for all of said stocks and bonds, and for all of the proceeds thereof which came into the hands of the Trust Company, or over which it had any control. The defendants deny that they or either of them pretend or claim that they are retaining any money above the actual cost of the said several railroad properties for the purpose of paying for the commissions and services of the Trust Company in the matter of the sale and disposition of said bonds or stock, or any of them, except as hereinbefore particularly stated, and these defendants again state that each and every of said transactions, and each and all of said charges for commissions and services were fair, reasonable, fully accounted for and satisfactory to the Belt Company and acquiesced in and approved by all of its officers, directors and stockholders, many years prior to the institution of this suit.

10. These defendants further answering, deny that on or about the 30th day of June, 1896, or at any other time prior or subsequent thereto, the Trust Company, either in its own name, or in the name of any of its officers, or in the name of any corporation controlled by it, or in any other manner whatever, had entered into any contract whereby it was obligated to construct a line of railroad from Kansas City, Missouri to Pattonsburg, Missouri, for the purposes alleged in the ancillary bill, or for any other purpose; but state that the Trust Company was never in any way obligated or bound to build the said railroad from Kansas City to Pattonsburg, or any part thereof, and never assumed any obligation in connection therewith.

These defendants deny that the Trust Company at any time ever caused the Kansas City and Northern Connecting Railroad Company to be incorporated, and deny that it caused certain of its officers and employes to be elected as officers and directors of the
said Connecting Company, and deny that the Trust Com-
160 pany at all times, or at any time, dominated and controlled the affairs of the said Connecting Company; deny that the Trust Company set about to discover a way in which it could cause the said railroad to be constructed without incurring any liability itself; deny that it had anything to do with the construction of the said railroad except as the Trustee and financial agent of the Belt Company, as hereinafter stated. They deny that the Trust Com-

pany conceived the idea or purpose of having the Belt Company undertake the construction of the said railroad; deny that the Trust Company by any means whatever caused or attempted to cause a contract to be entered into between the said Belt Company and the said Connecting Company, whereby the Belt Company agreed to construct the said railroad for the Connecting Company.

These defendants admit that the Belt Company did enter into a contract with the Connecting Company whereby the Belt Company agreed to build said railroad for said Connecting Company from Kansas City, Missouri to Pattonsburg, Missouri, and that the Exhibit A, heretofore filed by the Trust Company in its answer to the original bill of the Cambria Steel Company in this cause, is a true copy of the said contract between said Belt Company and the said Connecting Company.

These defendants deny that the Trust Company had anything whatever to do with the making of the said contract, or that it in any way controlled or dominated or in any way influenced either of the parties thereto to enter into the same. These defendants deny that the said connecting railroad was constructed in any way for the use and benefit of the Trust Company; deny that said Trust Company had any interest whatever in the building of the same; deny that the said connecting railroad has been of any benefit or value to the Trust Company; deny that the said connecting railroad has been of no benefit or advantage to the Belt Company, but, upon the contrary, state that it has been of large benefit to said Belt Company, and that it was necessary and useful for the corporate uses and purposes of the said Belt Company, and deny that the said railroad was built for the purposes and ends of the Trust Company, or that it had any interest whatever in the same.

These defendants deny that all of the money paid out by the Belt Company for the construction of the said connecting railroad passed through the hands of the Trust Company, but state, however, that much of said money did pass through the hands of the Trust Company, for the reasons and to the extent hereinafter stated, but not otherwise; they deny that all of the bonds and stock which
161 were to have been delivered to the said Belt Company under the terms of the said contract, passed through the hands of the said Trust Company, but state that some of said bonds and stock did pass through the hands of the Trust Company, for the purposes and to the amount hereinafter stated, and not otherwise.

The defendants admit that the Trust Company proceeded to sell and dispose of some of the said bonds and stock as hereinafter stated but the same was at the special instance and request of the Belt Company and as the financial agent of the said Belt Company, and not otherwise.

These defendants deny that the said Trust Company ever at any time when requested, failed to account to the said Belt Company for the amount realized by it from the sale of any of said bonds and stock; deny that the Trust Company has stated or pretended that the construction of the said road by said Belt Company resulted in a loss to that company of about $300,000.00 or any other sum;

but these defendants state that the Trust Company, frequently, at all times when requested, fully accounted to the said Belt Company for the proceeds of all of said bonds and stock which passed through the hands of the Trust Company and for any and all moneys which came into the hands of the Trust Company or under its control belonging to the said Belt Company, or in which the Belt Company had any interest.

These defendants deny that the Trust Company is, or ought to be in any way chargeable with the amount of any loss which may have resulted to the Belt Company, if any did result, on account of its contract in building the said connecting railroad; deny that the Trust Company is in any way responsible therefor, or should be held accountable therefor.

These defendants further answering, state that the facts connected with the building of the said connecting road are as follows:

The business of the Belt Company was not that of a trunk line, but consists in switching for trunk lines and for industries situated along its line, and in furnishing terminal facilities for other railroads that might want to enter Kansas City, and had no terminal facilities of their own; hence it was to the advantage and interest of the Belt Company to encourage and assist as many industries as possible to locate along its line; and also to assist and encourage other trunk lines of railroad to enter Kansas City, and to use
162 the terminals of the said Belt Company for the purpose of entering, either by aiding said trunk lines to build in to Kansas City, or by building out to meet them.

That in 1896, although all of the several portions of the said Belt Company's railroad system had been constructed and operated for several years, yet the Belt Company found that it had been and still was unable to earn enough from its business to pay its operating expenses and the interest on its bonds; hence it conceived the idea of building a railroad from Kansas City to Pattonsburg, there to meet the Omaha, Kansas City & Eastern Railroad, and the Omaha & St. Louis Railroad, and at an intervening point to meet the Chicago, Rock Island & Pacific Railroad, and thereby to furnish to those three railroad companies an entrance into Kansas City, which railroads would use the tracks and other terminal facilities of the Belt Company and pay a large and profitable switching business to the Belt Company. It was also thought by the Belt Company that it could make a large profit in constructing the Northern Connecting Railroad on its own account, so it was that the Belt Company caused the Kansas City and Northern Connecting Railroad Company to be organized, without any suggestion or domination by the Trust Company whatever, and the Connecting Company was organized for the purpose of building a railroad from Kansas City to Pattonsburg, for the use and benefit of the Belt Company, for the reasons above stated. The Belt Company caused some of its directors, officers, employes and stockholders to be chosen as the directors and officers of the Connecting Company, and the Connecting Company afterwards authorized the issuance of first mortgage bonds to the extent of $20,000.00 per mile of the road to be built, and second mortgage

income bonds to the amount of $15,000.00 per mile for each mile of road to be built, and made the Trust Company its Trustee under both of the mortgages securing such bonds, and authorized the issuance — shares of capital stock.

The Belt Company had no means whatever with which to carry out its contract for constructing the said railroad, except such as it might be able to realize from the sale of the bonds and stock of the Connecting Company, and at the special instance and request of the Belt Company and the Connecting Company, the Trust Company undertook to act as their financial agent in the sale and disposition of such of the bonds and stock of the said Connecting Company as it could find purchasers for, and at such price as it might be able to obtain. That the said second mortgage income bonds had
163 no market value, and only in one or two exceptional cases was the Trust Company able to sell any of the said second mortgage income bonds for any money, but found it necessary in selling the first mortgage bonds to deliver to the purchaser some of the second mortgage bonds as a bonus. The capital stock of the connecting company had no market or other value.

The Connecting Company issued in all 1851.8 of its first mortgage bonds, 1388 of its second mortgage income bonds, and 30,000 shares of its Capital Stock. That the Trust Company, for and on account of the said Belt Company and Connecting Company, and at their special instance and request, from time to time sold 882 of the said first mortgage bonds, and 791.7 of the said second mortgage bonds, and 19,180 shares of said stock, at the times and at the prices as follows, which were the highest and best prices which could be obtained therefor, and which was all they were worth:

July,	1896.	12 bonds at 80	with		
		4.2 seconds and	60 shares of stock as bonus.		
August,	1896.	154 bonds at 80	with		
		53.9 seconds and	770 shares of stock as bonus.		
Sept.	1896.	1 bond at 80	with		
		.350 seconds and	5 shares of stock as bonus.		
Sept.	1897.	18 bonds at 80	with		
		6.3 seconds and	90 shares of stock as bonus.		
Oct.	1897.	500 bonds at 75	with		
		175. seconds and	2500 shares of stock as bonus.		
Oct.	1897.	1 bond at 80	with		
		.350 seconds and	5 shares of stock as bonus.		
Dec.	1897.	3 bonds at 85	with		
		1.050 seconds and	15 shares of stock as bonus.		
Dec.	1897.	10 bonds at 75	with		
		3.5 seconds and	50 shares of stock as bonus.		
Feb.	1898.	65 bonds at 75	with		
		22.750 seconds and	350 shares of stock as bonus.		
March,	1898.	6 bonds at 75	with		
		2.1 seconds and	30 shares of stock as bonus.		
June.	1898.	50 bonds at 74½	with		
		17.5 seconds and	250 shares of stock as bonus.		

Aug.	1898.	2 bonds at 82 with .7 seconds and	10 shares of stock as bonus.
Aug.	1898.	18 bonds at 85 with 6.3 seconds and	90 shares of stock as bonus.
Sept.	1898.	7 bonds at 85 with 2.450 seconds and	35 shares of stock as bonus.
Oct.	1898.	5 bonds at 74½ with 1.750 seconds and	25 shares of stock as bonus.
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Nov.	1898.	25 bonds at 72 with 8.750 seconds and	125 shares of stock as bonus.
Dec.	1898.	5 bonds at 75 with 1.750 seconds and	25 shares of stock as bonus.
Oct.	1897.	483. seconds at 45.	
July,	1896.		850 shares of stock at $1.00 per share.
October,	1899.		13920 shares of stock at $1.42-6/7 per share.
	Totals,	882 bonds. 791.00 seconds, and	19180 shares of stock.

That the Trust Company was unable to find purchasers for said stock and bonds as fast as the money was needed by the Belt Company and Connecting Company to meet their demands in the construction of said Northern Connecting Railroad, and it was understood and agreed between them and the Trust Company, that the Trust Company might purchase as many of said bonds as it was willing to buy at the prices hereinafter named, and might deduct from the purchase price thereof in settlement an amount equal to what would be a fair commission in case such bonds had been sold by the Trust Company to other persons.

That in pursuance of said understanding, and for the purpose of furnishing and supplying money to the Connecting Company and the Belt Company for the building of the said Northern Connecting Road, the Trust Company did, from time to time, buy 414 of said first mortgage bonds, 277.9 of said second mortgage bonds, and 10,370 shares of said stock, at the times and for the prices as follows, which prices were fair and reasonable and fully as much as the said bonds and stock were worth:

July,	1896.	400 bonds at 75 with 140. seconds and	2000 shares of stock *and* bonus.
Sept.	1896.	14 bonds at 75 with 4.9 seconds and	70 shares of stock as bonus.
Dec.	1896.	16. seconds at 45.	
Oct.	1897.	117. seconds at 45.	
July,	1896.		2006 shares of stock at $1.00 per share.
July,	1896.		6250 shares of stock at $6.00 per share.

March, 1897. 50 shares of stock at $1.00 per share.

Totals, 414 First Mtg. Bonds.
277.9 Second Mortgage Bonds, and
10370 shares of stock.

The above purchases and sales account for the disposition of 1296 of the said first mortgage bonds, and 1069.6 of the second mortgage bonds, and 29,550 shares of said stock.

165 The remainder of said bonds and stock were delivered to and disposed of by the Belt Company, as these defendants are informed and believe, as follows:

Delivered by the Belt Company to the A. & P. Roberts Company, in part payment of indebtedness due from the Belt Company to said A. & P. Roberts Company.

10 first mtg. bonds, 3.5 second mortgage bonds.

Deposited with the Trust Company as collateral security for indebtedness of the Belt Company held by the Trust Company.

414 first mtg. bonds, 82.9 second mortgage bonds.

Deposited with Cambria Steel Company by the Belt Company, as collateral security to secure indebtedness from the Belt Company to the Cambria Steel Company,

131 first mtg. bonds.

That the remaining .8 of a first mortgage bond, and the remaining 232. of the second mortgage bonds still remain, as these defendants are informed and believe in the treasury of the Belt Company, and are still owned and held by it.

Of the remaining 450 shares of stock of said Connecting Company, 350 shares thereof were distributed to the directors of the said Connecting Company to qualify them and in compensation for their services, and 100 shares of said stock were issued to A. S. Potter on account of promotion.

That the Trust Company from time to time paid to and paid out for and on account of the said Connecting Company and the said Belt Company all of the proceeds of all of the said bonds and stock so sold by it, and also all of the purchase price of all of the said bonds and stock so purchased by it, except the charges hereinafter referred to for its commissions and services, and the said Connecting Company and the said Belt Company accepted and received the benefit thereof, as these defendants have frequently shown, and are now ready and willing to show again to this Honorable Court in so far as the same may be required.

That the Trust Company from time to time charged the account of the Belt Company and the Connecting Company for its services in acting as such financial agent, and in and about the matter of the said Connecting Company, and for its commissions in selling and disposing of the said bonds and stock, and for its serv-

166 ices in advancing money to the Belt Company for the purpose of building the said connecting road, the following amounts:

December 10th, 1896	$11,262.00
October 4th, 1897	50.00
December 23rd, 1897	65,791.55
February 10th, 1898	250.00
February 25th, 1898	300.00
September 8th, 1898	950.00
December 27th, 1898	250.00
Total	$78,853.55

all of which were fair and reasonable charges for the said services and commissions, and which is less than three per cent of the face value of such of the said bonds and stocks as were sold by the Trust Company or bought by it for cash, saying nothing about the bonds and stocks that were given as bonus.

That about the first of April, 1900, there was an entire change in the officers and management of the Belt Company, and the persons who were at that time chosen as its officers and directors were in no way connected with or interested in the Trust Company, but were hostile to it.

That the said Belt Company received and accepted the proceeds of the contract for the building of the said Northern Connecting Railroad and that since the change in the management of the Belt Company, as well as prior thereto, the Belt Company had claimed the stocks and bonds payable under the said construction contract as its property and they and the Belt Company, both prior to and since the said change in its management have continued and still continue to exercise acts of ownership and control over such of said bonds and stock as remain in the treasury of the said Belt Company, as aforesaid.

Wherefore these defendants say that the Belt Company is estopped now to claim that the said contract for the construction of the Northern Connecting Railroad, was in fact the contract of the Trust Company, and not of the Belt Company, and are estopped to claim that the Trust Company should in any way be held responsible for any loss that arose, if any, on account of the carrying out of the said contract by the Belt Company.

11. These defendants, further answering, deny that the Belt Company at any time advanced any money to the Trust Company,
167 or that the Trust Company took out of the earnings or assets of the Belt Company any sums of money whatever, which it pretended to expend for and on behalf of the Belt Company, or otherwise; they deny that the Belt Company ever advanced or delivered to the Trust Company any money, at any time, or times, except such as it was able, from time to time, to deliver to the Trust Company, in part payment of the indebtedness which the Belt Company from time to time owed to the Trust Company. The fact is that the Belt Company never had any money to advance to anybody; it needed all the money it had and more, too, to pay its current indebtedness, and instead of the Belt Company's advance any money to the Trust Company for any purpose whatever, the

contrary is true, that the Trust Company from time to time, advanced to the Belt Company to keep said Belt Company from bankruptcy and to keep it as a going concern.

These defendants deny that the Trust Company was ever requested by the Belt Company, or by anyone else, to account for any money alleged to have been so advanced or so taken out of the treasury of the Belt Company by the Trust Company; that, as a matter of fact, there never was any ground or basis for supposing that the Trust Company had ever gotten any of the Belt Company's money.

12. These defendants *in* further answering, deny that during the times hereinbefore mentioned, or at any time or times the Trust Company took upon itself the business of paying out practically all of the moneys which were paid out for the benefit of the said Belt Company, but state that the Trust Company did, from its own funds, frequently, and at various times advance large sums of money to and for the use and benefit of the Belt Company, because the said Belt Company had no money itself with which to meet demands that from time to time were pressing, and to make improvements and betterments that were absolutely necessary for its success as a money earning institution.

These defendants deny that the Trust Company took upon itself the duty of buying for the Belt Company practically all or any of the property which the said Belt Company needed to acquire in its business of operating said railroad, and deny that it used any money of the Belt Company for any such purpose; deny that the Trust Company caused other corporations to be formed for the purpose of holding the legal title to any properties purchased for the use and benefit of the Belt Company; deny that the Trust Company caused the capital stock of any such corporations to be issued to the Belt Company and then turned over to the said Trust Company, or to be issued to the said Trust Company direct, or otherwise, for any purpose whatever; deny that the Trust Com-
168 pany caused its own servants, agents and employes to be elected and continued as the officers and directors of any such companies, at any time; deny that the Trust Company, in the manner alleged in the ancillary bill, or in any other manner, controlled the affairs of the Belt Company, or controlled the actions and affairs of any of the said subsidiary companies; deny that the Trust Company caused the Missouri Elevator & Terminal Company to be incorporated for the purpose alleged in the ancillary bill or for any other purpose.

These defendants state that the Missouri Elevator & Terminal Company was organized by the procurement of the Belt Company for the purpose of acquiring and erecting grain elevators along the line of the Belt Company, so as to furnish such facilities as would increase the business and earnings of the Belt Company. That said Missouri Elevator & Terminal Company acquired certain lands in what is known as the East Bottoms of Kansas City, Missouri, and caused to be erected thereon three elevators, one of which has since been destroyed by fire. That the Trust Company advanced to

the said Missouri Elevator & Terminal Company, large sums of money for the erection of said elevators, and received from the said Missouri Elevator & Terminal Company three mortgages or deeds of trust, one on each of said elevators, one for $12,000.00, one for $12,000.00 and one for $8,000.00. That one of the said elevators was consumed by fire, and the amount of the insurance thereon, was collected by Wash Adams, the receiver of the Missouri Elevator & Terminal Company and was paid by him to the Trust Company and its receiver, and was duly credited upon the note which was secured by the mortgage on that elevator, leaving a balance still due on account of that mortgage of $4,251.50; that on the remaining two mortgages, one for $12,000.00 and the other for $8,000.00 nothing has been paid, and the interest on all of them has been long in default, and the Trust Company still holds said mortgages on said property.

The said Belt Company, from time to time, advanced some money to the Missouri Elevator & Terminal Company, which went into the construction of the said elevators, and received therefor 425 shares of the capital stock of the said Missouri Elevator & Terminal Company of the par value of $100.00 each, which is all or practically all of the stock which the said Missouri Elevator & Terminal Company has issued. It is true that the said elevator property was purchased and the said elevators built for the use and benefit of the Belt Company, but it is untrue that it was done by the Trust Company, and inasmuch as the Belt Company
169 is the owner of all or substantially all of the outstanding stock of the Missouri Elevator & Terminal Company, it is in this sense true that all of the property of the Missouri Elevator & Terminal Company belongs to the Belt Company, subject, however, to the lien of the mortgages thereon to the Trust Company, as before stated.

The Trust Company has not and never had any interest in any of the property standing in the name of the said Missouri Elevator & Terminal Company, except as the holder of the said mortgages.

These defendants deny that the Trust Company ever failed or refused to account to the Belt Company for all of the transactions of the Trust Company in connection with the said Missouri Elevator & Termial Company's property, and these defendants deny again that the Trust Company ever received any funds from the Belt Company, for the purpose of constructing said elevators; deny that the Trust Company caused the Belt Company to assume all of the outstanding debts and liabilities of the said Missouri Elevator & Terminal Company, but state that if the Belt Company did assume such outstanding debts and liabilities, it was a proper thing for it to do, as it is, by reason of its being the sole stockholder in the said company, the beneficial owner of all of the property subject to the said debts and liabilities, and there is no reason, in law or equity, why the Belt Company should be reimbursed for paying its own debts, or discharging obligations upon its own property, if it did discharge any such obligations. These defendants admit

that Wash Adams, Esquire, was appointed receiver of the Missouri Elevator & Terminal Company, as alleged in the ancillary bill, and still had and holds possession of its property.

These defendants deny that the Trust Company caused the Central Improvement Company to be organized for the purpose of holding the legal title to various pieces of real estate in Kansas City, Missouri, or elsewhere, purchased for the use and benefit of the said Belt Company, and the Kansas City, Pittsburg & Gulf Railroad Company, or either of them, or for any other purpose; they deny that the Trust Company caused its servants and employes to be elected as the officers and directors of the said Central Improvement Company; they deny that any money whatever was at any time paid out by the Belt Company to the Trust Company, for the purpose of purchasing any pieces of real estate to be held by the said Central Improvement Company; deny that any shares of stock of the Central Improvement Company were ever at any time issued to the said Trust Company; deny that the Trust
170 Company ever had any interest in or owned any of the stock of the Central Improvement Company; deny that any request or demand has ever been made by the Belt Company or anyone else, on the Trust Company for an accounting for any funds alleged to have been advanced to the Trust Company by the Belt Company for the purpose of buying land for the Central Improvement Company, or for an accounting for the alleged disposition of any of the stock of the said Central Improvement Company.

It is true that a corporation known as the Central Improvement Company was organized, but it was done at the instance and by the procurement of the Belt Company and the Kansas City, Pittsburg & Gulf Railroad Company, for the purpose of securing and acquiring title to various tracts of land in and about Kansas City, which were needed for the use of the said railroad companies. It is true that the Suburban Belt Railroad Company furnished some of the money to be paid upon the purchase price of the lands bought by the Central Improvement Company; it is also true that the Kansas City, Pittsburg & Gulf Railroad Company advanced some money for the same purpose; upon such money being furnished by the said railroad companies, the said Central Improvement Company issued to the Belt Company 1,120 shares of its capital stock, and also issued certain shares of its stock to the Kansas City, Pittsburg & Gulf Railroad Company, on account of the money furnished by it; all or practically all outstanding stock of the Central Improvement Company has been issued to and is held by the Belt Company and the Kansas City, Pittsburg & Gulf Railroad Company, or their assigns. That by reason of the fact that the Belt Company and the Kansas City, Pittsburg & Gulf Railroad Company, or their assigns, hold all of the stock of the Central Improvement Company, they are in equity the beneficial owners of all of the property of the Central Improvement Company, subject, however to any liens thereon for unpaid portions of the purchase price thereof. That the Trust Company has not now and never has had any interest in the property

of the Central Improvement Company, except that it holds a mortgage on a certain piece of the property owned by the said Central Improvement Company, to secure certain promissory notes aggregating the principal sum of $5,000.00, which mortgage was a subsisting lien upon the property at the time the Central Improvement Company bought it, and which mortgage was subsequently purchased and is now held by the Trust Company.

These defendants deny that any part of the lands upon which the depot of the Belt Company is situated, which stands in the name of the Second Street Improvement Company, belongs to
171 the Belt Company; deny that the said Belt Company has any interest whatever in any of the property standing in the name of the Second Street Improvement Company, except as lessee; deny that the Belt Company ever advanced or furnished any of the money which went into the purchase or improvement of the property now standing in the name of the Second Street Improvement Company.

These defendants admit that Wash Adams, Esquire, was appointed as receiver of the said Central Improvement Company, and that he now has possession and control of its property, as alleged in the said ancillary bill.

These defendants deny that the Trust Company caused the Fairmount Amusement Company to be organized, or to be dominated or controlled by it, as alleged in the ancillary bill; deny that the Belt Company ever advanced any money to the Trust Company for the purpose of purchasing or improving the property of the Fairmount Amusement Company. The defendants admit that all of the capital stock of the Fairmount Amusement Company belongs to the Belt Company, subject, however to the lien of the Trust Company upon it as a pledge for the security of certain indebtedness of the Belt Company to the Trust Company, as hereinafter shown. These defendants state that they do not know what moneys, if any, the Fairmount Amusement Company ever expended, if any, and do not know who furnished the money; but they deny that the Belt Company ever supplied the Trust Company with any money to be used in furthering the ends or purposes of the Fairmount Amusement Company; deny that the Trust Company ever took upon itself the duty of disposing of or disbursing any money for the Belt Company for any such purpose; deny that large sums of money, or any sums of money were ever paid by the Belt Company to the Trust Company for that purpose; deny that the Belt Company or anyone else has ever asked the Trust Company for an accounting on account of any such money alleged to have been furnished to the Trust Company for any such purpose.

It is true that the Fairmount Amusement Company was organized for the purpose of operating what is commonly known as Fairmount Park, along the line of the Kansas City & Independence Air Line, but it is untrue that the Trust Company at any time caused said Belt Company to advance to it large sums of money for the purpose of fiitting up Fairmount Park; it is true, however, that the Trust Company itself did advance at the special instance and re-

quest of the Air Line and the Belt Company, from time to time, large sums of money in the fitting up of Fairmount Park, and that it charged the same to the Kansas City & Independence Air
172 Line, and afterwards to the Belt Company when the account of the Air Line was merged in that of the Belt Company; but the defendants deny that the Belt Company ever supplied the Trust Company with any money for that purpose; deny that the Belt Company or any one else ever requested the Trust Company to account for any money alleged to have been advanced to it by the Belt Company in fitting up said Fairmount Park, but state that no such money was furnished; all of the money which the Trust Company advanced towards fitting up Fairmount Park, was charged, as aforesaid to the Air Line or to the Belt Company, and due and proper accounts were rendered thereof from month to month as the work progressed, and were duly audited and approved; the originals of such bills and accounts so rendered are now in the possession of the Belt Company and its receivers.

That all of the transactions of whatever nature between the Trust Company and the Air Line or the Belt Company in reference to Fairmount Park were fully accounted for, known to and ratified and approved by all of the officers, directors and stockholders of the Air Line Company and the Belt Company, more than five years ago, and these defendants plead the statutes of limitations of the State of Missouri, in bar of this suit in reference thereto.

These defendants deny that the Trust Company caused to be organized what is known as the Northern Townsite Company; deny that the Trust Company dominated or controlled the affairs of the said Northern Townsite Company; deny that the Trust Company caused the Belt Company to advance to the Trust Company upwards of $5,000.00, or any other sum which was used by the Trust Company in the purchase of property which was taken in the name of the said Northern Townsite Company; deny that all or substantially all of the money that was used for the purpose of acquiring the property of the Northern Townsite Company was money advanced by the Belt Company; and deny that the said Trust Company, instead of issuing to the said Belt Company all of the capital stock of the said Northern Townsite Company, issued large portions thereof to itself, or to other persons for its use and benefit; or that it otherwise disposed of the same, except as hereinafter stated. The defendants deny that the Belt Company, or any one else has ever requested the Trust Company to account for any money alleged to have been received by the Trust Company from the Belt Company for the purposes of the Northern Townsite Company.

It is true that the Northern Townsite Company was organized for the purpose of acquiring real estate along the line of the
173 Northern Connecting Railroad; the facts are that the Trust Company and the Belt Company supplied all of the money that was used in purchasing lands by the Northern Townsite Company. The Belt Company paid into the treasury of the Northern Townsite Company $6,286.57, and received therefor 439 shares of the capital stock of the said Northern Townsite Company of the

par value of $100.00 each, and the Trust Company paid into the treasury of the Northern Townsite Company $6,720.07, and received 489 shares of the capital stock of said Northern Townsite Company, of the par value of $100.00 each; that said shares so issued to the Belt Company and to the Trust Company, were issued in proper proportion to the amount of money paid in by each, and that the amount of money paid into the treasury of the said Northern Townsite Company by the Trust Company and the Belt Company was equivalent to about $14.32 on each share of stock so issued to them respectively. That 24 shares of said stock were issued to each of the following named parties, A. E. Stilwell, C. A. Braley and J. T. Nolthenius, in compensation for their services as directors and officers of the Northern Townsite Company, and that no other stock of the said Northern Townsite Company has been issued to anyone.

That the Trust Company owes the Belt Company nothing on account of the Northern Townsite Company's affairs, and there is nothing to call for any accounting by the Trust Company to the Belt Company in connection therewith.

13. These defendants deny that the Trust Company caused the Kansas City, Pittsburg & Gulf Railroad Company to be formed, and these defendants admit, however, that the said Kansas City, Pittsburg & Gulf Railroad Company was formed for the purposes stated in the said ancillary bill, and that it issued the bonds to the amount therein stated; that the default therein stated was made, and that the foreclosure proceedings stated therein were had.

These defendants deny that either the Belt Company, the Terminal or Air Line Companies were largely dependent upon the Kansas City, Pittsburg & Gulf Railroad Company for their earnings; they admit that an operating contract was in existence between the Belt Company and the said Kansas City, Pittsburg & Gulf Railroad Company, but they deny that it was well known to the Trust Company that if the Kansas City, Pittsburg & Gulf Railroad Company went into the hands of receivers, it would result in the insolvency of the Belt and other companies before named or that it would necessitate their ultimately being thrown into the hands of receivers, and the mortgages upon their respective properties foreclosed.

174 These defendants deny that the Trust Company at any time set about to contrive a scheme whereby it might appropriate to itself before the Belt Company should pass beyond its control, any of the property or assets of the Belt Company; deny that the Trust Company caused to be exhibited to its own officers and directors who were holding the positions of officers or directors of the Belt Company, various claims and demands which it alleged were due and owing by the Belt Company to it; deny that the Trust Company caused such of its own officers and employes who were holding the positions of officers and directors of the Belt Company to pass upon and approve such claims and demands; deny that the Trust Company caused its own officers and employes who were holding the positions of officers and directors of the Belt Com-

pany to execute to the said Trust Company various pretended promissory notes and other negotiable instruments for the alleged purpose of securing to the Trust Company the payment of such pretended claims, as alleged in the ancillary bill; deny that the Trust Company caused to be delivered and transferred to its various stocks, bonds and accounts and other personal property belonging to the Belt Company as collateral security for the said pretended indebtedness by the means or for the purposes alleged in the ancillary bill.

These defendants state, however, that the said Belt Company did duly execute and deliver to the Trust Company the certain negotiable promissory notes named in the ancillary bill of complaint, except that the note appearing in the ancillary bill as of date November 7th, 1899 was for $50,000.00, instead of $25,000.00 as alleged in the said ancillary bill, and that the belt company assigned and pledged to the Trust Company as collateral security for the payment of the said promissory notes and other indebtedness held by the Trust Company against the Belt Company, the stocks, bonds and property stated in the ancillary bill of complaint, except that the item of property stated in the said ancillary bill as being 600 tons of new steel rails, was in fact about 344 tons of steel rails and about 17 tons of fastenings.

These defendants deny that the said notes were executed or that the said stocks, bonds and property were given as collateral security by reason of or through any domination or control of the said Trust Company over the Belt Company. It is true that at the time the said notes were given and the said property assigned as collateral security that a majority of the officers and directors of the Belt Company were connected with the Trust Company, either as its officers, directors or employes, but these defendants deny that any of the officers or directors of the Belt Company were personally interested in securing to the said Trust Company any of
175 the assets of the Belt Company which in equity or good conscience ought not to have been secured and deny that the execution of said promissory notes, or either of them or the delivery of the said collateral security or any part thereof was fraudulent or void for any reason whatever.

On the contrary these defendants state and show to the court that the Belt Company was justly indebted to this defendant the Trust Company at and prior to the time of the execution and delivery of the said promissory notes respectively for moneys from time to time loaned to the said Belt Company, or advanced by the Trust Company and paid out to and for the use and benefit of the Belt Company, all subsequent to the first day of January, 1898; that each and all of said notes were given for the purpose of evidencing a bona fide indebtedness to the amount specified in said notes. That said notes were executed and delivered and the said collateral security assigned and pledged in good faith for the purpose of evidencing and securing the payment of debts justly and equitably due and not otherwise. That all of said notes were given for so much money loaned and advanced by the Trust Company

to the Belt Company, subsequent to the first day of January, 1898, as aforesaid.

These defendants deny that the Trust Company kept its officers and directors; or caused its officers and directors to be continued as the officers and directors of the Belt Company during the time stated in the ancilary bill, or at any time. It is true, however, that many of the officers and directors of the Belt Company were also officers and directors of the Trust Company, but that condition was occasioned by the fact that the stockholders of the Belt Company, who were persons other than the Trust Company elected certain officers, directors and employes of the Trust Company as officers and directors of the Belt Company, and it was not occasioned by any domination or control of the Trust Company, or by any influence whatever exerted by or on behalf of the Trust Company, and there never was, at any time, any officer, director or employe of the Trust Company, who was also an officer or employe of the Belt Company who desired or wished the Trust Company in any way to have or acquire any undue advantage whatever of the Belt Company, and there was at all times open and careful accounting had between the Belt Company and the Trust Company of all transactions in which they had any mutual connection; and although the Trust Company has at all times made full and accurate accountings for all of its business transactions with the Belt Company, all of which have been fully ratified and approved by
176 all of the officers, directors and stockholders of the Belt Company, as before stated, yet the Trust Company has at all times stood ready and is still ready and willing to make any such further accounting thereof, as may by the court be required.

These defendants deny that since the Belt Company passed into the control of other hands, it has ever been refused any accounting or information of any character concerning the past relations between the Trust Company and the Belt Company at any and all times when requested, but state, upon the contrary that the Trust Company has frequently rendered full, true and accurate accounts to the Belt Company, and to other persons, at its instance and request, of all of the transactions between the Trust Company and the Belt Company. That it has at all times offered every opportunity for the examination of its books and accounts; that at its invitation the Belt Company has had its own experts examine the books and accounts of the Trust Company. The Trust Company has always been anxious to have its accounts examined, and the balance due it settled and paid, and has insisted upon this from time to time.

14. These defendants further state and show that from and after the first day of January, 1898, continuously up until the first of April 1900, at divers and frequent times, the Trust Company loaned and advanced to the said Belt Company, at its instance and request, large sums of money, aggregating more than half a million of dollars, for the purpose of making necessary improvements in the said Belt Company's road and paying its operating expenses and meeting its interest charges, and also for the purpose of encourag-

ing and securing the location of industries along its line, to the end that its earnings and income might be increased. That the said Belt Company from time to time repaid to said Trust Company parts of the money so loaned and advanced by it as aforesaid, but left unpaid a very large portion thereof, for a part of which balance the said promissory notes were duly executed and delivered by the Belt Company to the Trust Company, and to secure which the said stocks, bonds and property were pledged as collateral security as aforesaid. That the said Belt Company since it passed into the hands of its present management, has frequently recognized the said indebtedness of the Trust Company as valid and just and has frequently promised to pay the same. That on the Month of June, 1900, the Belt Company, then being in the hands of its present management, paid, on account of some of the said promissory notes, large sums of money, which were duly credited thereon, as hereinafter shown, and promised to pay the remainder of said notes and other indebtedness.

177 15. That the Trust Company and its receiver now own and hold the following promissory notes duly executed and delivered, as aforesaid, by the said Belt Company, all of which are long past due and remain unpaid, to-wit:

One note dated March 31st, 1899, due July 2nd, 1899, for $50,000.00 with interest from date at the rate of 6 per cent per annum, on which there has been paid and credited on June 14th, 1900, $12,500.00.

One note dated July 26th, 1899, due on demand for $203,900.00 with interest at 6 per cent per annum from date, upon which there was paid and credited on June 11th, 1900 $9,996.65.

One note dated September 21st, 1899, due on demand for $23,056.48 with interest at 8 per cent per annum from date.

One note dated October 23rd, 1899, due on demand, for $7,162.40 with interest at 8 per cent per annum from date.

One note dated November 7th, 1899, due January 9th, 1900, for $50,000.00 with interest after maturity at 8 per cent per annum upon which there was paid and credited June 14th, 1900 $12,500.00.

One note dated January 25th, 1900, due May 25th, 1900 for $25,000.00, with interest after maturity at 6 per cent per annum.

One note dated February 8th, 1900, due May 12th, 1900, for $109,500.00 with interest from maturity at 8 per cent per annum, on which there was paid and credited October 23rd, 1900 as proceeds of sale of collateral made by the National Bank of Commerce $110,250.00, leaving a balance due on October 23rd, 1900 of $3,240.66.

One note dated February 9th, 1900, due June 11th, 1900, for $10,400.00, with interest from maturity at 6 per cent — annum.

In addition to the above stated promissory notes, the Belt Company is justly indebted to the said Trust Company and its receiver, on an open book account for so much money at various times and in divers sums advanced to and paid out for the use and benefit of the Belt Company, at its special instance and request, parts of which

were by the said Belt Company from time to time repaid and truly credited, all of which sums of money so advanced and paid out to and for the use and benefit of the said Belt Company, together with the payments and credits thereon, are fully and truly set out and appear from the itemized statement of account, which, ac-
178 count shows the balance due to the Trust Company on said account on September 26th, 1900, of $43,713.32, and which account is in words and figures as follows, to-wit:

Kansas City Suburban Belt Railroad Company in Account with Guardian Trust Company.

1899.		Debit.	Credit.
Sept. 25,	To payment of draft of Wm. S. Taylor, dated Sept. 23, 1899, for payment of 20 coupons Union Terminal R. R. Co., due Aug. 1, 1899	$500.00	
26,	To payment draft of Wm. S. Taylor, dated Sept. 26, 1899, for payment of 40 coupons Union Terminal R. R. Co., due August 1, 1899	1,000.00	
	To expressage on 65 coupons Union Terminal R. R. Co. from New York to Philadelphia	.50	
	To pro. of Philadelphia office expenses for month of August, 1899.....	4.50	
27,	To interest on note for $25,000, dated Sept 25, 1899, from that date to Jan. 25th, 1900, 122 days at 6%	508.33	
	To revenue stamps on note of $23,056.48 given by them to Trust Co., dated Sept. 21, 1899	4.62	
	To telegrams	2.38	
	To telegrams	.59	
29,	To revenue stamps on note of $25,000, given to Trust Co. dated 9/25/99,	5.00	
	To revenue stamps on note for $25,000 given 1st Nat'l Bank, K. C.....	5.00	

		To payment of semi-annual interest due Oct. 4, 1899, to Provident Life & Trust Co., on 2 notes of $5,000 each at 6% held by them, dated April 4, 1890	300.00	
	30,	To payment to Nat'l Bank of Commerce for draft on New York Remitted for coupon interest.....	40,000.00	
		By proceeds of sale of draft by K. C. Suburban Belt R. R. Co., at 30 days on J. de Goeijen, Jr., for florins 100,000 draft endorsed by Trust Co. amount to apply as credit on above charge of $40,000.00	....	$39,437.50
179				
Oct.	3,	To revenue stamps on draft on J. de Goeijen, Jr., and telegrams regarding draft	19.58	
Oct.	3,	By collection from J. de Goeijen, Jr., account interest on $89,333.33 for the month of Sept.....	....	521.10
	4,	To payment of 20 coupons Union Terminal R. R. Co. due August 1, 1899,	500.00	
	10,	To revenue stamps on 13,920 shares stock K. C. & N. C. R. R. Co. transferred account sale....	279.40	
	11,	To clerical service Oct. 1899	17.00	
		To funds deposited with Drexel & Co., for payment of coupons of Union Terminal & Consolidated Terminal R. R. Companies	1,000.00	
	14,	To telegrams	5.76	
	19,	To expressage N. Y. to Philadelphia on 20 coupons Union Terminal R. R. Co.	.13	

Nov.	7,	To interest on note of $50,000, dated M'ch 31, 1899, renewed by note maturing Jan'y 9, 1900, Interest Mch. 31, 1899, to Jany. 9, 1900, at 6%...	2,366.67	
	8,	By collection from J. de Goeijen, Jr., of interest on $89,333.33 month of Oct. 1899	....	538.48
	29,	To interest on daily balances, September, 1899,	37.22	
		To interest on daily balances, October, 1899...	22.74	
Dec.	1,	To interest on daily balances, November, 1899..	33.55	
Dec.	6,	By collection from J. de Goeijen, Jr., of interest on $89,333.33 for month of November, 1899.....	....	521.10
1900.				
Jan.	2,	By proceeds of sal of draft by K. C. S. B. R. R. Co. on J. de Goeijen, Jr., bearing endorsement of Trust Co., Draft for florins 37,735.64, sold at 39-3/4		15,000.00
		To drafts of Kuhn & Co. of London, dated Dec. 20, 1899, on Trust Co. as endorser, to take up drafts on J. de Goeijen, Jr., Sept. 30, 1899, for $39,437.50 not paid by him $41,000.00		
		Less allowances by Kuhn & Co. acc't excess in exchange 667.40		
			40,332.60	
180				
Jan.	4,	By collection of interest from J. de Goeijen, Jr., on $89,333.33 month of December, 1899	....	538.48

	25,	To draft of Kuhn & Co., London, dated Jan. 12, 1900, on Trust Co. as endorser, to take up draft on J. de Goeijen, Jr., Jan. 2, 1900, not paid by him.....	1,500.00	
Feb.	2,	By cash on account.....	....	3,245.13
May	17,	To clerical services, months of November and December, 1899, January, February and March,, 1900, 5 months at $17.00.....	85.00	
June	4,	To interest on daily balances:		
		Month of Dec. 1899, 34.95		
		Month of Jan. 1900, 200.65		
		Month of Feb. 1900, 224.36		
		Month of Mar. 1900, 254.01		
			713.97	
			$102,744.34	$59,031.02

Balance due Trust Company.....$43,713.32

That the Trust Company, and its receiver now hold certain stocks, bonds, accounts and property, which are the property of the Belt Company, and which have heretofore been duly transferred and pledged to the Trust Company as collateral security for the payment of the said indebtedness of the Belt Company to the Trust Company, including all of the said promissory notes and the said open book account, and the said Trust Company and its receiver now hold the said stocks, bonds, accounts and property as such collateral security; the said stocks, Bonds, accounts and property so held by the Trust Company and its receiver as such collateral security, are as follows:

82.9 Second Mortgage Income Bonds of the Kansas City and Northern Connecting Railroad Company.

25 shares of the capital stock of the Fairmount Amusement Company.

439 shares of the capital stock of the Northern Townsite Company.

1120 shares of the capital stock of the Central Improvement Company.

425 shares of the capital stock of the Missouri Elevator & Terminal Company.

A certain account and claim of the Belt Company against the

Kansas City, Pittsburg & Gulf Railroad Company, consisting
181 of charges for material furnished, labor performed, switching charges and terminal rentals due from Kansas City, Pittsburg & Gulf Railroad Company to the said Belt Company, which account on its face amounts to $133,805.44.

343-1940-2240 tons of steel rails.

16-1712/2000 tons of fastenings.

That the Trust Company has heretofore been temporarily enjoined at the suit of the Cambria Steel Company in the above entitled original cause from selling or otherwise subjecting the above named stocks and bonds, so held as collateral security, toward the payment of the indebtedness of the Belt Company to the Trust Company; and the said claim and account of the Belt Company against the Kansas City, Pittsburg & Gulf Railroad Company, so assigned to and held by the Trust Company, as collateral security for said indebtedness, has heretofore been by the Trust Company made the matter of an intervening petition in the suit of the State Trust Company complainant against the Kansas City, Pittsburg & Gulf Railroad Company, et al., defendants in the United States Circuit Court for the Western Division of the Western District of Missouri, and the said intervening petition is still there pending and undetermined.

That notwithstanding the Belt Company had assigned the said steel rails and fastenings to the Trust Company as collateral security, it afterwards refused to actually deliver the same to the Trust Company, and the Trust Company was therefore compelled to bring a suit in replevin therefor, which suit was brought in the State Court of Jackson County, Missouri, where the same is still pending and undetermined.

That whilst it is true as these defendants have hereinbefore stated, that the Trust Company had and has no interest in the property standing in the name of the Central Improvement Company, or of the Missouri Elevator & Terminal Company, or of the Fairmount Amusement Company except that it holds liens upon certain portions thereof, as hereinbefore stated, and that the Trust Company had and has no interest in the property of the Northern Townsite Company, except that it is a stockholder therein, as hereinbefore stated, yet it is also true as these defendants state and show to the court, that the Trust Company has and holds

25 shares of the capital stock of the Fairmount Amusement Company of the par value of $100.00 each.

1120 shares of the capital stock of the Central Improvement Company of the par value of $100.00 each, and

182 425 shares of the capital stock of the Missouri Elevator & Terminal Company of the par value of $100.00 each, and also

439 other shares of the capital stock of the Northern Townsite Company of the par value of $100.00 each, as collateral security duly deposited and pledged with the Trust Company by the Belt Company to secure the payment of the said indebtedness hereinbefore stated due and owing by the Belt Company to the said Trust Company.

These defendants further state and show that they are ready and willing, if in the judgment of this court, they ought and should do so, to render a fuller accounting of any and all of the transactions of the Trust Company with any and all of said companies, in such manner and at such times as the Court may direct.

These defendants further state and show that the Trust Company has heretofore frequently made demand upon the Belt Company for the payment of each and all of said promissory notes and said book account, and that the said Trust Company, on the first day of April, 1900, in due manner made special demand upon the said Belt Company for the payment of each of said promissory notes which are payable on demand, and also on that date made due demand on the said Belt Company for the payment of the said open book account. That the Belt Company has failed and refused to pay the said notes or account, or any part thereof.

All of which matters and things hereinbefore stated these defendants are ready to aver, maintain and prove as this Honorable Court may direct, and hereby pray that judgment may be rendered by this Court against the Kansas City Suburban Belt Railroad Company and its said receivers, in favor of the Guardian Trust Company and its receiver, for the amount of each and all of the said promissory notes, together with interest thereon, and for the amount of the said book account, with interest thereon from the 1st day of April, 1900, and that the said Trust Company and its receiver may have judgment against the said Belt Company, and its receivers, for any all further sums or amounts that may be found due the said Trust Company or its receiver, upon the accounting which may be had in this cause; that the court may by proper orders protect and enforce the interest of the Trust Company and its receiver in and to the stocks, bonds, accounts and property so deposited with and held by it as collateral security, as aforesaid, and that the said Kansas City Suburban Belt Railroad Company, and its receivers may be ordered and directed to pay to the Guardian Trust Company and its receiver, whatever sums of money the Trust Company or its receiver may be found entitled to upon such accounting, and that these de-
183 fendants also have judgment for their reasonable costs and charges in this behalf most wrongfully expended and sustained.

GUARDIAN TRUST COMPANY,
By TRIMBLE & BRALEY, *Its Solicitors.*
FRANCIS M. BLACK,
Receiver of the Guardian Trust Company.
By TRIMBLE & BRALEY, *His Solicitors.*

Afterwards, to-wit, on the 16th day of December, 1901, an answer of Cambria Steel Company was filed in cause No. 2616. Said Answer is in words and figures as follows:

In the United States Circuit Court for the Western Division of the Western District of Missouri, at Kansas City.

CAMBRIA STEEL COMPANY, Complainant,
vs.
THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY et al., Defendants.

Original Bill.

STUART R. KNOTT and EDWARD F. SWINNEY, as Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,
vs.
CAMBRIA STEEL COMPANY, et al., Defendants.

Ancillary Bill.

The Answer of the Cambria Steel Company to the Ancillary Bill of Complaint of Stuart R. Knott and Edward F. Swinney, as Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Co.

This defendant saving and reserving to itself, now and at all times hereafter, all and all manner of benefit and advantage of exception which can or may be had or taken to the said complainants' said ancillary bill of complaint, for answer thereto, and to so much thereof as this defendant is advised is in any wise material or necessary for it to make answer unto, answers and says:

Upon information and belief it avers that all the matters and things stated in said bill up to the prayer thereof are true; that heretofore, on September 6th, 1900, this defendant recovered a judgment against the Kansas City Suburban Belt Railroad Company hereinafter called the Belt Company, for $100,962.91, no part of which has been paid but all of which is still due. Having recovered such judgment, this defendant caused a writ of execution to be issued thereon directed to the marshal of this district, who
184 upon the same day, returned the said execution wholly unsatisfied for want of property upon which to levy the same. That said Belt Company was wholly insolvent and had no property subject to be reached by legal process which might be issued against it upon the judgment so recovered by this defendant; whereupon defendant filed in this court case number 2468, which was a bill in equity upon its behalf against said Belt Company, the Union Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company and Northern Townsite Company, the purpose and object of which was to have an accounting as between the said Belt Company and

the Guardian Trust Company and to subject to the payment of its judgment all the property which the said Belt Company owned excepting that covered by its railroad mortgages, and particularly all the collateral pledged to secure the notes mentioned in the said ancillary bill of complaint. Said cause is pending and still undetermined. This defendant begs leave to refer to said bill of complaint and all the proceedings in said cause the same as if copied herein, and respectfully shows that when an account is taken of the various transactions between the Guardian Trust Company and its receiver and the Belt Company or its receivers, as in and by said ancillary bill claimed, the sums found due the receivers of the Belt Company should be subjected to the payment of the judgment of this defendant, which is the first, prior and paramount lien thereon, and no action should be taken in this cause in any manner interfering with the rights of this defendant in said bill for an accounting. And this defendant denies all and all manner of unlawful combination and confederacy, wherewith it is by the said bill charged; without this, that there is any other matter, cause or thing in the said bill of complaint contained (material or necessary for this defendant to make answer unto; and not herein and hereby well and sufficiently answered, confessed, traversed, avoided or denied) which is true, to the belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain and prove, as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

L. C. KRAUTHOFF,
FRANK HAGERMAN,
Solicitors for Cambria Steel Company.

Afterwards, towit, on the 31st day of December, 1901, Complainants' exceptions to the answer of Guardian Trust Company
185 and Francis M. Black its receiver was filed in case #2616, Knott & Swinney Recors. et al., vs. Cambria Steel Company et al.

Said exceptions are in words & figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

STUART R. KNOTT and EDWARD F. SWINNEY, Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY and FRANCIS M. Black, Its Receiver; Missouri Elevator & Terminal Company and Wash Adams, Its Receiver; Central Improvement Company and Wash Adams, Its Receiver; Second Street Improvement Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

Exceptions Taken by the Complainants Stuart R. Knott and Edward F. Swinney, as Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company to the Separate Answer of the Defendants Guardian Trust Company and Francis M. Black, Its Receiver.

1. For that the following allegation contained in paragraph No. 2 of said Answer is impertinent, irrelevant and immaterial and contains no defense to the complainants' allegation and is insufficient: "But this defendant states and shows to the Court that the said original bill of complaint of the Cambria Steel Company and the said four bills of complaint so brought by the said The Provident Life and Trust Company of Philadelphia were each and all filed at one and the same time by the same counsel and as separate parts of one and the same transaction, and that all of the said four suits by the Provident Life and Trust Company of Philadelphia and also the said suit of the Cambria Steel Company were instituted at the solicitation and request and by collusion with the said Kansas City Suburban Belt Railroad Company for the fraudulent purpose
186 of hindering, delaying and defrauding the creditors of the Kansas City Suburban Belt Railroad Company and partic-

ularly the defendant the Guardian Trust Company, which was one of said creditors."

2. For that the following allegation contained in paragraph No. 2 of said Answer is impertinent, irrelevant and immaterial and contains no defense to the complainants' allegations and is insufficient: "These defendants deny that the said The Kansas City Suburban Belt Railroad Company has ever filed any answer to the said original bill of complaint of the said Cambria Steel Company and state that if it should file any such answer the same will be collusive and fraudulent for the purpose of carrying out the purposes of said suit in hindering, delaying and defrauding the creditors to the said Kansas City Suburban Belt Company."

Wherefore, the complainants come and in all particulars aforesaid except to the answer of the said defendants Guardian Trust Company and Francis M. Black, its Receiver, on the ground alleged that the same is irrelevant, impertinent and insufficient; and humbly pray that the said defendants may be compelled to put a full, complete and sufficient answer thereto and have such other relief in the premises as to the Court may seem proper.

LATHROP, MORROW, FOX & MOORE,
Solicitors for Complainants.

Service of a copy hereof is hereby acknowledged, this 31st day of Dec. 1901.

TRIMBLE & BRALEY &
FRANCIS M. BLACK,
Solicitors for Defendants Guardian Trust Co. & Francis M. Black, Its Receiver.

Afterwards, to-wit, on the 9th day of April, 1902, a Replication was filed in cause #2616 to Answer of Guardian Trust Company et al. Said Replication is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

187 STUART R. KNOTT and EDWARD F. SWINNEY, Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY and FRANCIS M. Black, Its Receiver; Missouri Elevator & Terminal Company and Wash Adams, Its Receiver; Central Improvement Company and Wash Adams, Its Receiver; Second Street Improvement Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

Replication to Answer of Guardian Trust Company and Francis M. Black, Its Receiver.

These replicants Stuart R. Knott and Edward F. Swinney, as Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, saving and reserving to themselves all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of Guardian Trust Company and Francis M. Black, its receiver, for replication thereunto say, that they do and will aver, maintain and prove their said ancillary bill to be true, certain and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive and insufficient in law to be replied unto by these replicants; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these replicants are ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly pray as in and by their said ancillary bill they have already prayed.

LATHROP, MORROW, FOX & MOORE,
Solicitors for Complainants in Ancillary Bill

Afterwards, to-wit, on the 1st day of April, 1902, an Order was filed and entered of record in Ancillary Cause #2616 wherein Stuart R. Knott, and Edward F. Swinney, Receivers, et al., are Complainants and the Cambria Steel Company, et al., are defendants. Said Order is in words and figures as follows:

188 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

CAMBRIA STEEL COMPANY, Complainant,
vs.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY et al., Defendants.

STUART R. KNOTT et al., Receivers, Complainants,
vs.
CAMBRIA STEEL COMPANY et al., Defendants.

(Ancillary Bill.)

Order.

The exceptions filed by complainants in the ancillary bill to the answer of the Guardian Trust Company and F. M. Black, its receiver, having been heard by the court and submitted by the respective counsel, and the court being fully advised in the premises:

It is ordered that the first exception thereto be, and the same is hereby, sustained; and the second exception thereto is sustained as to the following portions of the answer, to-wit: "And stated that if it should file any such answer, the same will be collusive and fraudulent, for the purpose of carrying out the purposes of said suit in hindering, delaying and defrauding the creditors of the said Kansas City Suburban Belt Railroad Company."

It is further ordered by the court that the complainants in the ancillary bill have leave to file replication to the answer of the respective defendants thereto on or before the 9th day of April, 1902; and that thereupon the cause shall stand referred to Shannon C. Douglas as Special Master to take the proofs and report the same, with his conclusions thereon to this court, in connection with the issues in the original cause herein and matters heretofore referred to him in the original suit herein, at the earliest practical date.

(Signed) JOHN F. PHILIPS, *Judge.*

Afterwards, to-wit, on the 29th day of May, 1902, the Resignation of Wash Adams, Receiver of the Central Improvement Company and Missouri Elevator & Terminal Company was filed. Said Resignation is in words and figures as follows:

189 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

CAMBRIA STEEL CO.
vs.
KANAS CITY SUBURBAN RAILROAD Co et al.

To the Hon. Judges of the said Circuit Court:

I hereby resign the oflice of Receiver of the Central Improvement Co. & the Missouri, Elevator & Terminal Co. appointed in the above entitled cause.

WASH ADAMS.

The order accepting resignation of Wash Adams, Receiver of the Central Improvement Company & Missouri Elevator & Terminal Co. filed May 29, 1902, is in the words & figures following:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

CAMBRIA STEEL COMPANY, Complainant,
vs.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY et al., Defendants.

Order.

The resignation of Wash Adams, Esq., Receiver of the Central Improvement Company and the Missouri Elevator & Terminal Company, heretofore appointed, in the above entitled cause, having been this day tendered to this court, it is by the court accepted.

It is further ordered by the court that said Wash Adams, as such receiver, upon the appointment of his successor in office, turn over and deliver to him all property and assets of whatsoever kind and description which came into his possession as such receiver, not otherwise disposed of by him in the execution of his said office, and take said successor's receipt therefor, and file the same with the clerk of this court.

It is further ordered by the court that said Wash Adams, at the earliest date practicable, make and file with the clerk of this court his report giving an account of his administration as such receiver with such other facts as to him may seem pertinent.

(Signed) JNO. F. PHILIPS,
U. S. Dist. Judge.

Afterwards, to-wit, on the 27th day of June, 1902, the following Order was filed and entered of record:

190 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

CAMBRIA STEEL COMPANY, Complainant,
vs.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY et al., Defendants.

Order.

The receiver heretofore appointed in this cause, to-wit, on November 8th, 1900, of the Central Improvement Company having resigned his position as such on the 29th day of May, 1902, it is ordered and adjudged by the Court,

1st. That Thomas T. Crittenden, Sr., be and he is hereby appointed to fill said receivership vacancy of all and singular the property, assets, rights and franchises of said Central Improvement Company wheresoever situate.

2nd. That said receiver is hereby authorized and directed to take immediate possession of said property and all the proceeds thereof, if any, and under and subject to the direction of this court, to conduct the business of said company and manage the properties thereof; and under and subject to the direction of this court, to collect and receive the income from said properties and to institute and prosecute such suits as may be necessary for the proper protection of the property and trust hereby vested in said receiver, and likewise to defend all actions instituted against him as such receiver or such as may now be pending, if any, against said company affecting said property.

3rd. That said receiver shall pay out, of any moneys or funds which may come into his hands, any and all taxes, lawfully charged against said property, as the same shall become due, and the necessary current expenses for conducting said business.

4th. That the said receiver within five days from the date of this order, make and file with the clerk of this court a bond in the sum of one thousand dollars ($1,000.00) with sufficient surety or sureties, to be approved by the judge of this court, conditioned that said receiver shall well and truly perform the duties of said office, and account for all moneys and property that shall come into his hands and abide by and perform all things which in this decree he is directed to, or shall hereafter be directed to perform by this court.

5th. The court reserves the right and power to make any and all further decrees in this case that it may deem necessary to carry out the intent and purposes of this receivership.

191 & 192 6th. The said receiver shall file report in this court at least once in every sixty days of his administration of said property, which report, if not accepted to within thirty days after the filing thereof, shall stand confirmed, otherwise the exceptions,

which same are filed, shall stand referred to S. C. Douglass as special master.

(Signed) JNO. F. PHILIPS, *Judge.*

Afterwards, to-wit, on the 7th day of February, 1905, a Stipulation making Kansas City Southern Railway Company, a party to this cause was filed.

Said stipulation is in words and figures as follows:

In the Circuit Court of the United States Within and for the Western Division of the Western District of Missouri.

CAMBRIA STEEL COMPANY, Complainant,
vs.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY et al., Defendants.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY et al., Cross-complainants,
vs.
GUARDIAN TRUST COMPANY et al., Cross-defendants.

Stipulation.

It is agreed by the parties to the above entitled cause, by their respective counsel, that The Kansas City Southern Railway Company shall become a party to the action, either as a joint complainant, or by a bill of intervention, as it may elect; that it may file its bill of intervention, or otherwise assert its claim by becoming a party complainant on or before February 25, 1905, and the adverse party shall have ten (10) days hereafter in which to plead; that the testimony heretofore or hereafter taken in this cause, so far as applicable, may be considered as evidence in support of the claim or bill of The Kansas City Southern Railway Company and in support of the claim of the adversary parties; that such
193 orders of court as may be necessary for the purpose may be entered, carrying into effect this stipulation.

H. S. MECARTNEY,
J. C. ROSENBERGER,
For Guardian Trust Co.
S. W. MOORE,
For The Kansas City Southern Ry. Co.
FRANK HAGERMAN,
For Cambria Co.

Afterwards, to-wit, on the 27th day of February, 1905, the following Stipulation was filed:

In the Circuit Court of the United States within and for the Western Division of the Western District of Missouri.

CAMBRIA STEEL COMPANY, Complainant,
vs.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY et al., Defendants.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY et al., Cross-complainants,
vs.
GUARDIAN TRUST COMPANY et al., Cross-defendants.

Stipulation.

It is agreed by the parties to the above entitled cause, by their respective counsel, that The Kansas City Southern Railway Company shall become a party to the action, either as a joint complainant, or by a bill of intervention, as it may elect; that it may file its bill of intervention, or otherwise assert its claim by becoming a party complainant on or before Febuary 25, 1905, and the adverse party shall have ten (10) days thereafter in which to plead; that the testimony heretofore or hereafter taken in this cause, so far as applicable, may be considered as evidence in support of the claim or bill of The Kansas City Southern Railway Company and in support of the claim of the adversary parties; that such orders of court as may be necessary for the purpose may be entered, carrying into effect this stipulation.

H. S. MECARTNEY &
J. C. ROSENBERGER,
For Guardian Trust Co.

Time for filing pleading or bill of the Kansas City Southern Railway Company extended to on or before Feb. 27th, 1905.

——— ———,
Attys. for Guardian Trust Co.

194 Time for Kansas City Southern Railway Co. to file its bill of intervention or bill to otherwise assert its claim in this cause is hereby extended from Feby. 25, 1905 to Feby. 27, 1905.
Dated this Feby. 24, 1905.

H. S. MECARTNEY,
J. C. ROSENBERGER,
Solicitors for Guardian Trust Co.

Afterwards, to-wit, on the 27th day of February, 1905, the following Order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2468. In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERMINAL Railroad Company, Kansas City & Independent Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Order.

In accordance with the stipulation herein filed it is ordered that The Kansas City Southern Railway Company shall become a party to the action and that leave to it is hereby granted to file its intervening petition, and that the adverse party shall have ten days in which to plead to the same; and that the issues so made shall stand referred to Honorable Shannon C. Douglass, Special Master, to take the testimony thereon and make report with all convenient speed.

(Signed) CHARLES F. AMIDON, *Judge.*

Afterwards, to-wit, on the 27th day of February A. D. 1905, the Kansas City Southern Railway Company filed its intervening petition herein.

Said intervening petition is in words and figures, as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2468. In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERMINAL Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

195 *Intervening Petition of the Kansas City Southern Railway Company.*

To the Judges of the Circuit Court of the United States for the Western Division of the Western District of Missouri:

The Intervenor, the Kansas City Southern Railway Company, respectfully shows:

1. The intervenor is a corporation duly organized and existing under the laws of the State of Missouri as a railway corporation, having been duly incorporated according to law in March, 1900.

2. That the Kansas City Suburban Belt Railroad Company, one of the defendants herein, being a railroad corporation duly organized and existing under the laws of the State of Missouri, and being about to construct and equip a line of railroad in Jackson County, Missouri, did, on or about May 1, 1890, execute and deliver its deed of trust to the Missouri, Kansas & Texas Trust Company (now by change of name called the Guardian Trust Company, one of the defendants herein) as Trustee, in which said mortgage or deed of trust it is recited that the said mortgage or deed of trust shall be a first mortgage and paramount lien upon said railroad and upon all the property and rights of property of the railroad company of every name, nature and description then held or that might be thereafter acquired including all the privileges and franchises thereto appertaining; that in and by said mortgage or deed of trust there was conveyed to said trustee to secure an issue of the first mortgage bonds of said railroad company in the principal sum of One Million Dollars ($1,000,000.00) all and singular the double track standard gauge railroad of the company (meaning thereby the Kansas City Suburban Belt Railroad Company) constructed and to be constructed from a point at the intersection of Second and Broadway Streets in Kansas City in Jackson County, Missouri; thence in an easterly direction on and along said Second Street to its point of intersection with Harrison Street in said city; thence in a north-easterly direction to a point near Randolph Avenue in said city; thence east for a distance of about one and one-half miles; thence in a southeasterly and southerly direction to the southern limits of said city; thence in a general southwesterly direction to a point at or near the mouth of Brush Creek in said county of Jackson, being about twelve (12) miles of double track railroad, about ten (10) miles of which are within the corporate limits of Kansas City; also all the lands, tenements, easements and hereditaments acquired or appropriated or which shall be thereafter acquired or appropriated for the purpose of a right of way for said rail-
196 road or for its tracks or switches; also all railroad tracks, railways and rights of way, depot grounds, station grounds and other structures, depots, station houses, engine houses, car houses, fuel houses, warehouses, machine shops and other shops, water tanks, turn tables, superstructures, erections, fixtures, rolling stock, furniture, fuel, tools, implements, machinery, *machinery* and appliances and other facilities for maintaining and operating said railroad, as well such as are then owned and held by the company as also such as the company might thereafter construct or acquire for use in connection with its said railroad; also all the terminals, terminal rights, privileges, contracts, leases, connections and appliances which the company then owned and held and which it might thereafter own and hold for use in connection with its said railroad; also all of certain described lots, tracts and parcels of land situated in Kansas City in the County of Jackson, State of Missouri, more specifically

described in said mortgage or deed of trust; also all and singular the rents, tolls, income, issues and profits of the said railroad, premises and property; and also all the estate, right, title and interest, legal and equitable and present and future of the company in and to the same and every part thereof; and also all the corporate and other rights, privileges, liberties and franchises of the company connected with or pertaining to the said railroad or the construction, acquisition, maintenance or use thereof as well *as* those thereafter to be acquired as those then held.

That default was made in the payments required by the terms of said mortgage or deed of trust and, on September 6, 1900, proceedings were instituted for the foreclosure of said mortgage or deed of trust in the circuit court of the United States for the western division of the western district of Missouri; that the defendant Guardian Trust Company was a party to said proceedings.

The intervenor further states that the Kansas City & Independence Air Line, one of the defendants herein, being a railroad corporation duly organized and existing under the laws of the State of Missouri and being about to construct and equip a line of railroad in Jackson County, Missouri, did, on or about March 1, 1892, execute and deliver its deed of trust to the Missouri, Kansas & Texas Trust Company (now by change of name called the Guardian Trust Company, one of the defendants herein) as Trustee, in which said mortgage or deed of trust it is recited that the said mortgage or deed

of trust shall be a first mortgage and paramount lien upon
197 the railroad of said company and upon all its property and rights of property of every name, nature and description then

held or that might thereafter be acquired, including all the privileges and franchises thereto appertaining; that in and by said mortgage or deed of trust there was conveyed to said trustee to secure an issue of the first mortgage bonds of said railroad company in the principal sum of Three Hundred Thousand Dollars ($300,000.00), all and singular the standard gauge railroad of the company (meaning the Kansas City & Independence Air Line) constructed and to be constructed from a point on the line of the Kansas City Suburban Belt railroad at or near the southeast corner of section twenty-five (25) township fifty (50), Range Thirty — (33) west, in Jackson County, Missouri; thence in a general easterly direction to the city of Independence in said County of Jackson, in the State of Missouri, being about six (6) miles of standard gauge railroad and lying wholly within the said county of Jackson and State of Missouri; also all the lands, tenements, easements and hereditaments acquired or appropriated, for the purpose of a right of way for said railroad or for its side tracks or switches; also all railroad tracks, railways, ways and rights of way, depot ground, station grounds and other grounds, bridges, viaducts, culverts and other structures, depots, station houses, engine houses, car houses, fuel houses, warehouses, machine shops and other shops, water tanks, turn-tables, superstructures, erections, fixtures rolling stock, furniture, fuel, tools, implements, machinery and appliances and other facilities for maintaining and operating said railroad, as well such as the company

then owned or held as also such as the company thereafter may construct or acquire and own for use in connection with its said railroad; also all the terminals, terminal rights, privileges, contracts, leases, connections and appliances which the company then owned and held and which it might thereafter hold and own for use in connection with its said railroad; also all and singular the rents, tolls, income, issues and profits — the said railroad, premises and property; and also all the estate, right, title and interest, legal and equitable and present and future of the company in and to the same and every part thereof; and also all the corporate and other rights, privileges, liberties and franchises of the company connected with or pertaining to the said railroad or the construction, acquisition, maintenance or use thereof as well those thereafter to be acquired as those then held; that default was made in the payments required by said mortgage or deed of trust and on September 6, 1900, proceedings were instituted for the foreclosure of the said mortgage or deed of trust in the Circuit Court of the United States within and for the western division of the western district
198 of Missouri; that the defendant Guardian Trust Company was a party to said proceedings.

That such proceedings were held in the two foreclosure suits above mentioned that the said causes were consolidated, and upon the 6th day of November, 1901, there was entered by said court a final decree of foreclosure and sale adjudging and decreeing that default had been made in the payment of the principal and interest upon the bonds secured by the mortgages aforesaid and that the railroads, properties and franchises embraced in each of said mortgages should be sold as in and by the said decree provided, reference being hereby made thereto and to the record in said causes; that pursuant to said decree a commissioner was appointed to make said sale and the said commissioner did on December 31, 1901, at the place in the said decree specified duly sell at public auction to the intervenor, The Kaias City Southern Railway Company, it being the highest and best bidder at said sale, all and singular the railroads, property and franchises in said decree mentioned and directed to be sold and in said mortgages described as heretofore set forth, due notice of the time and place of said sales having been published pursuant to said decree, and the said decree was complied with in all things relating to said sales; that said commissioner did duly make and file his report of said sales on December 31, 1901, in the above entitled causes and court, which said report and sales were, after notice given, duly confirmed and made absolute, and the said commissioner did thereafter as directed by said court and on or about January 4, 1902, duly convey by commissioner's deed all and singular the railroads, franchises and property of every kind and description theretofore belonging to the said railroad companies and set forth and described in said mortgages including the property held by the said companies respectively at the date of said mortgages and also the property thereafter acquired by them and each of them, to your intervenor, The Kansas City Southern Railway Company, which is now the lawful owner thereof.

3. Your Intervenor further shows that the Union Terminal Railroad Company, one of the defendants herein, being a railroad corporation duly organized and existing under the laws of the State of Kansas, and being about to construct and equip a line of railroad in Wyandotte County, in the State of Kansas, did, on or about February 1, 1893, execute and deliver its deed of trust to the Missouri, Kansas & Texas Trust Company, (now by change of name called the Guardian Trust Company, one of the defendants herein) and the Provident Life & Trust Company of Philadelphia, as
199 Trustees, in which said mortgage or deed of trust it was recited that said mortgage or deed of trust should be a lien upon the railroad of said company and upon all the property and rights of property of the said company of every name, nature and description then held or that might thereafter be acquired including all the privileges and franchises thereto appertaining; that in and by said mortgage or deed of trust there was conveyed to the said trustees all and singular the standard gauge railroad of the said Union Terminal Company constructed and to be constructed from a point in the City of Argentine, in the County of Wyandotte, in the State of Kansas, to a point on the north side of the Kansas River opposite the said city of Argentine; thence in a northwesterly direction by the most convenient and practical route, to a point at or near the Missouri River; thence along and down the valley of the Missouri and up the valley of the Kansas river to the place of beginning, so as to substantially encircle the city of Kansas City, Kansas, in said County of Wyandotte; also such branch or branches and spur or spurs as may be necessary to enable it to connect with the Kansas City Suburban Belt Railroad Company's railway at the state line between Missouri and Kansas where the said railway intersects said state line on or near the south bank of the Missouri river; the main line of the railway of the Union Terminal Railroad Company being about twenty-two miles in length and lying wholly within the said County of Wyandotte and State of Kansas; also all the lands, tenements, easements and hereditaments acquired or appropriated, for the purpose of a right of way for said railroad, or for its side tracks or switches; also all railroad tracks, railways, ways and rights of way, depot grounds, station grounds, and other grounds, bridges, viaducts, culverts, and other structures, depots, station houses, engine houses, car houses, fuel houses, warehouses, machine shops and other shops, water tanks, ties, rails, furniture, fuel, tools, implements, machinery supplies and appliances, and other facilities for maintaining and operating said railroad, as well such as were then owned or held by the company as also such as the company might thereafter construct or acquire and own for use in connection with its said railroad, and also the terminal, terminal rights, privileges, contracts, leases and connections and appliances which the company then owned and held and which it should thereafter own and hold for use in connection with its said railroad; also all and singular the rents, tolls, income, issues and profits of the said railroad, premises and property; and also all the estate, legal and equitable and present and future of the company in and to the same and every part

thereof; and also all the corporate and other rights, privileges,
200 liberties and franchises of the company connected with or pertaining to the said railroad or the construction, acquisition, maintenance or use thereof, as well those thereafter to be acquired as those then held; that default was made in the payments required by the terms of said mortgage or deed of trust and on September 6, 1900, proceedings were instituted for the foreclosure of said mortgage and deed of trust in the circuit court of the United States for the district of Kansas, first division; that such proceedings were had in said foreclosure suit; that upon the 6th day of November, 1901, there was entered by the said court a decree of foreclosure and sale, adjudging and decreeing that default had been made in the payment of the principal and interest upon the bonds secured by the mortgage aforesaid and that the railroad properties and franchises embraced in said mortgage should be sold as in and by the said decree provided, reference being hereby made thereto and to the record in said cause; that pursuant to said decree a commissioner was appointed by the court to make said sale, and the said commisioner did, on December 31, 1901, at the place in the said decree specified, dûly sell at public auction to the intervenor, The Kansas City Southern Railway Company, it being the highest and best bidder at such sale, all and singular the railroad property and franchises in said decree mentioned and directed to be sold, including all property held by the said railroad company at the time of the execution of said mortgage, as well as property thereafter acquired and held as provided in said mortgage or deed of trust, due notice of the time and place of said sale having been published pursuant to said decree, and the said decree was complied with in all things relating to said sale; that said commissioner did duly make and file his report of said sale on December 31, 1901, in the above entitled cause and court, which said report and sale were, after notice given, duly confirmed and made absolute; and the said commissioner did thereupon and on the 4th day of January, 1902, as directed by said court, duly convey by commissioner's deed all and singular the railroad, franchises and property of every kind and description theretofore belonging to said company at the time of the execution of said mortgage or deed of trust, and also all property therein described thereafter acquired by said company, to your intervenor, The Kansas City Southern Railway Company, which is now the lawful owner thereof.

4. Your intervenor further states that the Kansas City, Pittsburg & Gulf Railroad Company, being a railroad corporation duly organized and existing under the laws of the State of Missouri, and being engaged in the construction of a line of railroad from a point
201 near Kansas City, Missouri, southwardly to the Gulf of Mexico, did on or about April 1, 1893, execute and deliver its deed of trust to the Missouri, Kansas & Texas Trust Company (now by change of name called the Guardian Trust Company, one of the defendants herein) and the State Trust Company of the City of New York, as Trustees, in and by which said mortgage or deed of trust there is conveyed to the trustees therein named all and singular the line of railroad constructed or thereafter constructed or acquired

from Kansas City in the State of Missouri, southerly through the counties of Jackson, Cass, Bates and Vernon, and the northwest corner of Barton County, in said State of Missouri to the western line of Barton County in said State of Missouri, and so on to the city of Mena in the State of Arkansas; and all and singular the railroad, ways and rights of way, roadbeds, depot grounds and other lands and all tracks, bridges, viaducts, culverts, fences, depots, stations, station houses, engine houses, car houses, freight houses, wood houses, locomotive shops and other shops, and all other structures and buildings whatsover then held or owned or which should be thereafter in anywise acquired, held or owned by the said railroad company for use in the construction,, maintenance or operation of its line of railroad or any extension, continuation, branch railroad or lines of railroad which it might thereafter purchase, construct or acquire in connection with its main line of railroad; also all locomotives, tenders and passenger, baggage, freight, cattle and other cars, and all other rolling stock and equipment whatsover, and all machinery, tools and implements and all fuel, supplies and materials then or thereafter held, owned or acquired by said railroad company for constructing, maintaining, operating and repairing its said railroad or any extension or branch thereof; also all rights, privileges, powers, immunities and exemptions and all corporate and other franchises then owned, held and enjoyed by the said railroad company with respect to said main line or any part thereof or which should be thereafter owned, acquired, held or enjoyed by or conferred upon said railroad company connected with or relating to the said main line of railroad, its extensions, continuations and branches; also all leases, traffic contracts and arrangements of every kind and character whatsoever which said railroad company had or might thereafter enter into with any other railroad company forming part of the said line; also all and singular any tenements, hereditaments and appurtenances to said railroad or lines of railroad and each and every part thereof acquired and to be acquired, constructed, and to be constructed, then or thereafter belonging or in any wise appertaining; and all the reversion and reversions remainder and remainders, estate, right, title, interest, prop-
202 erty, possession, claim and demand whatsoever, as well in law as in equity which the said railroad company then had or was entitled to or which the said railroad company, its successors or assigns should thereafter acquire or become entitled to concerning the said railroad or any extension, continuation or branch thereof or their rights, franchises and each and every part and parcel thereof with the appurtenances. Said mortgage or deed of trust was executed and delivered to said trustees to secure an issue of the first mortgage bonds of said railroad company in the principal sum of Twenty-three Million Dollars ($23,000,000.00); that default was made in the payments required by the terms of said mortgage or deed of trust, and on April 28, 1899, proceedings were instituted in the Circuit Court of the United States for the western division of the western district of Missouri for the foreclosure of the said mortgage or deed of trust; that such proceedings were had in

said action that on the 5th day of January, 1900, there was entered by said court a decree of foreclosure and sale adjudging and decreeing that default had been made in the payments of the principal and interest upon the bonds secured by the mortgage or deed of trust aforesaid; and that the railroads, properties and franchises embraced in said mortgage should be sold as in and by the said decree provided, reference being hereby made thereto and the record in said cause; that pursuant to said decree a special master was appointed to make said sale and the said special master did, on March 19, 1900, at the place in said decree specified duly sell to a committee acting for your intervenor, the said committee being the highest and best bidder at said sale, all and singular the railroads, property and franchises in said decree mentioned, including the properties owned and acquired at the time of the execution of said mortgage or deed of trust as well as those thereafter acquired for use in connection with its said railroad, and directed to be sold, due notice of the time and place of said sale having been published pursuant to said decree and sale, and said decree was complied with in all things relating to said sale; that your intervenor by leave and order of court became the substitute bidder in the place of said committee; that said special master did duly make and file his report of said sale on March 20, 1900, in the above entitled cause, which said report and sale were, after notice given, duly confirmed and made absolute, and the said special master did thereupon, as directed by said court, duly convey by master's deed all and singular the railroad, franchises and property of every kind and description belonging to the said railroad company, including not only the properties described in said mortgage or deed of trust as then owned and held by the said railroad company but also the properties thereafter acquired for use in connection with the operation of
203 said railroad, to your intervenor, The Kansas City Southern Railway Company, which is now the lawful owner thereof.

The mortgages or deeds of trust mentioned in the foregoing paragraphs are all duly and properly acknowledged and duly and properly recorded in the various counties in which the properties mentioned therein were respectively located at or about the dates of said mortgages or deeds of trust respectively.

5. The intervenor further shows that, about the year 1887, the defendant Guardian Trust Company, hereinafter called the Trust Company, conceived and entered upon the plan and purpose to cause to be constructed a number of railroads in and about Kansas City in the State of Missouri, and Kansas City in the State of Kansas, and leading from or to said city; it was a part of the said plan and purpose of the Trust Company to cause said railroads to be built, constructed and operated by various corporations to be organized by the Trust Company and to elect certain of the officers, agents and representatives of the said Trust Company as the officers and directors of the said several railroad companies so as to at all times *to* absolutely dominate and control the corporate action of the said railroad companies through their common directors and officers; it was a further part of the plans and purposes of the Trust

Company to utilize and employ some one or more of the said railroad companies to act for and on behalf of the Trust Company in building and operating railroads and in the issue of bonds and stocks so as to gather unto the Trust Company all the profits and other advantages accruing in the premises to foist upon the said railroad companies so utilized any and all losses, burdens or other liabilities which might result in the course of their operation; in carrying out its said plans and purposes the Trust Company assumed the position of trustee and agent in constructing and operating said railroad and in managing and disposing of the bonds, stocks, funds and other assets of the said railroad companies and is held to the liability of trustee or agent for the use and benefit of the parties who might and did become concerned or interested therein; and that consequently the relation of the Trust Company to each and all of the said railroad companies and especially those hereafter named so far as the said Trust Company might employ the same, or either of them, as agents and instrumentalities to further its own plans and purposes, was that of a principal bound and charged with the duty to i-demnify and protect such railroad company so employed and utilized in any particular transaction against any and all losses, burdens and liability arising in the premises;

204 moreover the Trust Company was either the sole trustee in the mortgages above mentioned, or when joined as co-trustee with the Provident Life & Trust Company was the active trustee in the charge and management of the trust created by the several mortgages or deeds of trust above described, and as such trustee owed an active duty at all times during the continuance of such relation, to care for and in every way protect the interest of the bondholders secured by said mortgages, as well as to care and protect the interests of the mortgagors themselves; the Trust Company in pursuance of the plans and purposes so conceived and entered upon by it, did acquire the control of the Kansas City Suburban Railroad Company, hereinafter called the Suburban Company, in the year 1899, and caused it to issue the bonds secured by the mortgage afore-said and to issue capital stock in a large amount and to cause said company to construct and thereafter to operate a railroad in Jackson County, Missouri, as described in the mortgage or deed of trust of said company heretofore set forth; the Trust Company, in pursuance of the same plan, did, in 1891, cause to be incorporated the Consolidated Terminal Railroad Company (hereinafter called the Consolidated Company) and did cause said Consolidated Company to issue bonds and a mortgage or deed of trust to secure the same, and to issue its capital stock in a large amount, and to construct a railroad in Kansas City, Jackson County, Missouri, connecting with the railroad of the Suburban Company, the two roads forming a continuous line of railroad from the state line between the states of Kansas and Missouri at a point in the eastern portion of Jackson County known as Belt Junction; that in December, 1891, the Trust Company caused to be incorporated under the laws of the State of Kansas the Union Terminal Railroad Company (hereinafter called the Terminal Company) and did cause it to issue and execute the bonds

and mortgage or deed of trust above referred to and issue capital stock in a large amount and did further cause it to construct a railroad beginning at the state line between the states of Kansas and Missouri and extending southwesterly along the left bank of the Kaw, or Kansas, river to a point at or near the town of Argentine, Wyandotte County, Kansas; in Januray, 1891, the Trust Company caused to be incorporated under the laws of the State of Missouri, the Kansas City & Independence Air Line (hereinafter referred to as the Air Line) and did cause the Air Line to issue and execute the bonds and mortgage above referred to and issue stock in a large amount and to construct and operate a railroad in Jackson County, Missouri, extending from a point on the line of the Suburban Company known as Air Line Junction to the City of Independence
205 in the State of Missouri. Shortly after the issue of the bonds and stocks of the Consolidated Company the Trust Company caused it to Consolidate with the Suburban Company forming a new company called the Kansas City Suburban Belt Railroad Company (hereinafter referred to as the Belt Company); that the Trust Company caused the Terminal Company to execute a lease of all its property, rights and franchises to the Belt Company and thereunder the Belt Company operated the line of the Terminal Company and its own line and continued so to operate the same until the institution of the foreclosure proceedings above referred to; the Trust Company, by virtue of its ownership and control of the capital stock of the Belt Company, Air Line and Terminal Company, did, at all times, cause its officers and directors to be elected as the officers and directors of said lines, and did thereby dominate and control all the affairs and business of said lines and caused them and each of them to do and perform all such corporate acts and things as the Trust Company from time to time deemed to be beneficial to its own interests; that the Trust Company in the year 1893 caused to be incorporated the Kansas City, Pittsburg & Gulf Railroad Company, hereinafter called the Gulf Company, and caused it to issue and execute the bonds and mortgage or deed of trust above referred to and issue stock in a large amount. The Trust Company also caused the Gulf Company to construct and operate a railroad extending generally from a point near Kansas City, Jackson County, Missouri, to the Gulf of Mexico and did cause the Gulf Company to enter into contracts with the Belt Company for the use of the latter's terminals at Kansas City; the Trust Company also caused its officers and directors to be elected officers and directors of the Gulf Company and at all times by that means did dominate and control the affairs of the Gulf Company and did cause it to perform such corporate acts and things as the Trust Company deemed to be for its benefit and advantage; that by reason of such domination and control of the Trust Company at all times had a complete and intimate knowledge of all the affairs and transactions of all the companies above referred to in all their details, including the transactions hereinafter specifically mentioned.

6. Your intervenor further shows that in the year 1895, the Trust Company caused to be incorporated under the laws of the

State of Missouri the Central Improvement Company (hereinafter called the Central Company) the directors and officers of which were at all times made up from the directors and officers of the Trust Company, and the Central Company was at all times in all of its transactions dominated and controlled by the Trust Company;

206 the purposes of the incorporation of the said Central Company were to hold the legal title to real estate that might be needed and acquired for right of way or other purposes necessary for and in connection with the operation of the various railroad companies so dominated and controlled by the Trust Company, in some instances the purpose being that upon the purchase of property by one of the said railway companies the title should be taken in the name of the Central Company in order that it might be enabled to give back a mortgage or deed of trust to secure a portion of the purchase money, which said mortgage or deed of trust would be a first lien and not subject to the first mortgage or deed of trust lien upon the property of the railway companies respectively. In pursuance of this plan large amounts of money were furnished to the Central Company by the Belt Company, by the Air Line and by the Gulf Company for the purchase of right of way and terminal properties necessary for the use and operation of the said railways respectively, and purchases were accordingly made of properties for the use and operation of said companies, a list of which properties so purchased is hereto attached, marked "Exhibit A"; this statement shows the price paid for each particular piece of property and for which particular railroad company the said property was acquired, and by which company the purchase price was paid; that the titles to said property so acquired were, for convenience merely, placed in the name of the said Central Company; in some instances the money so furnished to pay for such properties was furnished directly by the Belt Company or other companies for whose benefit the purchase was made to the vendors and in other instances the money was furnished direct to the Central Company, which issued to the company so furnishing such funds its capital stock representing approximately the amount of money so furnished. That in this way there were issued by the Central Improvement Company fourteen hundred and seven (1407) shares, of which eight hundred and seventeen shares (817) are now held by the Belt Company, three hundred and thirty four (334) shares are now held by the Union Terminal Company, twenty-two (22) shares are now held by the Air Line and two hundred and thirty four (234) shares are now held by the Gulf Company, such companies having furnished form time to time for the purchase of property for the use and benefit of such companies the following amounts:

Belt Company	$129,673.96
Air Line	16,104.41
Gulf Company	23,673.89

that no money was ever received by the Central Company except the money so furnished as aforesaid, and it did not have at any time any assets or property except property so purchased as aforesaid;

that the said fourteen hundred and seven (1407) shares of
207 stock were the only shares of stock ever lawfully issued by the Central Company; and by reason of the premises the said Central Company is, and was at all times, a mere trustee holding the legal title to the various properties, in trust, for the said railways, for whose use and benefit said lands were purchased as aforesaid; immediately upon the making of such purchases and the vesting of title in the Central Company the particular railroad company for which such purchase was made became the equitable owner and entitled to a conveyance thereof; the said properties so purchased for the said railroad companies and to which the said railroad companies respectively were entitled to a conveyance were necessary for the use of such railroad company in connection with and in the operation of its railroad and came within the after acquired property clause of the mortgage placed upon said road, so that the equitable liens of said mortgages respectively attached to and became a charge upon the said properties in favor of their bondholders respectively; that sales of some of said properties have been made by the Central Company and by its receiver acting under order of this court and the proceeds thereof are now in the possession of said receiver. By the foreclosure proceedings above mentioned and decrees of sale had thereunder the intervenor acquired the equitable title to all of said properties so held by the Central Company, as aforesaid, and became and is now entitled to a conveyance of the same and to the proceeds of sales thereof now held by the said receiver, but the Trust Company denies the right of the intervenor to said property or to the stock of the Central Company, and pretends to hold the said stock of the Central Company as collateral security to an alleged indebtedness from the Belt Company to it, as hereinafter more specifically set forth.

7. Your intervenor further shows that, prior to February 1, 1900, the Belt Company purchased and owned a large quantity of steel rails for use in the construction and repair of its railroad and in connection therewith; there were in the possession of the Belt Company on February 1, 1900, and prior thereto, approximately six hundred (600) tons more or less of said steel rails so owned by the Belt Company and approximately twenty tons of fastenings for use in connection therewith; by virtue of the after acquired property clause above referred to in the mortgage of the Belt Company, the said steel rails and fastenings became charged with a lien to secure the payment of the bonds so issued by the Belt Company, as aforesaid, upon the foreclosure of the said mortgage of the Belt Company and the sale had thereunder the equitable title to said rails passed
to and vested in the intervenor, The Kansas City Southern
208 Railway Company, and it became and is now the equitable owner thereof; the Trust Company claims to have acquired said steel rails and fastenings on or about February 1, 1900, as collateral security to an alleged indebtedness from the Belt Company to it and the Trust Company denies the right and claim of your intervenor to said steel rails and fastenings, although it received the same with actual notice of the mortgage lien thereon, the value

of said steel rails and fastenings was and is thirty five dollars ($35.-00) per ton and the Trust Company should be required in equity to deliver said property to your intervenor, or if the said property has been sold by the Trust Company then it should be required to account for and pay to your intervenor the proceeds or full value thereof.

8. Your intervenor further states that the railroad of the Terminal Company was a connecting railroad with the line of the Belt Company the two railroads forming a continuous line of railroad and the Belt Company was, therefore, authorized by law to aid the Terminal Company in the construction of its road and to acquire the stock of the Terminal Company in the lawful execution of the corporate purposes of the Belt Company did acquire five thousand (5,000) shares of the capital stock of the Terminal Company and held said stock for the uses and purposes of its railroad as by law duly authorized to do; by virtue of the after acquired property clause in the mortgage executed by the Belt Company as above set forth, the lien of said mortgage in equity attached to said five thousand (5,000) shares of Terminal stock when so acquired by the Belt Company and inured to the benefit of the bondholders of the Belt Company as the Trust Company well knew. The Trust Company acquired possession of said Five Thousand (5,000) shares of Union Terminal stock so covered by said mortgage lien as aforesaid, and claims to hold the same as collateral security for an alleged indebtedness from the Belt Company to it, and denies the right of your intervenor to said stock or to the proceeds thereof. On or about June 14, 1900, the Trust Company claims to have sold said five thousand (5,000) shares of Terminal stock at and for the sum of twenty-five thousand ($25,000.00) dollars which sum was the fair value thereof at that time. By virtue of the said mortgage of the Belt Company and the foreclosure proceedings and sale thereunder your intervenor became entitled in equity to said five thousand (5,000) shares of Terminal stock, or twenty-five thousand dollars ($25,000.00), the value or proceeds thereof, together with interest thereon at six per cent per annum from said June 14th, 1900, which the Trust Company unlawfully withholds from the intervenor.

209 The Air Line owned and operated a railroad connecting with the railroad from the Belt Line, as hereinbefore stated, and the two formed a continuous line of railroad, and the Belt Company thereby, by virtue of the Statutes of the State of Missouri, became entitled to aid the Air Line in the construction of its road and to purchase and hold the capital stock of the Air Line; prior to June 11, 1900, the Belt Line had acquired and owned 4,994 shares of the capital stock of the Air Line; the Belt Line also at the same time had acquired as aforesaid and held 14,997 shares of the Terminal stock in addition to the five thousand shares above mentioned, that the said Terminal stock and the said Air Line stock were acquired by the Trust Company claiming to hold the same as collateral security to an alleged indebtedness from the Belt Line to it but the said stocks had been acquired by the Belt Company prior thereto and were covered by the after acquired property clause in

the mortgage of the Belt Company, as the Trust Company well knew, to secure the bonds of the Belt Company; and upon the foreclosure of said mortgage of the Belt Company and the sale thereunder to your intervenor the latter acquired the equitable title to said stock or to the value or proceeds thereof; the Trust Company claims that it did, on or about June 11, 1900, sell said 14,997 shares of Terminal stock and 4,994 shares of the Air Line stock at the sum or price of $9,996.65; and it holds the said stocks or the proceeds thereof and denies the right of your intervenor thereto; that your intervenor in equity is entitled to said stock or, if the same has been sold by the Trust Company, to have the Trust Company account to it for the value or the proceeds thereof together with interest thereon from June 11, 1900, at six per cent.

9. Your intervenor states that in the year 1896, the Trust Company caused to be incorporated a railroad corporation under the laws of the State of Missouri, called the Kansas City Northern Connecting Railroad Company (hereinafter called the Connecting Company) for the purpose of constructing a line of railroad from Kansas City, Missouri, to Pattonsburg, Missouri, in order to connect with the railroads at that point running eastwardly to Quincy, Illinois, and northwardly to Council Bluffs, Iowa. The Trust Company, after the incorporation of said railway company, caused it to execute its bonds, secured by mortgage or deed of trust, in a large amount and to issue its capital stock in a large amount, and thereupon caused the Connecting Company and the Belt Company to enter into a contract, by the terms of which the Belt Company undertook to acquire the right of way and to construct the railroad of the Connecting Company, and as a consideration thereof, the
Connecting Company agreed to execute, issue and deliver
210 to the Belt Company the bonds and stocks of the Connecting
Company; that the proposed line of the Connecting Company formed a direct connection with the line of the Belt Company and the two lines formed a continuous line of railroad; in pursuance of said contract the Belt Company began the construction of the railroad of the Connecting Company and the acquisition of its right of way, and received as a consideration for so doing, a large amount of the first mortgage bonds and of the capital stock of the Connecting Company and held and owned a large amount in value of said stock and bonds, for use in connection with the operation of its railroad on and prior to July 20, 1899; that at various dates the Trust Company took and converted to its own use eleven hundred and thirty (1130) of the first mortgage bonds of the Connecting Company which at that time belonged to the Belt Company and were of the value of eight hundred forty five thousand four hundred and fifteen dollars ($845,415.00); that at the same time the Trust Company took and converted to its own use sixteen (16) of the second mortgage bonds of the Connecting line which were at that time owned by the Belt Company, of the value of seven thousand two hundred dollars ($7,200.00); that at the same time the Trust Company took and converted to its own use six thousand two hundred and fifty (6250) shares of the capital stock of the Con-

necting Company, which were the property of the Belt Company of the value of thirty-seven thousand five hundred dollars ($37,500.00). On or about July 20, 1899, the Trust Company took from the Belt Company four hundred and fourteen (414) mortgage bonds of the Connecting Company and three thousand nine hundred and twenty (3920) shares of the stock of the Connecting Company, which were at that time the property of the Belt Company, and claimed to hold the same as collateral security for an alleged indebtedness from the Belt Company to it. All of said bonds and stocks came under the after acquired property clause of the mortgage or deed of trust executed by the Belt Company and were charged with an equitable lien to secure the bonds of the Belt Company, as the Trust Company at all times well knew. By the foreclosure proceedings and sale to your intervenor as above referred to the equitable title to said stocks and bonds or to the proceeds thereof, when they had been sold by the Trust Company, vested in your intervenor, which is now in equity the owner thereof. On or about September 30, 1899, the Trust Company claims to have sold said 3920 shares of Northern Connecting stock and to have received therefor the sum of Nineteen thousand eight hundred and eighty-five and 71/100 Dollars ($19,885.71); the Trust Company denies the right
211 of your intervenor to said bonds and stocks, or the value or proceeds thereof, but claims that it has since the acquisition thereof sold all of said first mortgage bonds, including those above referred to as collateral, and to have received therefrom the proceeds thereof in the sum of Nine Hundred Ninety-five Thousand four hundred fifteen Dollars ($995,415.00) and your intervenor is entitled in equity and good conscience to have the proceeds of all of said stocks and bonds above mentioned accounted for and paid to it.

10. Your intervenor further shows that in the month of ——— 1896, the Trust Company caused the Belt Company to enter into a terminal contract with the Gulf Company, by the terms of which the Belt Company gave to the Gulf Company an entrance into Kansas City and certain valuable terminal rights and facilities; and the Gulf Company on its part undertook and agreed to pay to the Belt Company certain sums of money as rental for the rights and privileges granted to it in said contract; both parties entered upon the performance of said contract and continued so to do until April 1, 1899, when receivers for the Gulf Company were appointed by the Circuit Court of Jackson County, Missouri. At the time of the appointment of said receivers there was due to the Belt Company from the Gulf Company under and by virtue of the terms of said terminal contract a large sum claimed by the Trust Company to be in excess of One Hundred Thirty Three Thousand Dollars ($133,000.00). That said terminal contract, by virtue of the provisions of the after acquired property clause in the mortgage of the Belt Company heretofore set forth became charged in equity with the mortgage lien to secure the bonds issued by said company, and the rents, issues and profits at that time due the Belt Company under said contract also became

charged in equity with the mortgage lien of the Belt Company to secure said bonds; that by virtue of the said foreclosure proceedings and sale thereunder to your intervenor the latter acquired all equitable right and title to said contract and to the rentals due thereon as the Trust Company at all times well knew. The Belt Company, on or about February 1, 1900, undertook to transfer and assign said account to the Trust Company as collateral security to secure an alleged indebtedness from the Belt Company to it and the Trust Company claims to be the assignee of said account, and refuses to cancel or re-assign said account to your intervenor as in equity and good conscience it should be required to do.

11. Your intervenor further states, that in connection with the contract between the Belt Company and the Connecting Company aforesaid, and as a part of the obligation of the Belt Company under said contract to procure the right of way for the
212 railroad of the Connecting Company, the Belt Company purchased and acquired certain lands along the line of said railroad in addition to the right of way and took the title thereto in a corporation organized under the laws of the State of Missouri called the Northern Townsite Company (hereinafter referred to as the Townsite Company) which corporation was organized by the Trust Company and officered by the officers of the Trust Company. In purchasing land for said right of way it became frequently necessary, in the economical handling of the matter, to purchase larger tracts out of which the right of way would be carved, and also to purchase lands for townsites, and the title to the lands of this character that were purchased was taken in the name of the Townsite Company. All of the money used in purchasing said lands, amounting to the sum of Forty Six Thousand Four Hundred Sixty Three and 75/100 Dollars ($46,463.75) was furnished and provided by the Belt Company, except the sum of $6,288.57, which was furnished and provided by the Trust Company. That the capital stock of the Townsite Company, to the extent of 439 shares, was by it issued to the Belt Company to represent the moneys contributed by it in the purchase of said lands; that the purchase of said lands was incidental to the construction of the railroad of the connecting line; and the title to said lands (except such as may be held to have been purchased with moneys furnished by the Trust Company) in equity belonged to the Belt Company and were covered by the after acquired property clause in the mortgage of the Belt Company as aforesaid; that by virtue of the said foreclosure proceedings and sale thereunder to your intervenor, the latter became vested with the title to said lands so owned in equity by the Belt Company and became entitled to the capital stock so issued by the Townsite Company to the Belt Company; that the Trust Company denies the right of your intervenor to said lands, or any part thereof, and to said capital stock, and claims to hold the said capital stock as collateral security to an alleged indebtedness from the Belt Company to it. By virtue of the premises your intervenor is entitled in equity and good conscience to a decree

requiring the Trust Company to turn over to your intervenor all of the said capital stock representing moneys advanced by the Belt Company, and to the cancellation of any and all of the capital stock of said Townsite Company issued without consideration, or to a conveyance to the Belt Company of all the properties and assets of the Townsite Company upon repayment to the Trust Company by your intervenor of the said sum of $3,288.57, so advanced by the Trust Company to the Townsite Company.

213 12. Your intervenor further shows that, as above stated, the Trust Company at all times fully controlled and dominated all the corporate acts and doings of the Belt Company; that the Trust Company at all times caused its own officers and directors to be the officers and directors of the Belt Company, and was in a position to require, and did require, the said officers and directors of the Belt Company to do and perform the will and behest of the Trust Company in each and every act and deed. The Trust Company, while possessed with this power of domination and control, did not exercise the same for the interest or benefit of the Belt Company or its stockholders or bondholders whose bonds were secured by mortgage on the property of the Belt Company; nor did the Trust Company in any degree or in any way carry out the duties imposed upon it as trustee in said mortgage, but on the contrary the trust company at all times controlled the acts and doings of the Belt Company in the interest and for the benefit of the Trust Company and exercised its powers and duties as trustee in said mortgage in its own interest and in violation of its trust.

On April 1, 1899, the Gulf Company, being then insolvent, defaulted in the payment of a semi-annual installment of interest then due and on the same day all its railroads and properties were placed in the hands of receivers appointed by the Circuit Court of Jackson County, Missouri; and on April 28, 1899, upon bill filed by the State Trust Company all the railroads and property of the Gulf Company were placed in the hands of receivers appointed by the United States Circuit Court for the Western Division of the Western District of Missouri, the suit and proceedings in the State court being then dismissed. Prior to said default the Trust Company, whose officers and directors were also the officers and directors of the Gulf Company as well as of the Belt Company, knew that a default would occur and that receivers would be appointed, and the Trust Company also knew if the Gulf Company became bankrupt or passed out of its possession and control the other auxiliary companies, to-wit, the Belt Company, the Air Line, the Union Terminal and the Consolidated Terminal, would soon likewise pass out of its control and domination; and the Trust Company, in violation of its duty as trustee in said mortgages and with a view of appropriating to itself whatever of value there was remaining in the possession of the said companies, contrived the plan of requiring said companies to turn over to it all of the personal property owned by said companies, of every nature and description, as and for security for alleged indebtedness from the Belt Company to it. In

pursuance of this plan the Trust Company on March 31, 1899,
caused the Belt Company to turn over to it Ten thousand
214 five hundred (10,500) shares of the capital stock of the
Terminal company to secure an alleged indebtedness; and
on July 20, 1899, the Trust Company caused the Belt Company to turn over to it, as collateral security to secure said alleged indebtedness, four thousand nine hundred ninety eight (4998) additional shares of stock of the Union Terminal Company, four thousand nine hundred and ninety three (4993) shares of the stock of the Kansas City & Independence Air Line, eleven hundred twenty (1120) shares of stock of the Central Improvement Company, four hundred thirty nine (439) shares of stock of the Northern Townsite Company, four hundred and twenty five (425) shares of the stock of the Missouri Elevator & Terminal Company, twenty five (25) shares of the stock of the Fairmount Amusement Company, thirteen thousand nine hundred and twenty (13920) shares of the stock of the Kansas City & Northern Connecting Company, sixty seven and nine tenths (67.9) second mortgage bonds of the Kansas City & Northern Connecting Railroad Company, and also the right of the Belt Company to receive eighteen hundred and fifteen (1815) additional shares of the stock of the Northern Connecting Railroad Company; also two hundred and seven and five tenths (207.5) of the second mortgage bonds of the Kansas City & Northern Connecting Railroad Company. On September 30, 1899, the Trust Company caused the Belt Company to sell to it all of the stock of the Kansas City & Northern Connecting — held by the Belt Company at the price of one and three sevenths Dollars ($1 3/7) per share to apply upon the alleged indebtedness from the Belt Company to the Trust Company. On February 5, 1900, a decree of foreclosure and sale was rendered in the foreclosure proceedings in the United States Circuit Court for the Western Division of the Western District of Missouri in the case of State Trust Company against the Gulf Company; the Trust Company knew some time prior to the rendition of said decree that said decree would be rendered and accordingly on February 1, 1900, the Trust Company caused the Belt Company to pretend to hold a meeting of its directors and to specifically turn over all of the afore-mentioned stocks and bonds to the Trust Company to secure said alleged indebtedness, and also to assign and transfer to the Trust Company by bill of sale as collateral security six hundred (600) tons, more or less, of sixty-pound (60-lb.) steel rails owned by the Belt Company and stored in its yards at East Kansas City; and to assign and transfer to the Trust Company an account owned by the Belt Company against the Gulf Company in the sum of One Hundred Thirty Three Thousand and fifty eight and 4/100 Dollars ($133,058.04) as collateral security
for the said alleged indebtedness. This transaction com-
215 pletely stripped the Belt Company and the other companies
of all portable personal property and there was nothing left which could be appropriated by the Trust Company under the guise of taking additional security.

Your intervenor further states that the said acts of the Trust Company in causing the Belt Company to turn over said stocks, bonds and property and account to the Trust Company, were unlawful and void and were solely due to the unlawful domination and control exercised by the Trust Company over the officers and directors of the Belt Company as aforesaid; that the matters and things so done and transacted were not known to or approved by any independent board of directors or to the persons in interest owning the stocks and bonds of the Belt Company.

Your intervenor further states that the Trust Company by reason of its control of the Belt Company had intimate and exact knowledg- of all the affairs and accounts, assets and liabilities of the Belt Company although it was trustee in the mortgage of the Belt Company, and thus bound to a high degree of fidelity to the interests of the Belt Company and its bondholders, yet it used its knowledge of the affairs of the Belt Company to its own advantage in endeavoring and undertaking to protect what it claimed its own indebtedness rather than the other indebtedness of the Belt Company, both floating indebtedness and also that secured by the mortgage aforesaid, all of which was contrary to equity and good conscience and in violation of its duties as trustee; the Trust Company by virtue of its position as trustee in said mortgage and its relation to the bondholders and to the mortgagor is estopped to assert that it took said security to secure its own alleged indebtedness, but it is deemed and held in equity to have received said collateral security above specifically described as trustee under the said mortgage of the Belt Line for the benefit of the outstanding bonds secured thereby. The equities, if any there be, in favor of the Trust Company are inferior and subordinate to the superior equity of your intervenor to the collateral security above described by virtue of the mortgage of the Belt Company and the purchase at foreclosure sale thereunder by your intervenor.

13. Your intervenor further states that, on September 6, 1900, the Cambria Steel Company, a corporation organized and existing under the laws of the State of Pennsylvania, exhibited its creditors' bill in this case based upon a judgment and unsati-fied execution against the Belt Company. It is claimed by the said Cambria Company that the collateral security now held by the Trust Company being a part of the collateral security above described, is not
216 covered by the mortgage executed by the Belt Line but that said collateral security so held by the Trust Company may be subjected to the payment of the judgment of the Cambria Company; but your intervenor states that the claims of the Cambria Company under the said creditors' bill are subordinate and inferior to the claims of your intervenor as aforesaid. Your intervenor further shows that, on the -- day of November, 1901, the Belt Company and its receivers filed their ancillary bill against the Cambria Company and the parties defendant herein, claiming that the alleged indebtedness asserted by the Trust Company against the Belt Company was fictitious and that no such indebtedness in

fact existed; and further claiming that said indebtedness as well as the notes heretofore executed by the Belt Company to evidence the same, should be cancelled, and that the said collateral security held by the Trust Company should thereupon be returned to the said Belt Company and its receivers. Your intervenor shows that the claims of the Belt Company and its receivers, for the reasons hereinbefore set forth are inferior and subordinate to the claims of your intervenor. An injunction has been issued in this cause by this court restraining the Trust Company from disposing of said collateral until the final order and decree of this court as to all of said collateral security, except as to ninety-nine (99) first mortgage bonds of the Connecting Company which have heretofore been sold and the proceeds thereof, amounting to forty thousand dollars ($40,000.00) are held in lieu of said bonds to await the final judgment and decree of the court.

Wherefore, your intervenor prays:

a. For the judgment, order and decree of this court requiring the Central Improvement Company and its Receiver to convey to your intervenor all the real estate or other property standing in its name and to turn over to your intervenor all the moneys held by the Central Improvement Company, or its Receiver, or owing to it, or them, arising from the sale or the proceeds of said property;

b. That the defendant, Guardian Trust Company, be required to account for and pay to your intervenor the value of the steel rails and fastenings mentioned in paragraph seven (7), together with interest thereon;

c. That the defendant, Guardian Trust Company, be required to account for and pay to the intervenor the value of the five thousand (5,000) shares of Union Terminal stock, together with the value of four thousand nine hundred and ninety four (4,994) shares of the capital stock of the Air Line and also the value of
217 the fourteen thousand nine hundred and ninety seven (14,997) shares of the capital stock of the Terminal Company, together with interest thereon.

d. That the defendant, Guardian Trust Company, be required to account for and pay to your intervenor the value of the bonds of the Kansas City and Northern Connecting Railroad Company mentioned in the preceding paragraph nine.

e. That the defendant, Guardian Trust Company, be required to assign to your intervenor the account of the Belt Company against the Gulf Company mentioned in the foregoing paragraph ten.

f. That the defendant, Guardian Trust Company, be required to release to your intervenor all of the capital stock of the Northern Townsite Company and that said Northern Townsite Company and its receivers be required to convey to your intervenor all of the property held by said Northern Townsite Company and its receivers, together with all the moneys in their possession or owing to them as the proceeds of the property formerly held by said Townsite Company upon repayment to the Trust Company of such sum as the Court may find was contributed by said Trust Company for the pur-

chase of property taken in the name of the Townsite Company and for such further relief as may be equitable and just.

(Signed)

S. W. MOORE,
T. R. MARKS,
Solicitors for Intervenor.

STATE OF MISSOURI,
County of Jackson, ss:

H. B. Johnson, of lawful age, being duly sworn upon his oath says, that he is the Auditor of The Kansas City Southern Railway Company, and makes this affidavit for and on its behalf; that he has read the foregoing intervening petition and knows the contents thereof; and that the matters and facts therein stated are true as he verily believes.

(Signed)

H. B. JOHNSON.

Subscribed and sworn to before me this 27th day of February, 1905.

[SEAL.]

CLARENCE R. HALL,
Notary Public in and for Jackson County, Missouri.

My commission expires Oct. 10, 1908.

Afterwards, to-wit, on the 7th day of March, A. D. 1905, the Guardian Trust Company filed its answer to the intervening
218 petition of the Kansas City Southern Railway Company. Said answer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

No. 2468.

CAMBRIA STEEL COMPANY, Complainant,
vs.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERMINAL Railroad Company, Kansas City and Independence Air Line, Guardian Trust Company, Missouri Elevator and Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

The Answer of Guardian Trust Company to the Intervening Petition of the Kansas City Southern Railway Company.

To the Judges of the Circuit Court of the United States for the Western Division of the Western District of Missouri:

The Guardian Trust Company, one of the defendants in the above entitled cause, and one of the respondents to the intervening petition

of the Kansas City Southern Railway Company, for its separate answer to said intervening petition, answering, says:

1. This respondent admits that the said intervenor is a corporation, duly organized and existing under the laws of the State of Missouri, as a railway corporation, and that it was incorporated, according to law in March, 1902.

2. This respondent admits that *on or* about March, 1890, the Kansas City Suburban Belt Railroad Company, a railroad corporation duly organized under the laws of the State of Missouri, executed and delivered its deed of trust to this respondent, as trustee, for the purpose of securing an issue of the first mortgage bonds of said Railroad company in the principal sum of one million ($1,000,000,) dollars; and this respondent admits that the provisions of said trust deed are substantially as set forth in said intervening petition. That default was made in the payments required by the terms of said mortgage or trust deed and that on September 6, 1900, proceedings were instituted for the foreclosure of said mortgage or trust deed, as is alleged in said intervening petition, and that this respondent was a party to said proceedings.

This respondent admits that the Kansas City and Independence Air Line, being a railroad corporation duly organized under
219 the laws of the State of Missouri, did, on or about March 1, 1892, execute its deed of trust to this respondent as trustee to secure an issue of the first mortgage bonds of said last named railroad company in the principal sum of three hundred thousand ($300,000,) dollars, and that the provisions of said trust deed are substantially as set forth in said intervening petition. That default was made in the payments required by said last named mortgage, and that on September 6, 1900, proceedings were instituted for the foreclosure of said last named mortgage in the Circuit Court of the United States for the Western Division of the Western District of Missouri, and that this respondent was a party to said proceedings.

This respondent admits that the two foreclosure suits, above mentioned, were consolidated, and that upon the sixth of November, 1901, a final decree of foreclosure and sale was entered in said consolidated suit and the property therein involved decreed to be sold; that pursuant to said decree a sale was made and that the Kansas City Suburban Railway Company was the purchaser at said sale, but this respondent says that said mortgages were foreclosed and said suits were commenced and prosecuted and said sale made pursuant to and in accordance with the plan and scheme hereinafter described and under the circumstances hereinafter stated.

3. This respondent admits that the Union Terminal Railroad Company, being a railroad corporation organized under the laws of the State of Kansas, did on or about February 1, 1893, execute and deliver its deed of trust to this respondent and to the Provident Life and Trust Company, of Philadelphia, as trustees, and that the provisions of said mortgage or deed of trust are substantially as set forth in said intervening petition. That default was made in the payment required by the terms of said mortgage and trust deed and

that on February 6, 1900, proceedings were instituted for the foreclosure of said last named mortgage in the Circuit Court of the United States for the District of Kansas in the First Division; that such proceedings were had in said suit that upon the sixth day of November, 1901, a decree of foreclosure and sale was entered therein on the property and franchises embraced in said mortgage were decreed to be sold; that a sale was had pursuant to said decree, at which sale the Kansas City Southern Railway Company became the purchaser, but this respondent says that said mortgage was foreclosed and said suit was commenced and prosecuted and said sale made pursuant to and in accordance with the plan and scheme hereinafter described and under the circumstances hereinafter stated.

220 4. This respondent admits that the Kansas City, Pittsburg and Gulf Railroad Company, being a railroad corporation organized and existing under the laws of the State of Missouri did, on or about April 1, 1893, execute and deliver its deed of trust to this respondent and the State Trust Company of the City of New York, as trustees, to secure an issue of the first mortgage bonds of said last named railroad company, in the principal sum of twenty-three million ($23,000,000) dollars; that the provisions in said last named trust deed are substantially as set forth in said intervening petition; that default was made in the payments required by the terms of said last named mortgage or trust deed, and that on April 28, 1899, proceedings were instituted in the Circuit Court of the United States for the Western Division of the Western District of Missouri, for the foreclosure of said last named mortgage, and that such proceedings were had in that suit that on the fifth day of February, 1900, a decree of foreclosure and sale was entered therein, decreeing that the railroad's properties and franchises embraced in said mortgage should be sold; that pursuant to said decree said railroad's properties and franchises were thereafter sold to said intervenor, but this respondent says that said mortgage was foreclosed and said suits were commenced and prosecuted and said sale made pursuant to and in accordance with the plan and scheme hereinafter described and under the circumstances hereinafter stated.

This respondent admits that the several mortgages hereinabove referred to were all duly and properly acknowledged and recorded in the various counties in which the properties mentioned therein were respectively located at or about the dates of said mortgages respectively.

5. This respondent denies that about the year 1887, or at any other time it conceived and entered upon the plan and purpose to cause to be constructed railroads in and about Kansas City; it denies that it was part of said plan and purpose to cause said railroads to be built, constructed or operated by corporations to be organized by respondent and to elect certain officers, agents and representatives of rspondent as the officers and directors of said railroad companies so as to dominate and control the action of said railroad companies. It denies that it was a part of its plans and purpose to utilize one or more of said railroad companies to act on behalf of respondent in

building and operating railroads and in the issue of bonds and stocks, or either of them so as to gather under the Trust Company the profits and other advantages accruing therefrom and to foist upon the railroad companies the losses or liabilities resulting therefrom. It denies that either in building said roads, or in the
221 sale of stocks and bonds of said railroad companies it employed said railroad companies, or any of them, as its agents to further its own plans and purpose, and therefore denies that it was a principal, bound and charged with the duty to indemnify and protect said railroad companies against losses and liability arising in the premises; but admits that it was in some cases sole trustee in the mortgages above mentioned; but denies that in any case it was active trustee therein. It denies that it, in pursuance of said plans and purposes, or for any other reason, or in any other circumstances acquired the control of the Kansas City Suburban Railroad Company (hereinafter called the Suburban Company) in the year 1899, or at any other time. Denies that it caused said Suburban Company to issue bonds, secured by mortgage. Denies that it caused said Suburban Company to issue capital stock in a large amount, or in any amount and denies that it caused said company to construct and operate a railroad. It denies that in 1891, or at any other time it caused to be incorporated the Consolidated Terminal Railroad Company, (hereinafter called the Consolidated Company); denies that it caused said Consolidated Company to issue bonds and a mortgage or deed of trust to secure the same. Denies that it caused said company to issue capital stock and to construct a railroad.

It denies that in December, 1891, or at any other time, it caused to be incorporated the Union Terminal Railroad Company (hereinafter called the Terminal Company) or that it caused said company to issue and execute bonds and mortgage securing the same and capital stock, or any of them, as is alleged in said intervening petition.

It denies that it caused said company to construct a railroad.

It denies that it caused to be incorporated the Kansas City and Independence Air Line (hereinafter referred to as the Air Line). It denies that it caused the Air Line to execute and issue bonds and mortgage and to issue stock and construct a railroad, as alleged in said petition. On the contrary, this respondent says that each and all of the said corporations were organized in the manner and under the circumstances set forth in the answer of this respondent and Francis N. Black, its receiver, heretofore filed in this cause, to the bill called "Ancillary Bill of Complaint", filed by Stewart R. Knott and Edward F. Swinney, as receivers of the Kansas City Suburban Belt Railroad Company, which said answer is hereby referred to and made a part of the answer to said intervening petition.

222 This respondent denies that it at any time caused the said Consolidated Company to consolidate with the Suburban Company, forming a new company called the "Kansas City Suburban Belt Railroad Company" (hereinafter referred to as the Belt Company) but this respondent says that said companies did, of their own accord and volition affect said consolidation on or about

July 25, 1892, and that the Consolidated Company so formed was called the Kansas City Suburban Belt Railroad Company.

Respondent denies that it caused the Terminal Company to execute a lease of all its property, rights and franchises, or any part thereof, to the Belt Company, and that thereunder the Belt Company operated the line of the Terminal Company and its own line. On the contrary, this respondent alleges that said lease was made without the interference of this respondent and wholly at the volition of the parties to said lease.

This respondent denies that by virtue of its ownership and control of the capital stock of the Belt Company, Air Line and Terminal Company, it did at all times, or at any time cause its officers and directors to be elected as the officers and directors of said lines, or any of them. It denies that it dominated and controlled the affairs and business of said lines, or caused them or either of them to perform such corporate acts and things as this respondent deemed beneficial for its own interest. On the contrary this respondent says that the directors and officers of said company were elected by the stockholders of said respective companies in the free exercise of their own judgment, in the same manner as the directors and officers of any other company are elected; that in some instances a part of the officers and directors of said several corporations were also at the same time officers and directors of this respondent, but that in such instances such officers and directors had no personal interest in procuring for this respondent any undue advantage over the other companies.

This respondent denies that in the year 1893, or at any other time, it caused to be incorporated the Kansas City, Pittsburg and Gulf Railroad Company (hereinafter called the Gulf Company) or caused it to issue, and execute bonds, mortgages and stock, or any of them, as is alleged in said intervening petition. It denies that it caused the Gulf Company to construct a railroad from Kansas City to the Gulf of Mexico, or any part thereof. It denies that it caused the Gulf Company to enter into contracts with the Belt Company for the use of the latter's terminals at Kansas City. On the contrary it says that said contract between the Belt Company and said Gulf Company was freely made and entered into
223 by the parties thereto, without any interference on the part of this respondent, and that said contract was made in the manner and under the circumstances stated in said answer to said Ancillary Bill.

This respondent denies that it caused its officers and directors to be elected officers and directors of the Gulf Company, and by that means, or by any other means dominated and controlled the affairs of the Gulf Company and caused it to perform such corporate acts as this respondent deemed to be for its benefit and advantage. On the contrary it says that said Gulf Company was managed and controlled by directors and officers, freely and voluntarily elected by the stockholders thereof in the usual and ordinary manner.

This respondent denies that it had complete and intimate knowl-

edge of all the affairs and transactions of all the said companies, as is alleged in said intervening petition.

6. Respondent denies that in the year 1895, or at any other time *in* caused to be incorporated the Central Improvement Company. It denies that the directors and officers of said Central Company were at all times made up from the directors and officers of this respondent, or that this respondent, in all or any of the transactions in said Improvement Company dominated and controlled the said Improvement Company. On the contrary, this respondent says that the directors and officers of said Central Company were freely elected by the stockholders of said company and that while some of the directors and officers of the Central Company were also officers and directors of this respondent, yet they had no personal interest in procuring any benefit or advantage for this respondent at the expense of the Central Company, and did not procure any such advantage.

This respondent admits that the Central Improvement Company was organized, but it says that it was organized at the instance and by the procurement of the Belt Company and the Gulf Company, for the purpose of securing and acquiring the title to various tracts of land in and about Kansas City, which was needed for the use of said railroad companies but it is true that the Belt Company furnished some of the money paid for said land bought by the Central Company. It is also true that the Gulf Company advanced some money for the same purpose, but whether or not the list of said properties so purchased by the Central Company is correctly shown on "Exhibit A", attached to said intervening petitions, this respondent is not advised and therefore neither admits nor denies the same. This respondent, however, denies that the titles to said real estate, so purchased, were for mere convenience placed in the name of the Central Company; but says that said Central
224 Company was duly organized for the purpose of acquiring said lands, and that it did acquire title to the same and whatever interest said Belt Company, or said Gulf Company have, or had, in said lands is represented by the stock in said Central Company which was issued to them when said moneys were advanced.

This respondent denies that said Belt Company, or said Gulf Company, or any other company or person advancing money to said Central Company became the equitable owner of the land which was purchased by the money so advanced; but on the contrary says that the interest of the company, or the person so advancing money is represented by the stock issued by the Central Company.

This respondent further shows that the said Belt Company and Gulf Company, or their assigns, hold substantially all of the stock of said Central Company and in that sense they are the beneficial owners of the property of said Central Improvement Company, subject, however, to any liens thereon for unpaid portions of the purchase price thereof, or for other valid liens; but this respondent has not now, and never has had, any interest in the property of the Central *Improved* Company, except that it holds a mortgage on a certain piece of property owned by said Central Improvement

Company to secure certain promissory notes, aggregating the principal sum of $5000, which mortgage was a subsisting lien upon the property at the time the Central Company bought it, and which mortgage was subsequently purchased and is now held by this respondent.

This respondent denies that the properties so purchased by the Central Company were necessary for the use of said respective railroad companies in connection with the operation of their respective roads, and it denies that such property came within the "After Acquired" property clause of said mortgages, or either of them. It denies that the equitable liens of said mortgages, or either of them, attached to and became a charge upon said properties in favor of the bank holders. It is not advised as to whether any of said properties have been sold by the receiver of said Central Company.

This respondent denies that by the foreclosure proceedings, above mentioned and decrees of sale thereunder, the intervenor acquired the equitable title to all of said properties, or any part thereof so held by the Central Company, and it denies that said intervenor became and is now entitled to the conveyance of the same and to the proceeds of the sale thereof. On the contrary, this respondent says
225 that no part of said property was covered by said mortgages, or any of them; that said property was not in any way appurtenant or necessary to the operation of said railroads, or any of them and that in and by the said foreclosure proceedings said intervenor obtained no title to said lands or any part of the same.

7. This respondent denies that on or about February 1, 1900, the Belt Company had purchased and then had in its possession, approximately 600 tons of steel rails and fasteners. On the contrary, this respondent says that there was less than 361 tons of said rails and fastenings.

This respondent denies that by virtue of the "After Acquired" property clause in the mortgage of the Belt Company, said rails and fastenings became charged with a lien to secure the payment of the bonds; and denies that upon the foreclosure of said mortgage and the sale thereunder that the equitable title of said rails passed to and vested in the intervenor, or that it become the equitable owner thereof. On the contrary, respondent says that said intervenor obtained no title whatever, either legal or equitable to said rails by means of said foreclosure proceedings and sale.

This respondent further says that said mortgage did not by its terms cover said rails, and further that said rails were purchased for the consolidation of the said Consolidated Company and the Suburban Company, forming the new company called the Belt Company and long after the execution of said mortgage, and for the further reason that said rails were not appurtenant to the operation of said railroad.

This respondent admits that it formerly held said rails as collateral security to the indebtedness hereinafter referred to from the Belt Company to this respondent, but it denies that the value of said rails and fastenings was of the value stated in said petition, and that such rails and fastenings were subsequently sold by this respondent

for the sum of approximately eleven thousand ($11,000.) dollars, and that respondent has credited the net proceeds thereof on its accounts against said Belt Company; that notwithstanding said Company had assigned said rails and fastenings to this respondent as collateral security, said Company afterwards refused to deliver the same to respondents, and respondent was compelled to bring a suit of replevin therefor in the Circuit Court of Jackson County, Missouri, and said suit was subsequently determined in favor of this respondent; and that such judgment (which was entered on the —— lay of ——) is res judicata and cannot be here inquired into.

8. This respondent admits that the railroad of the Terminal Company was a connecting railroad with the line of the Belt Company and that the Belt Company was authorized to aid in the construction of the line of the Terminal Company. It admits that the Belt Company acquired 5000 shares of the capital stock of the Terminal Company; but denies that by virtue of the "After Acquired" property clause in the Belt Company mortgage that the lien of the mortgage in equity or in any manner attached to the 5000 shares of the Terminal stock so acquired by the Belt Company, or that said lien inured to the benefit of the bondholders of the Belt Company.

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Respondent admits that it acquired possession of said 5000 shares of Terminal stock as collateral security, but denies that it was collateral security to an alleged indebtedness, but on the contrary says it was a just and bona fide indebtedness of said Belt Company to this respondent.

Respondent admits that about June 14, 1900, it sold said 5000 shares of stock for $25,000.00, which sum was the fair and full value thereof at that time. Respondent denies that by virtue of said mortgage of the Belt Company and the foreclosure and sale thereunder that the intervenor became entitled in equity to said 5000 shares of stock, or the proceeds thereof, or any part thereof. On the contrary, this respondent says that *that* said mortgage did not by its terms cover said stock; that said stock was not in any manner appurtenant to the operation of said railroad; that said stock was acquired after the consolidation, as aforesaid, and that the said intervenor, by said foreclosure proceedings acquired no title or interest whatever in and to said stock, or the proceeds thereof.

Respondent admits that the Air Line owned and operated a railroad connecting with the railroad from the Belt Line, and that the two formed a continuous line of railroad, and that the Belt Company became and was entitled to aid the Air Line in the construction of its road and to purchase and hold the stock of the Air Line.

Respondent admits that prior to June 11, 1900, the Belt Company acquired and owned 494 shares of the capital stock of the Air Line, and also 14997 shares of the Terminal Company's stock, in addition to the 5000 shares above mentioned. It denies that it acquired said stock as collateral security to an alleged indebtedness from the Belt Line to it, but on the contrary says that the respondent held said stock as collateral security to a bona fide indebtedness owing from the Belt Company to this respondent. This respondent denies that

said stocks, or any part thereof, — recovered by the "After Acquired" property clause in the mortgage of the Belt Company and denies that upon the foreclosure of said mortgage and sale there-
227 under that the intervenor acquired the equitable title to said stock or to the value of the proceeds thereof. On the contrary this respondent says that no part of said stocks *were* covered by the terms of said mortgage; that said stocks were in no way appurtenant or necessary to the operation of said railroad and the said stocks were all acquired after the consolidation aforesaid and therefore that said intervenor acquired no right, title, or interest to said stocks, or any part thereof, by means of said foreclosure proceedings.

This respondent admits that on or about June 11, 1900, it sold said 14,997 shares of Terminal stock and 4994 shares of Air Line stock for the sum of $9,995.65, which sum was the full and fair value of said stocks at the time.

9. This respondent denies that in the year 1896, or at any other time, it caused to be incorporated the Kansas City Northern Connecting Railroad Company (hereinafter called the Connecting Company) for the purpose alleged in the intervening petition, or for any other purpose. It admits that said Connecting Company was organized for the purpose of constructing a railroad from Kansas City, Missouri, to Pattonsburg, Missouri, in order to connect with the railroads at that point running to Quincy, Illinois, and to Council Bluffs, Iowa.

Respondent denies that it caused said Connecting Company to execute bonds, mortgage and stock, or any of them, as alleged in said intervening petition, and denies that it caused said Connecting Company to enter into a contract, under which the Belt Company undertook to carry the right of way for said Connecting Company, and under which said Connecting Company agreed to give the Belt Company its bonds and stocks.

This respondent admits that such a contract was made between said companies, but it was made freely and of their own accord and without the interference of this respondent.

This respondent admits that pursuant to such contract the Belt Company began the construction of a railroad for the Connecting Company and the acquisition of its right of way and received as a consideration for so doing a large amount of the first mortgage bonds and of the capital stock of the Connecting Company, and that the Belt Company so held said stock and bonds on and prior to July 20, 1899.

This respondent denies that at various dates, or at any date it took and converted same to its own use, and denies that it ever at
228 any time converted any bonds or stocks belonging to said Belt Company.

Respondent denies that about July 20, 1899, it took from the Belt Company mortgage bonds and stock in the Connecting Company belonging to the Belt Company as collateral security for an alleged indebtedness from the Belt Company, to respondent, but on the contrary says that it did take said bonds and stock as collateral security to a bona fide indebtedness due to it from the Belt Company.

Respondent denies that said bonds or stocks, or any of them, came

under the "After Acquired" property clause of the mortgage made by the Belt Company and denies that they, or any of them were charged with an equitable lien to secure the bonds of the Belt Company. It denies that by means of the foreclosure proceedings and sale to the intervenor that the equitable title to said stocks and bonds, or the proceeds thereof, vested in equity in the intervenor. On the contrary this respondent say that said mortgage did not by its terms cover said bonds and stocks, or any part thereof; that said bonds and stocks were not necessary or appurtenant to the operation of said railroad; that all of said stocks and bonds were acquired after the consolidation, as aforesaid, and that said intervenor acquired no right, title or interest of any kind whatsoever in and to said stocks or bonds by means of said foreclosure proceedings.

This respondent admits that on or about September 30, 1899, it sold 13920 (not 3920) shares of Northern Connecting Company's stock, which it at one time had held as collateral, as aforesaid, for the sum of $19,885.70, which sum was the full and fair value of said stock at the time. That prior to said sale this respondent had accepted said stock as part payment on its said indebtedness at the same price for which respondent afterward sold said stock.

10. This respondent denies that in 1896, or at any other time, it caused the Belt Company to enter into a Terminal contract with the Gulf Company, by the terms of which the Belt Company gave to the Gulf Company an entrance into Kansas City and valuable terminal rights and facilities, and whereby the Gulf Company undertook and agreed to pay to the Belt Company certain rentals for such rights as were granted to the Gulf Company in said contract. On the contrary, this respondent says that said contract was entered into by said parties freely and as an act of said companies represented by their independent and adult officers and board of directors.

229 This respondent admits that said parties operated under said contract until April 1, 1899, when receivers for the Gulf Company were appointed; that at said last named time there was due to the Belt Company from the Gulf Company under said contract about the sum of $133,000.00.

This respondent denies that said terminal contract, by virtue of the provisions of the "After Acquired" property clause in the said mortgage of the Belt Company became charged in equity with a mortgage lien to secure the bonds issued by said Belt Company, and denies that the rents, issues and profits, or any part thereof at that time due the Belt Company under said contract became charged in equity with such lien. It denies that by virtue of said foreclosure proceedings and sale thereunder to the intervenor that the latter *required* all equitable right title, or any right and title to said contract and rentals thereon.

Respondent admits that the Belt Company, on or about February 1, 1900, did transfer and assign to it the said account against the said Gulf Company as collateral security to a bona fide indebtedness from the Belt Company to this respondent.

This respondent says that said intervenor acquired no right, title or interest whatever to said contract, or the rentals thereunder by

virtue of said foreclosure proceedings, because said contract and rentals thereunder are not covered by the terms of said mortgage, and because it is in no way appurtenant to the operation of said railroad, and because said rentals accrued after the said consolidation, as aforesaid.

11. This respondent denies that the Northern Townsite Company, (hereinafter referred to as Townsite Company) was organized by the officers of the Trust Company. On the contrary, says that said Townsite Company was organized at the behest of said Belt Company for the purpose of acquiring certain lands along the line of the railroad of the Connecting Company.

This respondent admits that all the money used by the Townsite Company in purchasing its lands was furnished by the Belt Company and by this respondent, but it denies that the sum of $46,463.75 was furnished and provided by the Belt Company and this [respondent*m*], but on the contrary says that a much smaller amount was furnished.

Further answering, it says that the total amount of money furnished by the Belt Company for the purchase of said lands was $6286.57, and that the Belt Company received therefor 439 shares of the capital stock of said Townsite Company, at the par value
230 of $100.00 each, and that the total amount of money furnished by this respondent for the same purpose was $6720.07, and that it received 489 shares of the capital stock of said Townsite Company.

This respondent denies that in equity the said lands represented by the money furnished by the Belt Company belong to the Belt Company and were covered by the "After Acquired" property clause in the said mortgage. It denies that by virtue of said foreclosure proceedings and sale thereunder to the intervenor that the intervenor became vested with the title to said lands, or any part thereof, and denies that said intervenor thereby became entitled to the capital stock so issued by the said Townsite Company to the Belt Company, or any part thereof.

This respondent denies that it holds the capital stock so issued to the Belt Company as collateral security to an alleged indebtedness from the Belt Company to it, but on the contrary says that it holds said stock as collateral security to a bona fide indebtedness from the Belt Company to this respondent. This respondent says that said intervenor is not entitled, either at law or in equity to any interest or title in said lands, or said stock, because the same are not covered by the terms of said mortgage, because they are not appurtenant to the operation of said railroad and because they were acquired after the consolidation, as aforesaid.

12. This respondent denies that it at any time dominated and controlled the acts of the Belt Company, or that it caused its officers and directors to be the officers and directors of the Belt Company. Denies that it required the officers and directors of the Belt Company to perform the will and behest of this respondent in any respect, but on the contrary alleges that the officers and directors of said Belt

Company at all times exercised their independent judgment and acted in good faith for the best interests of the said Belt Company.

This respondent further says that in all respects and at all times it fully and in good faith performed the duty imposed upon it as trustee in said mortgage, and that at no time did it control the acts and doings of the Belt Company in its own interest.

This respondent admits that about April 1, 1899, the Gulf Company was insolvent; that it defaulted in payment of interest and that it was placed in the hands of receivers, as alleged in said petition, but it denies that it knew that a default would occur prior to the time default was made, and denies that it knew that if the Gulf
231 Company became bankrupt that the so-called auxiliary companies would pass out of its control and denies that the so-called auxiliary companies were ever in its control. It denies that there was any violation of its duty as trustee of said mortgages with a view to appropriate to itself whatever value there was remaining in possession of said auxiliary companies it acquired the plan to require said companies to turn over to it all or any part of the personal property of said companies as and for security for an alleged indebtedness from the Belt Company to it, but on the contrary it alleges that at all times it acted in good faith and that in procuring the collateral security, as hereinafter stated, it acted in good faith towards the Belt Company and its creditors.

This respondent denies that on March 31, 1899, or at any other time, it caused the Belt Company to turn over to it the collateral, as alleged in said intervening petition, with the exception that said Belt Company did turn over to this respondent as collateral security to a bona fide debt then owing to this respondent from said Belt Company, collateral security as is shown in the said answer to said Ancillary Bill.

This respondent denies that on September 30, 1899, or at any time it caused the Belt Company to sell to it all of the stock of the Kansas City and Northern Connecting Company held by the Belt Company, at the price of one and three-sevenths dollars per share to apply upon as alleged indebtedness from the Belt Company to this respondent, but on the contrary this respondent says that said stock was a fair and open sale at a full fair value of said stock, and that the indebtedness upon which the same applied was a bona fide indebtedness from the Belt Company to this respondent.

Respondent admits that a foreclosure decree was entered on February 5, 1900, in the case of State Trust Company against the Gulf Company.

Respondent denies that it knew prior to the rendition of said decree that the same would be rendered.

It denies that on February 1, 1900, or at any time it caused the Belt Company to pretend to hold a meeting of its directors and to specifically turn over all of the stocks and bonds, as alleged in said intervening petition, or any part thereof, to secure an alleged indebtedness, and to assign and transfer to respondent the said steel rails, and to assign and transfer to respondent the account owned by the Belt Company against the Gulf Company, as aforesaid, as col-

lateral security for an alleged indebtedness. On the contrary, this respondent says that the meeting of said board of directors of
232 said Belt Company was held at their own volition, and without any interference or direction from this respondent, and that the action of the said board of directors in turning over said collateral security was the free act of the directors of said Belt Company.

Respondent denies that the action of the Belt Company in turning over said stocks, bonds and property to it as collateral was void, and denies that such action was due to the unlawful combination and control exercised by respondent over the officers and directors of the Belt Company, but on the contrary says that said action was the voluntary act of said officers and directors in the exercise of their independent judgment.

This respondent denies that by reason of its control of the Belt Company it had knowledge of the affairs and situation of the Belt Company, but it admits that it did, by reason of its connection with said Belt Company, have considerable knowledge of the affairs and situation of the Belt Company, and denies that it used its knowledge of the affairs of the Belt Company to its own advantage rather than for the purpose of the other indebtedness of said Belt Company, but on the contrary it says that it acted in good faith in protecting its own interests and in doing so did not violate any duty which it owed to the bondholders, or any other creditors of said Belt Company.

This respondent denies that on account of its position as trustee in said mortgage that it is estopped to assert that it took said security to secure its own indebtedness, and denies that it is deemed in equity to have received said collateral as trustee under said mortgages. On the contrary, it says that said mortgages, for the reasons hereinbefore stated, did not cover said security or any part thereof.

Further this respondent says that all of said transactions took place more than five years ago; and it hereby pleads to each and all of such transactions the statutes of limitations of the State of Missouri; that ever since the organization of said intervenor it has had full knowledge of all the facts and circumstances in connection with the taking of said collateral security and has made no protest against the same and has taken no steps to enforce any rights which it has, or claims to have in and to said collateral; that said intervenor has been guilty of laches in the premises and should not now be permitted to come into a court of equity and assert any claim to said property, or any part thereof.

13. This respondent admits that on September 6, 1900, the Cambria Steel Company filed its bill in this case, and that the allegations of said bill are substantially as set forth in said inter-
233 vening petition. That in November, 1901, the Belt Company, by its receivers, filed their Ancillary Bill herein, and that the allegations therein are substantially as set forth in said intervening petition.

This respondent admits that an injunction has been issued in this cause, restraining respondent from disposing of said collateral until the final order and decree of this court as to all of said collateral, ex-

cept 1899 first mortgage bonds of the Connecting Company, as is alleged in said intervening petition.

This respondent further answering, says that the indebtedness from said Belt Company to this respondent is evidenced by certain promissory notes, executed by said Belt Company, and by an open account, as set forth and fully stated in the said answer to said Ancillary Bill.

14. This respondent, the Guardian Trust Company, further shows that on or about the 14th day of June, A. D. 1899, William F. Harrity, B. M. Baker, August Hecksher, Edward Wagner, Samuel R. Shipley, Silas W. Pettit and Winthrop Smith entered into an agreement for the re-organization of the Kansas City Pittsburg & Gulf Railroad Company, Kansas City Suburban Railroad Company, and the Port Arthur Channel and Dock Company and their so-called subsidiary or auxiliary companies, including said Kansas City Suburban Belt Railroad Company, Union Terminal Railroad Company, Consolidated Terminal Railroad Company, and Kansas City and Independence Air Line Railroad Company; that said persons, calling themselves a re-organization committee formed a so-called "plan of re-organization", which was promulgated under date of November 7, 1899, and invited all holders of bonds and stocks of said several companies above named, to deposit the same with said re-organization committee under said plan of re-organization which proposed to organize a new corporation to be known as the Kansas City Southern Railroad Company, which should acquire the properties of all said above named corporations, and issue in payment therefor the bonds and stocks of said re-organized or new corporation in the proportions and on the terms and in the manner set out in the said plan of re-organization, which is hereby referred to and ready to be produced upon the hearing of this cause.

15. That after the promulgation of said plan on November 7, 1899, there was deposited with said re-organization committee the proportion of bonds and stock required by said plan to make the same operative; and on the 20th day of December, 1899, said plan was declared operative; that thereafter said committee caused to be organized and incorporated the Kansas City Southern Rail-
234 road Company under the statutes of the State of Missouri, for the purpose of acquiring title to the properties of said corporations named in the foregoing paragraph, and the stocks and bonds of said new corporation were thereafter exchanged for the stocks and bonds of said several corporations in the proportion and manner set out in said re-organization plan; that by means of said exchange said Kansas City Southern Railroad Company came to be the owner of practically all the bonds and stocks of said corporations above mentioned, and particularly of the said Kansas City Suburban Belt Railroad Company, and said corporation caused to be elected directors and officers of said Belt Railroad Company, who conducted the same and managed and operated it in the interests of and as a component part of the railroad system of said Kansas City Southern Railroad Company.

16. This respondent further shows that the organization of said

Kansas City Southern Railroad Company and exchange of its stocks and bonds above alleged for the stocks and bonds of said Belt Railroad Company, and the other steps taken in pursuance of said re-organization plan, effected a consolidation of said Kansas City Southern Railroad Company and said Kansas City Suburban Belt Railroad Company under the statutes of the State of Missouri; or a consolidation de facto, and that said Kansas City Southern Company is estopped to deny such consolidation, or to claim that the same was not legally complete; and that said Kansas City Southern Railroad Company thereby became and is liable for all the debts incurred by said Belt Railroad Company to the same extent as said last mentioned company, including the debts of this respondent heretofore mentioned and alleged in this answer.

17. Further answering, this respondent shows that said re-organization committee, when working out said plan of re-organization, expressly represented to this respondent that, in consideration of the debt due and owing from said Belt Company to this respondent, said committee would provide for the payment of all debts and obligations due to this respondent from all of said corporations proposed to be included in said re-organization plan, and particularly said Belt Railroad Company, and expressly promised this respondent that said committee would pay or cause to be paid all debts of every character due to this respondent from several corporations proposed to be consolidated, and particularly from said Belt Railroad Company; and that the said new and re-organized company would pay such debts; that certain members of said re-organization com-
235 mittee, constituting a so-called purchasing committee, purchased at the foreclosure sale of said Kansas City, Pittsburg and Gulf Railroad Company all its assets, right of way, rolling stock, etc., and thereafter assigned said bid to said Kansas City Southern Railroad Company, which said company entered into a contract with said re-organization committee, wherein and whereby it assumed and agreed to complete and carry out all the obligations undertaken and assumed by said re-organization committee; that under and by reason of said agreement and contract said Kansas City Southern became liable and agreed to pay all the obligations of said Belt Railroad Company to this respondent, and is still so liable.

18. That said Kansas City Southern was at the time of the foreclosure and sale of the Belt Company's assets the holder and owner of practically all the bonds and stock of said Belt Company; that, in order to obtain and control the stock of said Belt Company, said Kansas City Southern Railroad Company exchanged its stock in the proportions and in the manner specified in said plan of re-organization, which is hereby referred to, for the stock of said Belt Company, and thereupon proceeded to secure a foreclosure of said bonds of said Belt Company; that said scheme of re-organization and exchange of stocks aforesaid resulted in the stockholders of the Belt Railroad Company securing a large amount of stock of said Kansas City Southern Railroad Company, which was at that time and is yet very valuable, and was at that time and is yet of much greater market value than the total claims of this respondent against said Belt Rail-

road Company; that said scheme legally implied the payment by said Southern Company of all the claims of this respondent against said Belt Company.

19. This respondent therefore alleges and shows that if said scheme of re-organization and exchange of securities was intended by said re-organization committee and by said Kansas City Southern Railroad Company and its officers to deprive this respondent of all security and opportunity of collecting its said claims against the Belt Railroad Company, while preserving and securing to the stockholders of said Company said advantage and valuable interests through said scheme of transfer of stocks, that said foreclosure of said properties of said Belt Company, would have been a fraudulent scheme, and in that case should be held void and invalid, so far as this relator is concerned, and the property thereby transferred to said Kansas City Southern Railroad Company should be held subject to the debts and claims of this respondent and subjected to
236 their payment, even if it should be held by the Court that a legal consolidation, or actual or de facto consolidation, was not brought about as hereinabove alleged, whereby said Kansas City Southern Railroad Company became legally obligated to pay the claims of this respondent against said Belt Railroad Company.

20. All of which matters and things hereinbefore stated this respondent is ready to aver, maintain and prove as this Honorable Court may direct. Wherefore respondent prays that the so called intervening petition of the said Kansas City Southern Railway Company may be dismissed as without equity, and for its costs in this behalf most wrongfully expended.

GUARDIAN TRUST COMPANY.
By H. S. MECARTNEY AND J. C. ROSENBERGER.
Its Solicitors.

Afterwards, to-wit, on the 22nd day of March, 1905, an Amended and Supplemental Ancillary Bill of Complaint was filed in the cause wherein Stuart R. Knott, et al., are complainants, and the Cambria Steel Company, et al., are defendants.

Said Amended and Supplemental Ancillary Bill is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,
vs.
THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

STUART R. KNOTT and EDWARD F. SWINNEY, as Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,
vs.
CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

237 *Amended and Supplemental Ancillary Bill of Complainants.*

To the Judges of the United States Circuit Court for the Western Division of the Western District of Missouri, in the Eighth Circuit, sitting in equity:

Your orators, Stuart R. Knott and Edward F. Swinney, as Receivers of the Kansas City Suburban Belt Railroad Company and the Kansas City Suburban Belt Railroad Company, with leave of court, bring this their amended and supplemental ancillary bill of complaint against the Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company and Thomas T. Crittenden, its Receiver, Cambria Steel Company, Fairmount Amusement Company, and Northern Townsite Company, each and all of which said corporations, both complainant and defendants, are corporations organized and existing under and by virtue of the laws of the State of Missouri and citizens and residents of said state and each of them having their principal office and place of business at Kansas City in said state and each of them being an inhabitant of the Western Division of the Western District thereof, except the Cambria Steel Company, which is a corporation duly created and existing under the laws of the state of Pennsylvania and a non-resident of the State of Missouri.

Your orators state that on November 30, 1900, in the suit of W. W.

Bierce, et al., complainants, against the Guardian Trust Company, defendant, then pending in the United States Circuit Court for the Western District of Missouri, Francis M. Black was appointed receiver of the defendant Guardian Trust Company and was at the time of filing the original ancillary bill herein the duly qualified and acting receiver of said company, but that since the filing of said bill the receiver for the Guardian Trust Company has been discharged and the said Trust Company is now in possession of its corporate property, operating and conducting its own business in connection therewith; that in this suit Wash Adams was heretofore appointed receiver for the Missouri Elevator & Terminal Company but the property and assets of the said Missouri Elevator & Terminal Company had since the filing of the original ancillary bill herein been turned over to the Guardian Trust Company, the mortgagee in certain mortgages covering the property of said Missouri Elevator & Terminal Company; that at the time of filing said original ancillary bill Wash Adams was the duly qualified and acting receiver for the Central Improvement Company, since which time the said Adams has resigned and Thomas T. Crittenden has been appointed as his successor and is now the duly qualified and acting receiver of
238 said company; that said Thomas T. Crittenden is a citizen and resident of the Western Division of the Western District of the State of Missouri.

And, thereupon, your orators complain and say that the above-named complainant, the Cambria Steel Company, heretofore exhibited to this Honorable Court its bill of complaint against the Kansas City Suburban Belt Railroad Company, a defendant, and the other corporation defendants above named, in and by which said bill of complaint said Cambria Steel Company, as such complainant, set up the recovery of a judgment by it against the Kansas City Suburban Belt Railroad Company for the sum of One Hundred Thousand Nine Hundred Sixty-Two and 91-100 Dollars ($100,962.91), and the issuance and delivery, and return unsatisfied of an execution thereon, and in and by said bill of complaint sought to subject to the payment and satisfaction of said judgment certain rights, properties and assets belonging to the Kansas City Suburban Belt Railroad Company and the other defendants above named.

Your orators further show that prior to the filing of said bill of complaint by said Cambria Steel Company four certain bills of complaint were duly filed in this court by the Provident Life & Trust Company of Philadelphia, two of said bills being filed against the Kansas City Suburban Belt Railroad Company as the sole defendant; another of said bills was filed against the Union Terminal Railroad Company, a Kansas corporation, and the said The Kansas City Suburban Belt Railroad Company as defendants; and the other of said bills was filed against the Kansas City & Independence Air Line, a Missouri corporation, and the said Kansas City Suburban Belt Railroad Company. Each of said bills sought the foreclosure of a first mortgage upon certain railroad property described in the said bills of complaint respectively, and which said several described pieces of railroad property, together for a long time have been oper-

ated by the Kansas City Suburban Railroad Company as a continuous and allied system, said Kansas City Suburban Belt Railroad Company being also the beneficial owner of said properties by reason of owning the capital stock of said several companies. Upon the same day upon which the said bills of complaint were filed an application was made for the appointment of a receiver of all the property of said Kansas City Suburban Belt Railroad Company and on the same day, to-wit, on the sixth day of September, 1900, an order was duly entered of record in each of said causes, as well as in the above entitled cause, appointing your orators Stuart R. Knott and Edward F. Swinney as Receivers of the said Kansas City Suburban Belt Railroad Company,
239 and vesting your orators, Stuart R. Knott and Edward F. Swinney, as such receivers, with all the rights, title, estate, property and interest of the said the Kansas City Suburban Belt Railroad Company, and authorizing and directing your orators, Stuart R. Knott and Edward F. Swinney, as such receivers, to proceed to take such steps and institute such proceedings, legal or otherwise, as might be necessary and requisite to compel a restoration to said The Kansas City Suburban Belt Railroad Company, and your orators, Stuart R. Knott and Edward F. Swinney, as its receivers, of any property rights belonging to it and to com-el an accounting from any and all persons, firms or corporations from whom the said Kansas City Suburban Belt Railroad Company might be entitled to such accounting; that your orators, Stuart R. Knott and Edward F. Swinney, as such receivers, were also authorized to appear in any and all suits theretofore or thereafter instituted against the said Kansas City Suburban Belt Railroad Company, in its name or in the names of your orators, Stuart R. Knott and Edward F. Swinney, as the receivers, to defend any and all such suits. Your orators further show unto the court that under and by virtue of the powers and authorities so vested in them, as aforesaid, your orators for and on behalf of the Kansas City Suburban Belt Railroad Company, which is made a defendant to the bill of complaint in the above entitled cause, have appeared and filed their answer to said bills of complaint, as will appear of record herein, and having so filed said answer, your orators bring this, their ancillary bill of complaint herein against the defendants above named, and now file this, their amended supplemental ancillary bill of complaint against said defendants.

Your orators further show unto the court that immediately upon the appointment of your orators, Stuart R. Knott and Edward F. Swinney, as such receivers, they took possession of each and all the property of the said The Kansas City Suburban Belt Railroad Company, and under and pursuant to the orders of the court so appointing them, and thereafter and until the foreclosure sale hereinafter referred to, did operate the railroad property of the said Kansas City Suburban Railroad Company. That such proceedings were had in the causes above referred to that on the 6th day of November, 1901, decrees of foreclosure and sale were duly rendered directing the sale of the railroad and properties of the Kansas City Suburban Belt Railroad Company, Kansas City & Independence Air Line, Consolidated Terminal Railroad Company and the Union Terminal Railroad Com-

pany, covered by the mortgages upon said railroads and property respectively, and on December 31, 1901, the said properties so covered by said mortgages, as aforesaid, were in pursuance of said decrees of foreclosure and sale duly sold and conveyed to the purchaser, The Kansas City Southern Railway Company.

240 And our orators further charge and aver that the matters and things mentioned and set forth in this, your orator's amended and supplemental bill of complaint are ancillary to the said suits so pending in this court wherein your orators, Stuart R. Knott and Edward F. Swinney, were appointed as such receivers and are properly cognizable in this court, which has possession of each and all property of the said Suburban Belt Railroad Company, except such as was covered by its mortgage and has been heretofore conveyed as aforesaid. For convenience, the Kansas City Suburban Belt Railroad Company will be hereinafter referred to as the Belt Company; the Guardian Trust Company will hereinafter be referred to, for convenience, as the Trust Company; the Missouri Elevator and Terminal Company will be hereinafter referred to, for convenience, as the Elevator Company; the Central Improvement Company will hereinafter, for convenience, be referred to as the Central Company; the Fairmount Amusement Company will hereinafter, for convenience, be referred to as the Amusement Company.

Your orators show unto the court that the Trust Company was incorporated according to law in and about the year 1883, and that on or about the month of June, 1899, and until on or about the month of June, 1899, the name of the Trust Company was the Missouri, Kansas & Texas Trust Company, but that at said latter date such proceedings were taken as are provided by the statutes of the State of Missouri in such case made and provided, so that its name was changed to the Guardian Trust Company.

Your orators upon information and belief further show unto the court that on or about the first day of January, 1887, a corporation was formed under the laws of the State of Missouri known as The Kansas City Suburban Belt Railroad Company, hereinafter for convenience called the Suburban Company, for the purpose of building a belt line of railroad to encircle the cities of Kansas City, Missouri, and Kansas City, Kansas. That as your orators are informed and believe and so charge the facts to be the said Suburban Belt Railroad Company was either organized by the said Trust Company, or the control of the Suburban Company passed to the Trust Company shortly after its incorporation, so that the servants and employes of the Trust Company were elected as its officers and directors and the said Trust Company at all times hereinafter mentioned dominated and controlled the said Suburban Company. That as your orators are informed and believe and so charge the fact to be the Trust Company so dominating and controlling the Suburban Company by virtue of holding possession of the offices of its board of directors and

241 officers caused the Suburban Company to issue and deliver to it, the Trust Company, each and all of the capital stock of the Suburban Company, and also caused the Suburban Company to execute its bonds secured by a first mortgage upon all of its corporate

porperty then held and to be thereafter acquired amounting in the aggregate to the sum of One Million Dollars ($1,000,000.00), and that said bonds in like manner, by virtue of the domination and control of the Trust Company were delivered to the Trust Company, and the Trust Company thereupon proceeded to sell and otherwise dispose of said bonds and stock and to apply the proceeds thereof as claimed by it for the corporate purposes of the Suburban Company in the construction and operation of its road; but the Trust Company although often requested to do so, did not at any time and never has truly accounted to the Suburban Company for the proceeds realized by it from said bonds and stock, and never has accounted in any way for said proceeds or the manner in which it has so expended the same, except as hereinafter stated.

Thereafter, as your orators are informed and believe, and so charge the fact to be, the Trust Company caused to be formed under the laws of the State of Missouri, a corporation known as the Consolidated Terminal Railway Company, for the purpose of building a line of road to connect with the line of road constructed or proposed to be constructed by the Suburban Company, although the Suburban Company had full power under its charter to have constructed the said road itself. The Consolidated Terminal Railway Company is hereinafter, for convenience, referred to as the Consolidated Company.

That, as your orators are informed and believe and so charge the fact to be, the Consolidated Company was formed and controlled by the Trust Company, electing as its officers and directors the servants and employes of the Trust Company so that at all times it dominated the Consolidated Company, and the Trust Company thereupon caused the Consolidated Company to issue and deliver to it its entire capital stock and also bonds secured by a first mortgage upon its corporate property then and to be thereafter acquired aggregating the sum of Seven Hundred and Fifty Thousand Dollars ($750,000.00), and caused all said bonds to be delivered to the Trust Company, and the Trust Company thereupon proceeded to sell and dispose of said bonds and stock of the Consolidated Company so delivered to it as aforesaid and to apply the proceeds thereof as alleged by it for the corporate purposes of the Consolidated Company in the construction and operation of its road; but the Trust Company, although often requested so to do, did not and never has truly accounted to the Consolidated Company for the disposition made by it of said bonds
242 and stock so delivered as aforesaid and the proceeds derived therefrom and the purposes to which said proceeds were applied, and never has accounted in any way therefor, except as hereinafter stated.

Your orators further show unto the court that they are informed and believe, and so charge the fact to be, that thereafter and on or about the 25th day of July, 1892, the Consolidated Company and the Suburban Company, as authorized by the Statutes of the State of Missouri, entered into articles of consolidation whereby the said two companies became one consolidated corporation, thereafter known as the Kansas City Suburban Belt Railroad Company, of which your orators, Stuart R. Knott and Edward F. Swinney, were appointed

Receivers, as aforesaid, and under and by virtue of said articles of consolidation, as well as the statutes of the State of Missouri in such case made and provided, the said the Kansas City Suburban Belt Railroad Company and your orators, Stuart R. Knott and Edward F. Swinney, as its receivers, have succeeded to each and all of the rights of both the Consolidated Company and the Suburban Company.

Your orators further show unto the court that they are informed and believe, and so charge the facts to be, that at the time of the consolidation of said two companies, as aforesaid, the Trust Company caused its officers and employes to be elected to the positions of officers and directors of the Belt Company, the company so formed by said consolidation, and continued such persons in such positions respectively, continuously until about the month of April, 1900, whereby the Trust Company at all times, up to said last mentioned date, completely dominated and controlled the actions of the Belt Company.

Your orators further show unto the court that they are informed and believe, and so charge the facts to be, that some time prior to said consolidation and on or about the 30th day of December, 1891, it was found advisable in the course of the construction of the line of road of the Suburban Company to have a corporation formed under the laws of the state of Kansas for the purpose of building and holding the title to that portion of the line of road of the Suburban Company lying within the State of Kansas and for that purpose the Union Terminal Railroad Company, hereinafter referred to as the Union Company, for the sake of convenience, was by the Trust Company caused to be incorporated under the laws of the State of Kansas and the Trust Company, as in the other instances, caused its officers and employes to be elected the officers and directors of the Union
243 Company, and the Union Company was a corporation organized for the sole purpose of holding the title to said property of the Suburban or Belt Company in the State of Kansas; that the Trust Company thereupon caused all of the stock of the Union Company to be issued to the Suburban or Belt Company and also caused the Union Company to execute its first mortgage bonds in the amount of Two Million Dollars ($2,000,000.00); and said bonds were secured by a first mortgage upon all the property of the Union Company then and to be thereafter acquired; that said bonds were thereupon issued and delivered to the Trust Company for the use and benefit of the Suburban or Belt Company; that the Trust Company immediately proceeded to sell, or otherwise dispose of, the said bonds and stock of the Union Company, which had been theretofore delivered to it by the Belt Company, and to apply the proceeds derived from such sale in part, as alleged by it, the construction and operation of the road so built for the Belt Company and held and operated in the name of the Union Company; that the Trust Company thereupon became liable to account to the Belt Company for the proceeds and disposition of the same derived from the sale of the said bonds and stock, but although often requested so to do it always has failed and refuses to account truly to the Belt Company for the disposition made by it of said

bonds and stock, the proceeds derived from such disposition and the manner in which said proceeds were disposed of, and has never accounted therefor in any way except as hereinafter stated.

Your orators further show unto the court that they are informed and believe and so charge the facts to be that thereafter and on or about the 23d day of January, 1891, the Trust Company caused to be incorporated under the laws of the State of Missouri, a corporation known as the Kansas City & Independence Air Line, hereinafter, for convenience, referred to as the Air Line; said company being incorporated for the purpose of building a line of road connecting the line of the Suburban Belt Company and the City of Independence, Missouri; that the capital stock of said company was placed at the sum of Five Hundred Thousand Dollars ($500,000.00). The Trust Company immediately caused its officers and employes to be elected directors and officers of the Air Line and thereupon caused the Air Line to issue its first mortgage bonds to the amount of Three Hundred Thousand Dollars ($300,000.00), secured by a first mortgage upon all of its corporate property then and to be thereafter acquired; and by virtue of the fact that the officers and directors of the Air Line were officers and employes of the Trust Company it at all times dominated and controlled the Air Line up to and until the month of April, 1900; that
244 thereafter the Trust Company acquired each and all of the bonds and stock of the Air Line, the Trust Company in fact constructing the railroad of the Air Line and acquiring said bonds and stock in consideration therefor; afterwards it proceeded to dispose of the same and to apply the proceeds, as it alleged, for the corporate purposes of the Belt Company; but the Trust Company, although often requested so to do, has never at any time truly accounted to the Belt Company for the disposition made by it of the said bonds and stock, and the proceeds realized by it therefrom and has never accounted to the Belt Company in any manner except as hereinafter stated.

Your orators further show that they are informed and believe and so charge the facts to be that the Trust Company at all times up to and about the month of April, 1900, absolutely and completely dominated and controlled the affairs of the Belt Company by reason of the fact that the officers and employes of the Trust Company were elected officers and directors of the Belt Company at the behest of the Trust Company and were simply dummies acting as the agents of the Trust Company; that the Trust Company itself attended to the disbursement of all the moneys which were realized from the sale of the bonds and stock of the several companies hereinbefore named, and itself attended to the disbursement of the moneys which were used in the construction and building of the lines of road of said different companies. That your orators are informed and believe, and on such information and belief state that the total cost of the lines of all of the said companies did not exceed the sum of about Two Million Dollars ($2,000,000.00), but that there was actually delivered to and disposed by the Trust Company secured bonds and stock aggregating more than Five

Million Dollars ($5,000,000.00), and that the Trust Company has never at any time truly accounted to the Belt Company or to your orators for the proceeds derived by it from the sale of said bonds and the disposition made by it of such proceeds and has never accounted to the Belt Company in any way, except as hereinafter stated.

Your orators upon information and belief further charge and aver that on or about the 30th day of June, 1896, the Trust Company, either in its own name or in the name of some of its officers, or some corporation controlled by it, had entered into a contract whereby it was obligated to construct a line of railroad from Kansas City, Missouri, to Pattonsburg, Missouri, for the purpose of connecting at that point with the Omaha & St. Louis Railroad Company and the Omaha, Kansas City & Eastern Railroad Company; that the Trust Company thereupon caused to be incorporated under the laws of the State of Missouri a corporation known as the
245 Kansas City & Northern Connecting Railroad Company, hereinafter for convenience called the Connecting Company, and caused certain of its officers and employes to be elected officers and directors of the Connecting Company and by virtue thereof at all times dominated and controlled the affairs of the Connecting Company; that the Trust Company being under obligation to construct said road as aforesaid set about to discover a way in which it could cause said railroad to be constructed without incurring any liability itself and without making itself liable for the possibility of a loss in such construction; that it thereupon conceived the idea of having the Belt Company undertake the construction of said railroad on consideration of the issuance of bonds and stock of the Connecting Company that therefore, by virtue of the domination and control which the Trust Company exercised over the affairs of both the Belt Company and the Connecting Company, the Trust Company caused a contract to be entered into between the Belt Company and the Connecting Company whereby the Belt Company agreed to construct and did construct said line of railroad for the Connecting Company in consideration, among others, of the issuance to the Belt Company of certain first and second mortgage bonds and stock of the Connecting Company, more fully specified in said contract; that said contract so entered into as aforesaid is set up in Exhibit A to the answer of the Trust Company filed in this cause to which reference is hereby made. The said line of railroad so built as aforesaid was constructed for the sole use and benefit of the Trust Company and for the purpose of enabling it to comply with its obligations to so furnish the said railroad; that the said railroad so furnished, as aforesaid, was not and never has been of any value whatsoever to the Belt Company; that the construction of said road, as aforesaid, by the Belt Company was the result of the Trust Company's domination and control of the Belt Company, utilizing the Belt Company to further and consummate its own purposes and ends and for its own benefit; and the said contract for the construction of said railroad of the Connecting Company was so entered into by it as aforesaid solely by the domination and control exercised over the Belt Company by

the Trust Company, and the Trust Company in so constructing said railroad as aforesaid, simply used the Belt Company as an unwilling agency in the building of the same and occupied towards the Belt Company the relation of principal; that each and all of the moneys paid out by the Belt Company for the construction of said connecting road passed through the hands of the Trust Company and all the bonds and stock which were to have been delivered to the Belt Company under the terms of said pretended con-
246 tract in like manner passed through the hands of the Trust Company and the Trust Company proceeded to sell or otherwise dispose of the same; that the Trust Company never at any time truly accounted to the Belt Company for the amount realized by it from said bonds and stock, and has never accounted in any manner to the Belt Company therefor, except as hereinafter stated. Your orators particularly charge and aver that the Trust Company in so using the Belt Company in the construction of said line is charged in law and equity with the amount of the said loss claimed by the Trust Company to have resulted to the Belt Company and should be held accountable therefor.

Your orators further show unto the court that they are informed and believe and so charge the fact to be, that, during the time the Trust Company so dominated and controlled the affairs of the Belt Company, it at various times had the Belt Company advance to it or take out of the earnings and assets of the Belt Company large sums of money which it pretended to expend for and on account of the Belt Company; that by reason of the fact that the Trust Company at all times dominated and controlled the affairs of the Belt Company and had its employes and servants elected as officers and directors of the Belt Company; your orators are unable to state the amount of money so appropriated by the Trust Company and belonging to the Belt Company and which the Trust Company alleges was expended for the corporate purposes of the Belt Company, but upon information and belief your orators charge and aver that said amount aggregates upwards of Five Hundred Thousand Dollars ($500,000.00); and that the Trust Company has never at any time truly accounted for the said money so received by it, nor the manner in which it was expended, and has never accounted in any manner therefor, except as hereinafter stated.

Your orators further show unto the court that they are informed and believe, and so charge the fact to be, that during the times hereinbefore mentioned the Trust Company took upon itself the business of paying out practically all the moneys which were paid out for the benefit of the Belt Company and of buying for the Belt Company practically all the property which the Belt Company needed to acquire in its business of operating said road and used the moneys of the Belt Company for that purpose, but, instead of taking the title of the property so purchased, in the name of the Belt Company, the Trust Company caused other corporations to be formed for the purpose of holding the naked legal title to said respective properties, and caused the capital stock of said corporations so organized as aforesaid to be issued to the Belt Company

and then turned over to the Trust Company, or to be issued
247 to the Trust Company direct, in trust, for the use and benefit of the Belt Company; and the Trust Company caused its own servants and agents and employes to be elected and continued as officers and directors of such companies respectively and at all times, down to the month of April, 1900, so that the Trust Company, in the same manner that it controlled the affairs of the Belt Company, dominated and controlled the actions and affairs of the said subsidiary companies; that among the companies so organized by the Trust Company, in the manner aforesaid, is the Missouri Elevator & Terminal Company, with a capital stock of One Hundred Thousand Dollars ($100,000.00), of which Forty-two Thousand Dollars ($42,000.00) has been issued; that the said company owns two certain elevators in Kansas City, Missouri, along the line of the Belt Company; and that the Trust Company caused the construction of said elevators, and one other elevator, which has since been destroyed by fire, and in the construction of the same used the money of the Belt Company; said money being paid out to the Trust Company upon its request; that no true accounting has ever been had between the Trust Company and the Belt Company as to the amount of money which it actually expended for the construction of said elevators or of the manner in which it disposed of the funds received by it from the Belt Company for the alleged purpose of undertaking such construction, although requests for such accounting have frequently been made upon the officers of the Trust Company, and no accounting has ever been made therefor, except as hereinafter stated. That the Trust Company caused the Belt Company to assume all the outstanding debts and liabilities of the Missouri Elevator & Terminal Company, and upon said outstanding debts and liabilities the Belt Company paid large sums of money, for which said Belt Company has never been reimbursed. That upon the 8th day of November, 1900, one Wash Adams was appointed Receiver of the Missouri Elevator & Terminal Company; that since that date the court in this cause has made an order turning over to the Trust Company the said properties of the Elevator Company for the collection of the rents therefrom and the application of said rents upon underlying mortgages or encumbrances held by the Trust Company; that the Trust Company also caused to be organized the Central Improvement Company, a corporation organized under the laws of the State of Missouri, with a capital stock of Two Hundred Thousand Dollars ($200,000.00), of which One Hundred Forty-one Thousand Five Hundred Dollars ($141,500.00) par value has been issued; that said company was organized for the purpose of holding the title to various pieces of real estate in Kansas City, Missouri, and elsewhere, purchased for the use and benefit of the Belt Com-
248 pany, and the Kansas City, Pittsburg & Gulf Railroad Company, another Missouri railroad, and other of the companies above mentioned so organized, dominated and controlled by the Trust Company; that the officers and employes of the Central Company, all of whom were the officers, servants or employes of the

Trust Company, continued nominally in office and to control and manage such company until about the month of April, 1900; that certain pieces of real estate which are of vital importance to the Belt Company are held in the name of the Central Company; that the Trust Company took upon itself the duty of purchasing the said pieces of property and using for that purpose funds of the Belt Company; that various sums of money were, during the period above mentioned, paid out by the Belt Company to the Trust Company for the purpose of purchasing such pieces of real estate; that the Trust Company has never truly accounted to the Belt Company, although often requested so to do, for the sums of money so received by it and the disposition made by it of such sums of money, and has never accounted at all therefor, except as hereinafter stated. That certain shares of stock of the said Central Improvement Company were also, although belonging to the Belt Company, issued to the Trust Company and it has disposed of the same, and, although frequently requested so to do it has never truly accounted to the Belt Company therefor and has never accounted at all therefor, except as hereinafter stated. That a large amount of property was purchased with money advanced by the Belt Company, the title to which property, however, was taken in the name of the Central Improvement Company; that all of said property in truth and in fact has belonged to the Kansas City Suburban Belt Company; that the Belt Company has never been reimbursed for the money so advanced as aforesaid; that upon the 8th day of November, 1900, one Wash Adams, Esq., was appointed Receiver of the Central Improvement Company; that thereafter said Wash Adams resigned and T. T. Crittenden, Esq., was duly appointed receiver, as the successor of Wash Adams, and the said Crittenden since his appointment has held possession of the property of the Central Improvement Company, all of which in truth and in fact belonged to the Kansas City Suburban Belt Railroad Company and now belongs to it, unless the title thereto has passed from it by virtue of the foreclosure sale of the property covered by its mortgage, as hereinbefore stated; that another subsidiary company organized by the Trust Company was the Fairmount Amusement Company, with a total capital stock of Twenty-Five Hundred Dollars ($2,500.00), all of which belongs to the Belt Company; that said company was organized, dominated and controlled in the same manner by the Trust Company as the other corporations hereinabove set
249 forth; that all of the moneys expended by the Fairmount Amusement Company were moneys supplied by the Belt Company or supplied by the Trust Company and charged to the Belt Company; and the Trust Company took upon itself the duty of disbursing all of the said funds, and that large sums of money were paid by the Belt Company to the Trust Company for that purpose, but the Trust Company has never at any time truly accounted to the Belt Company for said money so received by it or the manner in which it expended the same, although often requested so to do, and has never accounted in any way therefor, except as hereinafter stated. That said Fairmount Amusement Company was organized

for the purpose of operating what is commonly known as Fairmount park, along the line of the Kansas City & Independence Air Line road; that during the time that the Trust Company so dominated and controlled the Belt Company it caused the Belt Company to advance to it large sums of money for the purpose of fitting up said Fairmount Park; that the Trust Company took upon itself the duty of expending said sums of money for the purpose of fitttting up Fairmount Park; that as your orators are informed and believe, upward of Three Hundred and Ffty Thousand Dollars ($35,000.00) was thus supplied to the Trust Company for the purpose of fitting up Fairmount Park; that the Trust Company has never at any time truly accounted to the Belt Company for the manner in which it expended such sums of money, although frequently requested so to do, and has never accounted at all therefor except as hereinafter stated; that another company organized by the Trust Company was the Northern Townsite Company, a Missouri corporation, with an authorized capital of One Hundred Thousand Dollars ($100,000.00), of which Ninety-Two Thousand Eight Hundred Dollars ($92,800.00) has been issued; that the said company was organized by the Trust Company in connection with the construction of the Kansas City & Northern Connecting Railroad for the purpose of acquiring property at or near townsites along the line of said road, that the Trust Company in the same manner as it dominated the other corporations above named caused its own servants and employees to be elected and maintained as officers and directors of said Townsite Company and at all times dominated and controlled the affairs of said Townsite Company; and the Trust Company caused the Belt Company to advance to it upwards of Forty-Seven Thousand Dollars ($47,000.00), which it used in the purchase of property which was taken in the name of the Townsite Company; and your orators are informed and believe and on such information and belief state that substantially all the money with which the property of the said Townsite Company was acquired was money advanced by
250 the Belt Company, and that the Trust Company instead of issuing the Belt Company all the capital stock of the Townsite Company issued large portions of it to itself or to other persons for its use and benefit, or otherwise disposed of the same; that the Trust Company has never truly accounted to the Belt Company at any time for the money so received by it for the *purpose* of said Townsite Company from the Belt Company, or the manner in which it expended the same, although frequently requested so to do, and has never accounted in any manner therefor, except as hereinafter stated.

Your orators further show unto the court that they are informed and believe and so charge the fact to be that the Trust Company also caused to be organized under the laws of the State of Missouri a corporation known as the Kansas City, Pittsburg & Gulf Railroad Company, for the purpose of constructing a line of railroad from Kansas City, Missouri, to the Gulf of Mexico; and that the said railroad was so constructed under the direction of the Trust Company acting through the said railroad corporation; and for the pur-

pose of acquiring funds with which to construct the said railroad the said Railroad Company issued its first mortgage to secure the issue of bonds herein specified, and on or about the first day of April, 1899, there were issued and outstanding bonds to the amount of Twenty-Three Million Dollars ($23,000,000.00); that at that time a default was made in the payment of an installment of interest due on the said bonds, and a bill was forthwith filed for the foreclosure thereof and receivers of the said railroad were appointed, and thereafter such proceedings were had that the said railroad was sold under the foreclosure decree.

Your orators further show unto the court that they are informed and believe and so charge the fact to be that the Suburban Belt Railroad Company, the Union Company and Air Line above named were very largely dependent upon the said Kansas City, Pittsburg & Gulf Company for their earnings, and an operating contract was in existence between the Belt Company and the said Kansas City, Pittsburg & Gulf Railroad Company; so that it was well known to the Trust Company that if the said Kansas City Pittsburg & Gulf Railroad Company went into the hands of receivers it would necessarily and inevitably result in insolvency of the Belt Co. and other companies hereinbefore named and would necessitate their ultimately being thrown into the hands of receivers and the mortgages upon the property being foreclosed; that the Trust Company by reason of the domination and control which it exercised over the affairs of the said Kansas City, Pittsburg & Gulf Railroad Company well knew that at and for some time prior to the first day
251 of April, 1899, said company would make default in the payment of the installment of interest due on that date and that such default would inevitably result in the filing of a bill to foreclose the mortgage and for the appointment of receivers for the said road and that the Trust Company thereupon set about to contrive a scheme whereby it might appropriate to itself, before the Belt Company passed beyond its control, all of the remaining property and assets of the Belt Company which were in such shape that they could by any possibility be transferred to the Trust Company. That the Trust Company thereupon caused to be exhibited to its own officers and employes who were holding the positions of officers and directors of the Belt Company various claims and demands which it alleged were due and owed by the Belt Company to it and caused such of its own officers and employes as were holding the positions of officers and directors of the Belt Company to pass upon and approve said claims and demands, and thereupon caused its own officers and employes so holding the positions of officers and directors in the Belt Company between the 31st day of March, 1899, and the 9th day of February, 1900, to execute to the Trust Company various pretended promissory notes and other negotiable instruments for the alleged purpose of securing to the Trust Company the payment of the said pretended claims which it held against the Belt Company, and caused its own officers and employes so holding the positions of officers and directors of the Belt Company to cause to be delivered or transferred to it various stocks, bonds and

accounts and other personal property belonging to the Belt Company as collateral security for the said pretended indebtedness of the Belt Company to the Trust Company.

Your orators further charge and aver upon information and belief, that the notes so fraudulently caused to be made by the Belt Company to the Trust Company are as follows:

Note dated March 31st, 1899, payable on July 2d, 1899, for $50,000, with interest at the rate of 6 per cent per annum.

Note dated July 26th, 1899, payable on demand with 6 per cent interest for $203,900.

Note dated Sept. 21st, 1899, payable on demand, with 8 per cent interest, for $23,056.48.

Note dated Oct. 23d, 1899, payable on demand, with 8 per cent interest, for $7162.40.

Note dated November 7th, 1899, due January 9th, 1900, with 8 per cent interest, for $50,000.00.

252 Note dated January 25th, 1900, due May 25th, 1900, with 6 per cent interest, for $25,000.

Note dated February 8th, 1900, due May 12th, 1900, with 6 per cent interest, for $10,400.

Note dated February 9th, 1900, due June 11th, 1900, with 8 per cent interest, for $10,400.

The stocks and bonds and other property which the Trust Company fraudulently caused its own officers and employes as officers and directors of the Belt Company to turn over to it for the purpose of securing the payment of the said pretended notes as aforesaid, are as follows:

338 first mortgage, 30 year 5 per cent gold bonds of the Kansas City & Northern Connecting Railroad Company of the denomination of $1000, dated January 1, 1897, being bonds numbered 1467, 1769 to 1733, both inclusive; 1799 to 1818, both inclusive; 1324 to 1331, both inclusive; 1756 to 1768, both inclusive; 1184 to 1216, both inclusive; 1466, 1369 to 1400, both inclusive; 1431, to 1440, both inclusive; 1609 to 1658, both inclusive; 1659 to 1708, both inclusive; 1819 to 1851, both inclusive; 1774 to 1798, both inclusive; 1301 to 1323, both inclusive, and 76 of said bonds, the numbers of which are not known to your orators.

67 and 9-10 second mortgage, 30 year 5 per cent income bonds of the Kansas City & Northern Connecting Railroad Company, of the denomination of $1000 each, dated January 1st, 1897, being bonds numbered 1064 to 1098, both inclusive; 1149 to 1157, both inclusive; 1162 to 1173, both inclusive; 1192 to 1202, both inclusive.

Certificate No. 227, entitling the holder to 250-1000 of said mortgage income bonds.

Certificate No. 229, entitling the holder to 250-1000 of said second mortgage income bonds.

Certificate No. 220, entitling the holder to 150-1000 of said second mortgage income bonds.

25 shares of the capital stock of the Fairmount Amusement Company of the par value of $100 each, as evidenced by certificates Nos. 9, 6, 5 and 4.

1120 shares of the capital stock of the Central Improvement Company of the par value of $100 each, as evidenced by certificate- Nos. 148, 149 and 147.

439 shares of the capital stock of the Northern Townsite
253 Company of the par value of $100 each, as evidenced by certificate No. 11.

425 shares of the capital stock of the Missouri Elevator and Terminal Company of the par value of $100 each, as evidenced by certain certificates Nos. 36, 34, 37, 40 and 38.

19,997 shares of the 20,000 shares constituting the capital stock of the Union Terminal Railroad Company.

4994 shares of the capital stock of the Kansas City and Independence Air Line.

15 Kansas City and Northern Connecting Railroad Company's second mortgage income bonds.

About 600 tons of new steel rails, theretofore purchased by, and then belonging to said Belt Company, and being stored in its yards.

Your orators further charge that the Trust Company also caused the Belt Company to assign to it an open account against the Kansas City, Pittsburg & Gulf Railroad Company in an amount of One Hundred Thirty-Three Thousand Fifty-Eight and 4-100 Dollars ($133,058.04), to secure said alleged indebtedness.

Your orators further charge and aver upon information and belief that the said notes were executed and the said account assigned and the said property above described given as collater- security solely under and by virtue of the domination and control of the Trust Company over the Belt Company, and at the time the said action was pretended to have been taken by the Belt Company the officers and directors of the Belt Company so causing the Belt Company to take such action were either officers and directors or servants of the Trust Company, and as such officers and directors or servants and employes of the Trust Company were personally interested in securing to the Trust Company all the available assets of the Belt Company, and that the execution of said promissory notes and delivery of said collateral security under such circumstances was fraudulent and void as against the Belt Company, and in law and in equity ought to be set aside.

Your orators further charge and aver upon information and belief that the Trust Company continued to keep its own officers, servants and employes filling the positions of officers and directors of the Belt Company down to about the month of April, 1900, when the said Kansas City, Pittsburg & Gulf Railroad Company having been sold under foreclosure decree and a re-organization of
254 said property joined with the Belt Company having been undertaken, the control of the said Belt Company passed into other hands, and that during all the time until said month of April, 1900, the said Trust Company continuously kept its own officers and employes in the positions of officers and directors of the Belt Company, so that at no time were there any persons holding the positions of officers and directors of said Belt Company, who were not personally interested in said Trust Company, and desirous of

assisting the said Trust Company in every possible way; and at no time was there ever any true accounting had between the Trust Company and the Belt Company, for or by reason of the matters and things hereinabove set forth, except such an accounting as the officers and employes of the Trust Company, so holding the positions of officers and directors of the said Belt Company pretended to make in looking over and going through the form of approving the accounts and statements rendered to the Belt Company by the Trust Company.

Your orators further show unto the court that ever since the control of the Belt Company passed out of the hands of the Trust Company the Belt Company prior to the appointment of your orators and receivers, endeavored to procure from the Trust Company a true accounting for and by reason of the matters and things hereinabove set forth, for the purpose of determining the true state of accounts between the Belt Company and the Trust Company; but all such demands of the Belt Company have been refused by the Trust Company.

Your orators further show that, since the filing of the original and ancillary bill herein the Trust Company has prepared and submitted a statement of account which it pretends and claims to be a full and complete statement of account of all the matters and transactions had between it and the Belt Company covering the matters hereinbefore set forth; but your orators charge the fact to be that the said account is insufficient, untrue, and that it does not properly or truly account for the stocks and bonds and other properties received by the Trust Company from, for or on account of the Belt Company; that many of the charges against the Belt Company contained in said account are untrue, illegal, unauthorized and ought not in law or equity to be permitted to stand as charges against the Belt Company; that the Trust Company in making said account has omitted therefrom a large number of credits to which the Belt Company is properly and lawfully entitled; and your orators hereby set forth their objections to said account by reference to specific items and instances, without, however in any degree waiving their right to object to said account as a whole or to insist that no such account has been rendered by the Trust Company as is
255 contemplated and required by law or equity or the equity rules governing such matters.

In the said pretended statement the accounts of the Trust Company against the Union Company, Consolidated Company and Air Line were consolidated with the account of the Belt Company in 1893, so that all charges made against or on account of said lines now appear in the statement of the account of the Belt Company.

1. Your orators further show that the Suburban Company was organized under the laws of the State of Missouri on or about January 8th, 1887; that nothing was done by the Suburban Co. in the way of construction of its road or the issue or sale of its securities until on or about May 31, 1889. Prior to said date Mr. A. E. Stillwell, Vice President of the Trust Company, and his associates among the officers and directors of the Trust Company, came into control

of the Suburban Company; and the Trust Company, through them, undertook to promote and finance the Suburban Company and to construct, or cause the construction, of its line of railroad. The plan adopted by the Trust Company for this purpose was to cause the Suburban Company to issue a large amount of securities, consisting of bonds and stocks, to be used in securing money with which to construct the railroad, and for this purpose to organize as its agency a construction company which, directly or through some contractor, should construct the line of the Suburban Company, and nominally take the securities of the Suburban Company in payment therefor. It was the further intention and purpose of the Trust Company, as a part of the same plan to cause securities of the Suburban Company to be issued very largely in excess, in value, of the cost of constructing the line of the Suburban Company, and to cause said securities to pass through the Trust Company, which would exact large and exorbitant amounts (under the guise of commissions and services for promotion and of a similar nature), and to cause such securities finally to be distributed among the stockholders and directors of the Construction Company which was to be organized very largely from the officers and directors of the Trust Company; so that the large profits arising from the enterprise might inure to the Trust Company and its officers, directors and their friends and associates; and in accordance with the aforesaid plan the Trust Company caused the Suburban Company on or about May 31, 1889, to enter into a contract with A. E. Stilwell (said contract being hereinafter referred to as the Stilwell contract) dated June 1, 1889, by the terms of which said Stilwell, or assigns, agreed to organize a construction company within sixty days from the date of said contract, to be called
256 the Kansas City Terminal Construction Company, for convenience hereinafter called the Construction Company, and to cause said Construction Company to build the line of railroad of the Suburban Company from Broadway Street in Kansas City, Missouri, and along Second Street to Harrison Street; thence in a northeasterly direction along the recorded survey of said line, as near as may be, to Cecil Station near the Blue River; said road to be double track the entire distance, with not less than sixty-pound steel rails and to be built in all particulars in a first class manner. It was further provided in said contract that the work should begin not later than the first day of September, 1889, and to be completed within twelve months from that date; that the Construction Company should buy such grounds as it might deem necessary for the use of said railroad company for depot purposes and to pay for all rights of way remaining unsecured by the railroad company; that the Construction Company should build a depot of such dimensions and cost and locate same at such a point and equip the road in such manner as it might deem for the best interests of the railroad company, and to pay all and every nature of expense incurred by the building of said road. In consideration for the building of the road, as above stipulated, the Suburban Company agreed in said contract to issue its first mortgage bonds upon that portion of its line above described in the sum of Five Hundred Thousand Dollars ($500,000.00), bearing six per cent interest, the bonds to be in such form

and of such denomination and to run such length of time as the said Stilwell or his assigns might designate; that of this issue of bonds the Suburban Company should place in escrow with the Trust Company, Four Hundred and Fifty Thousand Dollars ($450,000.00) of the same, face value, along with Nine Hundred Thousand Dollars ($900,000.00), face value, of the stock of the Suburban Company, to be delivered by said Trust Company as trustee to the said Stilwell, or his assigns, upon the faithful completion of said road as in said contract provided. On the day of the execution of said contract, to-wit, June 1, 1889, said A. E. Stilwell duly transferred and assigned the said contract to the Trust Company in consideration of the sum of Ten Thousand Dollars ($10,000.00), and the Trust Company, as the assignee of said Stilwell, thereupon undertook to comply with and perform all the conditions and terms of said contract imposed upon said Stilwell.

Your orators further show that, in pursuance of the duty and obligation cast upon the Trust Company by said contract, it proceeded to and did organize a corporation called the Kansas City Terminal Construction Company; and the Trust Company
257 caused its own stockholders, employes, officers and directors to be elected and appointed officers and directors of the Construction Company, so that the Trust Company by reason thereof at all times absolutely dominated and controlled the Construction Company. The stockholders of the Construction Company were also made up of the stockholders, employes, officers and directors of the Trust Company and such of their friends as they were willing to permit to come in and enjoy the fruits and profits of the plan. The Construction Company thereupon began the construction of the railroad of the Suburban Company between the points above designated as Broadway Street and Cecil Station; and had only partially completed the construction of said road, the acquirement of the right of way and the performance of their duties and obligations required by said contract, when, on or about May 9, 1890, the officers of the Construction Company and of the Suburban Company and of the Trust Company (who were substanitally the same persons and having the same purposes and ends in view), with the intent to secure to themselves large and exorbitant profits through their interest in the Construction Company and the Trust Company, and contracting with themselves as the representatives of the said corporations, caused the Construction Company and the Suburban Company to go through the form of agreement, by the terms of which the Suburban Company agreed to receive and accept the uncompleted railroad so partially constructed by the Construction Company as aforesaid as a full compliance with the requirements of said Stilwell contract and to authorize and direct the Trust Company to turn over to the Construction Company the stocks and bonds described in said Stilwell contract; and accordingly by virtue of such control and domination so exercised by the Trust Company over the Suburban Company, the latter went through the form of accepting the said uncompleted railroad and directing the Trust Company to release the said securities, and the Trust Company did release and turn over to the Construction Company bonds of the

Suburban Company in the amount of Four Hundred Thousand Dollars ($400,000.00), face value, and stock of the Suburban Company in the amount of Six Hundred Thousand Dollars ($600,000.00), face value, retaining for itself and its officers Fifty Thousand Dollars ($50,000.00), par value of the bonds, and Three Hundred Thousand Dollars ($300,000.00), par value of the stock, as hereinafter set forth; and said stocks and bonds in the amount of Six Hundred Thousand Dollars ($600,000.00) and Four Hundred Thousand Dollars ($400,000.00), respectively, were there-
258 upon distributed by the Trust Company and by the Construction Company to the stockholders, employes, officers and directors of said two companies and their friends who had been permitted to participate in the scheme as aforesaid.

Your orators further show that the action of the Trust Company in causing the Suburban Company to accept a partial compliance with its terms as and for a full compliance, and in causing said securities to be issued, was contrary to the best interests of the Suburban Company, oppressive, inequitable and was solely by virtue of the said domination and control and to the end that the persons so in control and domination might realize unlawful gains and profits; and the said transaction ought not in equity to be permitted to stand as against parties in interest in the Suburban Company.

(*a*) Your orators further show that the cost of the road and right of way so constructed and acquired by the Construction Company did not exceed the sum of Two Hundred and Ninety-Two Thousand Dollars ($292,000.00), and that the bonds and stock as aforesaid so turned over to the Trust Company and the Construction Company as the pretended consideration were of the reasonable value of Four Hundred and Eighty Thousand Dollars ($480,000.00), and that the unlawful profits of said transaction amounting to the sum of One Hundred and Eighty-Eight Thousands Dollars ($188,000.00), with interest thereon from May 9th, 1890, at six per cent per annum, ought in equity and good conscience to be accounted for by the Trust Company and paid to your orators, and that the pretended account rendered by the Trust Company omits said item, to which the complainants are properly entitled.

(*b*) Your orators further show that at the time of issuing the bonds aforesaid there were issued the sum of Five Hundred Thousand Dollars ($500,000.00) par value, and that those remaining after delivery of the Trust Comapny to the Construction Company of bonds of par value of Four Hundred Thousand Dollars ($400,000.00), to-wit, bonds in the sum of One Hundred Thousand Dollars ($100,000.00), par value, were fraudulently, wrongfully and unlawfully taken and appropriated by the Trust Company for its own benefit; and that said bonds so wrongfully taken and appropriated were of the reasonable value of Ninety Thousand Dollars ($90,000.00); that at the same time the capital stock issued by the Suburban Company was of the par value of One Million Dollars ($1,000,000.00), and that remaining after the delivery by the Trust Company to the Construction Company of Six Hundred Thousand Dollars ($600,000.00), par value, of as aforesaid, to-wit,

259 the sum of Four Hundred Thousand Dollars ($400,000.00), par value, of said capital stock was fraudulently, wrongfully and unlawfully taken and appropriated by the Trust Company to its own use, and the said stock so wrongfully taken and appropriated was at that time of the reasonable value of Eighty Thousand Dollars ($80,000.00); that your orators are entitled in equity and good conscience to have the Trust Company account for and pay over to your orators the value of said stocks and bonds, to-wit, the sum of One Hundred and Seventy Thousand Dollars ($170,000.00), with interest thereon from May 9, 1890, at six per cent per annum, all of which the Trust Company refuses to do and all of which said items are omitted as credits from said pretended statement of the Trust Company.

(*e*) Your orators further show that by reason of the failure of the Trust Company and its agents to fully complete said contract as provided for under the terms of the said Stilwell contract, the Suburban Company, its successor the Belt Company, one of your orators, as well as the receivers of the Belt Company, who are also your orators, were compelled to and did expend large sums of money to complete the construction of said railroad, and for the purchase of certain right of way which should have been procured and furnished by the Trust Company or by its agent, the Construction Company under said Stilwell contract, and which would have been so furnished but for the unlawful action of the Trust Company in causing the Suburban Company to accept a partial compliance with said contract as and for a full performance thereof; that a partial list of the amounts so expended by the Suburban Company during the year 1890-1891, are as follows:

For Right of Way and Expenses in Connection Therewith.

Date.	Name.	Amount.
May .., 1890	M. Uhrig, Curator	$101.10
" 10, 1890	Emma Ackerman and others	50.56
" .., 1890	Dobson & Trimble	1,767.00
" 22, 1890	H. H. Noland, Cl'k 1st Div	650.00
June .., 1890	Winford Dougherty	550.00
" 14, 1890	Winford Dougherty	10.00
" 25, 1890	Chi. & Alton, damages	4,202.00
July 17, 1890	Dobson & Trimble	1,198.73
" 29, 1890	C. R. Barnhart	441.50
.., 1890	G. Friday	75.00
Aug. 8, 1890	T. D. Windrate	54.00
" 8, 1890	Sedden & Edwards Brick Co	400.00
.., 1890	J. P. Knoche	252.50
Oct. 28, 1890	Land Title & Gaur. Co	42.50
" 23, 1890	T. S. Case	20.40
Jan. 21, 1891	Jennie Barber	25.00

260 *For Construction Work.*

Date.	Name.	Amount.
May 10, 1890	Nat'l W. Wks. Co	11.25
" 14, "	Smith & Bradbury	251.25
" 14, "	Smith & Bradbury	403.57
" 20, "	Mrs. S. J. Crute	300.00
" 31, "	K. C. Switch & Frog Co	333.00
" 31, "	K. C. Switch & Frog Co	666.00
" 31, "	K. C. Switch & Frog Co	128.00
June 6, "	K. C. Bolt & Nut Co	252.00
June 6, "	Am. Supply Co	108.48
" 19, "	Richards & Conover H. Co	4.17
"	Western S. & D. Co	37.50
" 19, "	American Supply Co	128.97
" 3, "	Pay Roll, Cons. Train	208.75
" 19, "	Am. Supply Co	120.42
.., "	Smith & Bradbury	3,682.10
June .., "	Am. Supply Co	225.70
July 7, "	Am. Supply Co	60.87
" .., "	Smith & Bradbury	695.66
" 17, "	K. C. Switch & Frog Co	1,161.00
" .., "	C. R. Barnhart	314.00
" 26, "	J. Smith	10.00
" .., "	Holton, Warren Lbr. Co	128.01
" .., "	Holton, Warren Lbr. Co	104.55
July .., 1890	Holton, Warren Lbr. Co	183.60
" " "	Holton, Warren Lbr. Co	124.95
" " "	Holton, Warren Lbr. Co	199.92
" " "	Holton, Warren Lbr. Co	74.06
Aug. 8, 1890	Kansas City Switch & Frog Co	1,440.00
" 9, "	Kit Colyer	95.00
Aug. 8, "	Smith & Bradbury	842.30
.., "	Smith & Bradbury	643.50
Aug. 5, "	J. H. Knoche	100.00
" .., "	J. Whitaker	62.00
Aug. 24, "	Smith & Bradbury	318.45
Sept. 6, "	Kansas City Switch & Frog Co	576.00
" 6, "	Pinkerton Detective Agency	139.50
" 6, "	Kansas City Bolt & Nut Co	387.50
" 6, "	Kansas City Bolt & Nut Co	29.04
.., "	Richards & Conover	8.17
.., "	Smith & Bradbury	992.00
.., "	Kansas City Switch & Frog Co	824.40
Sept. 27, 1890	Smith & Bradbury	1,273.53
.., "	Kansas City Switch & Frog Co	43.75
.., "	Smith & Bradbury	1,602.00
Dec. 22, 1890	H. R. & Co	962.98
Jan. 13, 1891	F. M. & Co	210.00
May 26, 1890	Smith & Bradbury	3,500.00

That your orators are entitled in equity and good conscience to a credit upon the pretended account produced by the Trust Company for each and all of the amounts above set forth and interest thereon at six per cent per annum from the dates when said payments were made, all of which have been improperly and unlawfully omitted from the said pretended account by the Trust Company.

(*d*) Your orators further show that by reason of the failure of the Trust Company to fully comply with the terms of and conditions of the said Stilwell contract and to furnish the right
261 of way and depot required to be furnished by said Trust Company as a part of said contract, it became necessary to secure additional parcels of right of way, all of which the Trust Company was obligated to procure and furnish under the said Stilwell contract, and the Trust Company undertook to procure such right of way for the Suburban Company and did procure the same and in all cases charged the cost thereof, together with interest thereon, to the Belt Company, and the items so charged appear as debits in the pretended statement produced by the Trust Company; that in many instances the Trust Company caused the Suburban or Belt Company to itself purchase said necessary right of way and to execute notes for deferred payments thereon and said notes and the interest payments as they were made from time to time were duly charged to the Belt Company and appeared as debits in said pretended account; that the Trust Company failed to furnish a depot for the Suburban Company as in and by said contract it was obligated to do through itself or through its agent, the Construction Company, and the Trust Company after the pretended completion of said Stilwell contract undertook to and did construct a depot building for the Suburban Company at Second and Wyandotte Streets and charged the cost thereof to the Belt Company, and said charges appear as debits in the pretended account presented by the Trust Company. The amount so expended for right of way aggregates the sum of One Hundred and Twelve Thousand, Two Hundred Thirty-nine and Eighteen-hundredths Dollars ($112,239.18) the itemized statement of which, showing the amounts and dates when the various items were charged to the Belt Company appears upon the itemized statement marked Exhibit "1" under the head of "Right of Way," hereto attached and made a part hereof. The interest paid on right of way notes as aforesaid, the payment of which was made necessary by the Trust Company's failure to comply with said Stilwell contract, aggregates the sum of Forty-three Thousand Sixty-six and 30-100 Dollars ($43,066.30), an itemized statement of which showing the dates, and amounts paid is set forth in the said Exhibit "1" under the head of "Interest on Right of Way notes," herewith attached as aforesaid.

(*e*) In addition to the amounts appearing upon the pretended statement of the Trust Company as so expended for right of way by the Trust Company and charged to the Belt Company, the Belt Company on or about June 2d, 1893, paid to Louise W. Crane and others, who were then owners of an undivided half interest in lot 124, block 12, of old town, all in Kansas City, Mo., the sum of Three

Thousand Dollars ($3,000) as a partial payment for said
262 interest in said lot; that it was the duty of the Trust Company or the duty of its agent the Construction Company, to procure and furnish this tract of land as a part of the right of way called for under the Stilwell contract of June 1, 1889, the said payment was made necessary because of the failure of the Trust Company or its agent, the Construction Company, to comply with and perform the terms of the said Stilwell contract and because of the unlawful action of the Trust Company in causing the Suburban Company to accept a partial compliance with said Stilwell contract as and for a full performance thereof; that said item of Three Thousand Dollars ($3,000.00) is wholly omitted in the pretended account or statement presented by the Trust Company and that the Belt Company is entitled to and should have credit for said item with interest thereon from the date thereof.

(*f*) In addition to the amounts appearing upon the pretended statement of the Trust Company as so expended for right of way by the Trust Company and charged to the Belt Company, the Suburban Company on or about April 4, 1890, paid to Thomas J. Emery, who was then the owner of lots 141 and 142 of block fourteen (14), old town, all in Kansas City, Mo., on account of the purchase of said lots the sum of Four Thousand Five Hundred Dollars ($4,500), and in addition thereto two notes of Five Thousand Dollars ($5,000) each were given as the balance of the purchase price of said lots in the manner hereinafter described; that it was the duty of the Trust Company or the duty of its agent, the Construction Company, to procure and furnish this tract of land as a part of the right of way that was called for under the Stilwell contract of June 1, 1889; and said payment was made necessary because of the failure of the Trust Company or its agent, the Construction Company, to comply with and perform the terms of the said Stilwell contract, and because of the unlawful action of the Trust Company in causing the Suburban Company to accept a partial compliance with said Stilwell contract as and for a full performance thereof; that said item of Four Thousand Five Hundred Dollars ($4,500) is wholly omitted in the pretended account or statement presented by the Trust Company and that the Belt Company is entitled to and should have a credit for said item with interest thereon from the date of the payment thereof.

(*g*) It was the duty of the Trust Company or the duty of its agent, the Construction Company, to procure and furnish to the Suburban Company a right of way across lots ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), and fifteen (15), block ten (10), of old town, and lot one hundred and one (101),
263 of block ten (10), old town, all in Kansas City, Mo., as a part of the right of way called for under the Stilwell contract of June 1, 1889; that the right of way of the Suburban Company crosses the said lots and that the said Suburban Company's road, as so built by the Trust Company or its agent, the Construction Company, passes over and upon these said lots; that the Trust Company or its agents, the Construction Company, has omitted and wholly failed to procure and furnish such right of way for and upon said

lots as called for and provided under the terms of the said Stilwell contract; that at the time of the institution of this action the reasonable value of the right of way over and upon lots ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14) and fifteen (15), of block ten (10), of old town, so omitted to be provided by the said Trust Company or its agent, the Construction Company, was Eleven Thousand Two Hundred and Fifty Dollars ($11,250); that at the time of the institution of this action the reasonable value of the right of way over and upon lot one hundred and one (101), block ten (10), old town, so omitted to be provided by the said Trust Company or its agent, the Construction Company, was Five Thousand Dollars ($5,000.00); that the reasonable value of the right of way over and upon the said lots, to-wit, Eleven Thousand Two Hundred and Fifty Dollars ($11,250.00) and Five Thousand Dollars ($5,000.00) are wholly omitted in the pretended account or statement presented by the Trust Company, and that the Belt Company is entitled and should have credit for the said items of Eleven Thousand Two Hundred and Fifty Dollars ($11,250.00) and Five Thousand Dollars ($5,000.00) with interest thereon from the date of the omission of said Trust Company or its agent, the Construction Company, to procure and furnish said right of way.

(*h*) There was paid by the Trust Company as rental for certain right of way, all of which said right of way the Trust Company was obligated to procure and furnish under the said Stilwell contract, and charged against the Belt Company in the pretended statement, the sum of One Thousand Two Hundred Eighty-three and Twenty-hundredths Dollars ($1,283.20) an itemized statement of which is set forth in said Exhibit "1," under the head of "Rental Paid for Right of Way," hereto attached, which said payment was made necessary because of the failure of the Trust Company to comply with and perform the terms of said Stilwell contract.

(*i*) In addition to the amounts appearing upon the pretended statements of the Trust Company as so expended for right of way and rental thereof, by the Trust Company and charged to the Belt Company, the Belt Company or its receivers, all of whom are
264 your orators herein, between March, 1897, and January 1, 1902, were compelled to pay to the Pacific Express Company (who was then the owner of lot one hundred and one (101), block ten (10), of old town, all in Kansas City, Mo.), as rental for right of way of said Belt Company across said lot the sum of Fourteen Hundred Seventy-five Dollars ($1,475.00); that the amounts so expended by the Belt Company or its receivers are as follows:

Amount Paid by the Belt Company.

March, 1897	$25.00
April, 1897	25.00
May, 1897	25.00
May, 1897	25.00
June, 1897	25.00
June, 1897	25.00

Sept.,	1897	25.00
Oct.,	1897	25.00
Nov.,	1897	25.00
Dec.,	1897	25.00
Jany.,	1898	25.00
Feb.,	1898	25.00
March,	1898	25.00
April,	1898	25.00
May,	1898	25.00
June,	1898	25.00
July,	1898	25.00
Aug.,	1898	25.00
Sept.,	1898	25.00
Oct.,	1898	25.00
Nov.,	1898	25.00
Dec.,	1898	25.00
Jany.,	1899	25.00
Jany.,	1899	25.00
Feby.,	1899	25.00
March,	1899	25.00
March,	1899	25.00
May,	1899	25.00
June,	1899	25.00
June,	1899	25.00
July,	1899	25.00
Sept.,	1899	25.00
Oct.,	1899	25.00
Nov.,	1899	25.00
Dec.,	1899	25.00
Jany.,	1900	25.00
Feby.,	1900	25.00
March,	1900	25.00
April,	1900	25.00

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May,	1900	25.00
June,	1900	25.00
July,	1900	25.00
Aug.,	1900	25.00
August,	1900	25.00
		$1,100.00

Amounts Paid by the Receivers of the Belt Company.

October,	1900	$25.00
November,	1900	25.00
December,	1900	25.00
January,	1901	25.00
February,	1901	25.00
March,	1901	25.00

April,	1901.....	
May,	1901.....	25.00
June,	1901.....	25.00
July,	1901.....	25.00
August,	1901.....	25.00
September,	1901.....	25.00
October,	1901.....	25.00
November,	1901.....	25.00
December,	1901.....	25.00
		25.00
		$375.00

That it was the duty of the Trust Company or the duty of its agent, the Construction Company, to procure and furnish the right of way over said lot as a part of the right of way called for under the Stilwell contract of June 1, 1889, and said payments were made necessary because of the failure of the Trust Company or its agent, the Construction Company, to comply with and perform the terms of said Stilwell contract and because of the unlawful action of the Trust Company in causing the Suburban Company to accept a partial compliance with said Stilwell contract as and for a full performance thereof; that the said items of rental amounting to Fourteen Hundred and Seventy-five Dollars ($1,475.00) are wholly omitted in the pretended account or statement presented by the Trust Company and that the Belt Company and its receivers (your orators herein) are entitled to and should have credit for said items with interest thereon from date of payment thereof.

(*j*) There was expended by the Trust Company and charged to the Belt Company as appears in the said pretended statement the sum of Fifty-nine Thousand Two Hundred Sixty-five and Sixty-two-One-Hundredths Dollars ($59,256.62) as the cost of the depot building at Second and Wyandotte Streets in Kansas City, Missouri,
266 which said building should have been constructed by the Trust Company, or its agent, the Construction Company, under and in pursuance of the terms of said Stilwell contract; an itemized statement of the items composing the charge of Fifty-nine Thousand Two Hundred Sixty-five and 62/100 Dollars ($59,265.62) is set forth in said Exhibit "1," under the heading "Second and Wyandotte Depots," hereto attached.

(*k*) There was expended by the Trust Company and charged to the Belt Company, as appears in the said pretended statement, the sum of Twenty-two Thousand One Hundred Fifty-eight and Seventy-five Hundredths Dollars ($22,158.75) as the cost of other station depots, platforms, sand house, round house and labor and material furnished, all of which should have been constructed, procured and furnished by the Trust Company or its agent, the Construction Company, under and in pursuance of the terms of the said Stilwell contract. An itemized statement of the items composing this charge of $22,158.75 is set forth in said Exhibit "1" hereto attached, under the head of "Other Buildings."

Your orators further say that all the foregoing matters, which ap-

pear (and are set forth in said exhibit) as debits in the pretended account presented by the Trust Company are unlawful and unjust and represent matters for which the Trust Company and not the Belt Company was and is responsible; that all of said items should be eliminated from said account and the Belt Company should be credited with interest thereon from the respective dates when said charges were made; that all of the foregoing matters not appearing upon the pretended statement or items which the Trust Company has unlawfully and improperly omitted therefrom and with which the Belt Company, in equity, should be credited.

(*l*) Your orators further show that, by reason of the failure of the Trust Company and its agents to fully complete said construction contract, it became necessary for the Suburban Company, or its successor, the Belt Company, one of your orators herein, to acquire ground for right of way and switching yards in Kansas City, Missouri, upon the line of its road, which should have been furnished and provided by the Trust Company, or its agent, the Construction Company, under and in pursuance of the said Stillwell contract; that accordingly the Trust Company caused the Second Street Improvement Company, which was also one of its auxiliary companies created and officered by it, to execute a lease from it to the Consolidated Terminal Railway Company covering a strip of land in section twenty-five (25), township fifty (50), range thirty-three (33), in Jackson County, Missouri, containing twenty-eight (28)
267 acres, which land adjoined the right of way and railroad tracks of the Suburban Company running parallel to such tracks at a distance of 4,809.8 feet. It was provided in said lease that the lessee should pay a yearly rental of Three Thousand Dollars ($3,000.00) and that the lessee should also have an option of purchase of said property on certain terms therein specified. Your orators duly paid said rent as it accrued from year to year, amounting to the aggregate sum of Twenty-six Thousand Two Hundred and Fifty Dollars ($26,250.00) and that the reasonable value of said property at the time of the institution of this action was Forty Four Thousand One Hundred Twenty-five Dollars ($44,125.00). Your orators are entitled in equity and good conscience to be credited upon the pretended accounts produced by the Trust Company for each and all said rental payments with interest thereon at six per cent per annum from the date of such payments and for the value of said property at the time of the institution of this action, with interest thereon as above stated; all of which credits have been improperly and unlawfully omitted from said account by the Trust Company.

(*m*) Your orators further show that by reason of the failure of the Trust Company and its agents to fully complete said Stilwell contract it became necessary for the Belt Company to acquire certain property at Second and Wyandotte Streets in Kansas City, Missouri, for depot purposes; that thereupon the Trust Company caused the said Second Street Improvement Company, one of its auxiliary corporations aforesaid, to lease to the Suburban Company for a period of ten years from June 1, 1891, lots one hundred and twelve

(112) and one hundred thirteen (113), block eleven (11), Old Town, all in Kansas City, Mo., which said property properly came within the terms of said Stilwell contract and should have been furnished and provided by the Trust Company or by its agent, the Construction Company; under the said lease for said lots 112 and 113 the Belt Company was caused to and did pay rental to the Second Street Improvement Company for the use of said lots from June 1, 1891, to October 31, 1901, a total of One Hundred and Twenty-Five (125) months, at the rental fixed in said lease of Two Thousand Five Hundred Sixty-Six and forty-hundredths Dollars ($2,566.40) per annum, or a total of Twenty-Six Thousand Seven Hundred Thirty-Three and sixty-four-hundredths Dollars ($26,733.64); and that the value of said lots at the time of the institution of this action was the sum of Twenty-Five Thousand Seven Hundred and Fifty Dollars ($25,750.00), and your orators are entitled in equity and good conscience to a credit upon the pretended account produced by the Trust Company for the sum paid as rentals with
268 interest thereon at six per cent per annum from the date of each payment and for the said sum of Twenty-Five Thousand Seven Hundred and Fifty Dollars ($25,750.00), with interest thereon; all of which credits have been improperly and unlawfully omitted from said pretended account by the Trust Company.

(*n*) Your orators further show that on March 20, 1890, the McClelland, Stumpf & Peltzer Brick Manufacturing Company owned lots one hundred forty-three (143), one hundred forty-four (144), one hundred forty-five (145), and one hundred forty-six (146), in block fourteen (14); lots one hundred nineteen (119), one hundred twenty-two, (122), one hundred twenty-three (123), one hundred twenty-five (125), and an undivided half interest in lot one hundred twenty-four (124), in block twelve (12), and lot one hundred thirty-eight (138), in block thirteen (13), all in Old Town, Kansas City, Missouri, all of which property is located in the vicinity of Second and Wyandotte Streets and is a part of the depot grounds of the Belt Company and was a part of the right of way to be acquired and furnished by the Trust Company or by its agent, the Construction Company, under the Stilwell contract of June 1, 1899. In March, 1890, the said Brick Manufacturing Company conveyed all of the foregoing property to Alfred L. Howe, agent or dummy of the Trust Company, and on the same date the said Howe executed two notes for Forty-Nine Thousand Three Hundred Thirty-Three and thirty-three-hundredths Dollars ($49,333.33) each, to secure to the said Brick Manufacturing Company the balance of the purchase price of the same, and a deed of trust to secure said notes was placed upon all said property. On June 23d, 1890, the said Howe conveyed said property to the Belt Company. The first of said notes was for $49,333.33, which became due March 20, 1891, and the second became due March 20, 1892, both bearing six per cent interest; the first of said notes was paid by the Trust Company on March 23, 1891, and charged by it to the Belt Company. On March 14, 1890, the said Brick Manufacturing Company conveyed to W. S. Taylor, an agent and dummy of the Trust Company, lots nine (9), ten

(10), eleven (11), twelve (12), thirteen (13), fourteen (14), and fifteen (15), in block eleven (11) of King & Bouton's Re-survey of the East Half of block eleven (11), Old Town, in Kansas City, Missouri, for a consideration of Forty-One Thousand One-Hundred Dollars ($41,100.00), and said Taylor executed to said Brick Manufacturing Company three notes in the sum of Ten Thousand Dollars ($10,000.00) each, dated June 1, 1890, to secure the unpaid purchase money, and gave a deed of trust to secure said notes. The property just described is located at Second and Wyandotte
269 Streets in Kansas City, Missouri, upon which the depot building of the Belt Company was afterwards constructed, and it was a part of the property and right of way that should have been furnished by the Trust Company, or by its agent, the Construction Company, under the terms of the said Stilwell contract of June 1, 1889. The Kansas City Terminal Construction Company, in recognition of its obligation to pay for this property at or about the time of its purchase paid from its treasury to the said Brick Manufacturing Company or for it the sum of Eleven Thousand One Hundred Dollars, ($11,100.00), which, with the said three notes of Ten Thousand Dollars ($10,000.00), given for deferred payments, made up the purchase price of said property; the said Taylor, after the execution of the said three notes, conveyed said property to the Belt Company. On April 7, 1890, Thomas J. Emery owned the following described real estate in Kansas City, Missouri, to-wit, lots twelve (12), and thirteen (13) of King & Bouton's Re-survey of the west half of block ten (10), Old Town; also lots one hundred forty-one (141) and one hundred forty-two (142) block fourteen (14), Old Town; on said date he duly conveyed said property to the said Alfred L. Howe, who was acting in the same capacity as aforesaid: that said Howe gave back to said Emery two notes for Nine Thousand Three Hundred Seventy-Five Dollars ($9,375.00), with six per cent interest, to secure the unpaid portion of the purchase price, securing said notes with a deed of trust upon the property; and thereafter on June 23, 1890, conveyed lots one hundred forty-one (141) and one hundred forty-two (142) in block fourteen (14) to the Belt Company, and the remainder of the property was conveyed to the Second Street Improvement Company; that of said two notes of Nine Thousand Three Hundred and Seventy-Five Dollars ($9,375.00) each, the sum of Ten Thousand Dollars ($10,000.00), or Five Thousand Dollars ($5,000.00) on each of said notes, represented the deferred payments on the property acquired for and deeded to the Belt Company; that all of said Emery property was a part of the property and right of way that should have been procured and furnished by the Trust Company or by its agent, the Construction Company, under the terms of the said Stilwell contract of June 1, 1889.

Your orators further show that the notes described, representing deferred payments on property purchased for and afterwards conveyed to the Belt Company are as follows:

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Date of note.	Date due.	Int.	In favor of	Amount.
4- 4-1890	4- 4-1891	6 per cent	T. J. Emery.....	$5,000.00
4- 4-1890	4- 4-1892	6 per cent	T. J. Emery.....	$5,000.00
6- 1-1890	6- 1-1891	6 per cent	McClelland, Stumpf & Peltzer Brick Mfg. Company.	$10,000.00
6- 1-1890	6- 1-1893	6 per cent	Do.....	$10,000.00
6- 1-1890	6- 1-1893	6 per cent	Do.....	$10,000.00
3-20-1890	3-20-1892	6 per cent	Do.....	$49,333.33

Your orators further show, that on or about October 15, 1897, the Belt Company was embarrassed financially and insolvent and that it had outstanding notes of a large amount, including the notes above mentioned, which were secured by a first mortgage as aforesaid; that the stock of the Belt Company was depressed in value and certain of the officers of the Trust Company and certain investors in it and in the Belt Company became desirous of improving the financial condition of the Belt Company by getting off its books certain of its bills payable, including the notes mentioned, in order that by certain manipulations a dividend might be declared, and the market in the stocks of the Belt Company might be improved and the parties interested might profit therefrom in their stock dealings and transactions. Accordingly, an arrangement was made between certain officers of the Trust Company and J. de Goeijen, by the terms of which the Trust Company assumed and agreed to pay the said real estate notes, including the notes above mentioned, and the amount of said notes, including the said [illegible] of Eighty Nine Thousand Three Hundred and Thirty-Three a[illegible] thirty-three-hundredths Dollars ($89,333.33), was by the Trust Company charged to the Belt Company on the books of the Trust Company, and the same now appears as a debit to the Belt Company in the pretended statement submitted by the Trust Company. At the time of said transaction, and on or about October 15, 1897, pursuant to the plan aforesaid, the said J. de Goeijen purchased certain bonds belonging to the Belt Company, which were by the Trust Company credited upon its books to the Belt Company in an amount sufficiently large to cover all of said notes, so that upon the books of the Belt Company all of said bills payable had been eliminated, and the Belt Company was thus enabled to make out and send to stockholders and financial publications a clean statement showing an improved financial condition for the purpose of bolstering up the market value of its stock aforesaid, all of which was accordingly done. The said statements showing said credits extended by the Trust Company and the improved financial condition of the Belt
271 Company resulting therefrom were sent out to stockholders and investors and the financial publications aforesaid, and the public was invited to purchase and trade in the stocks as well as the bonds of the Belt Company, in reliance upon such statements. And your orators aver that thereafter the public did deal in, buy and

sell the stocks and bonds of the Belt Company, and investments were made in reliance upon said statements.

Your orators further show, that on or about the month of April, 1899, and after the appointment of receivers for the Gulf Company, the Trust Company had good reason to believe and did believe that it would soon lose control of the Belt Company, and that other and independent directors and officers would be elected, and it thereupon set about to relieve itself of its assumption and agreement to pay the said notes above mentioned, aggregating Eighty-Nine Thousand Three-Hundred Thirty-Three and 33-100 Dollars, and thereupon made the pretense and claim that the aforesaid credit which it extended to the Belt Company on or about October 15, 1897, was on the understanding that the funds for such credit should be supplied by the said J. de Goeijen, and that said J. de Goeijen had failed to supply said funds; and thereupon said Trust Company undertook by an entry upon its own books to relieve itself of its said assumption and agreement to pay said notes aggregating $89,333,33, but failed, neglected and refused upon so doing to credit the account of the Belt Company with said sum, as it should have done. At that time the said de Goeijen was indebted to the Trust Company in an amount which said De Goeijen was unable to pay, or by reason of their intimate financial relationship the Trust Company was unable or unwilling to collect from De Goeijen, and thereupon the Trust Company contrived the plan of causing the Belt Company to take over its worthless account against De Goeijen, in lieu of crediting the Belt Company with such sum, as it should have done as aforesaid. At said time the Trust Company well knew that said account against De Goeijen was worthless and uncollectable, and its action in causing said entries to be made on the books of the Belt Company and in refusing itself to credit the Belt Company, was a fraudulent and unlawful attempt on the part of the Trust Company to relieve itself of its assumption of the agreement to pay said notes in said sum of $89,333.33, and at the same time to release said amount charged to the Belt Company on account of such assumption. By reason of the premises, the Trust Company is estopped to deny that the credit it extended to the Belt Company as aforesaid was an absolute credit, and is so estopped from saying that said credit was a conditional one, and cannot in equity and
272 good conscience claim the right to unload upon the Belt Company the worthless claim against De Goeijen in lieu of crediting the Belt Company or paying said notes, neither of which has been done by the Trust Company.

Your orators claim, therefore, that the charge of Eighty-Nine-Thousand Three Hundred Thirty-Three and 33-100 Dollars ($89,333.33), made by the Trust Company to the Belt Company on or about October 15, 1897, which appears in the pretended statement submitted by the Trust Company, should be eliminated therefrom, together with all charges of interest which also appear in said pretended statement, and that the Belt Company should be credited with same amount and interest thereon from said date of

October 15, 1897, together with interest upon the charges of interest made in connection therewith as aforesaid.

(1) Your orators further state that on or about May 9, 1890, when the Suburban Company and the Construction Company undertook, as above stated, to declare the contract between them for the construction of the first section of the Suburban Company's road duly performed in all respects, the said Construction Company had an overdraft at one of the banks in Kansas City, Missouri, in the sum of Three Hundred and Thirteen and 76-100 Dollars ($313.76), whereby the said Construction Company owed said bank the said sum of money; that the Trust Company, through its officers and agents unlawfully and fraudulently caused the Suburban Company to take up and pay said overdraft in said sum on the 7th day of May, 1890, and said sum is wholly omitted in the pretended statement of account submitted, and the Belt Company should be and is entitled to be credited with interest thereon from the day of payment thereof.

2. Your orators further show that upon the organization of the various companies above named, to-wit, the Suburban Company, the Consolidated Company, the Union Company, the Air Line and the Northern Connection Company, the Trust Company as above set forth caused these companies respectively to issue stocks and bonds, and thereupon the Trust Company undertook the disposition of said stocks and bonds, in some instances going through the form of purchasing said stocks and bonds itself and in other cases disposing of said stocks and bonds to others, and in connection therewith made large and exorbitant charges to the Belt Company under the guise of commissions for so doing.

(*a*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company un-
273 der the guise of commissions in connection with the Belt Company:

Aug.	8, 1890	$15,000.00
Dec.	22, 1893	4,000.00
Oct.	10, 1894	1,250.00
July	29, 1897	1.58
Feb.	8, 1899	75.00
Apr.	6, 1897	22.50
Nov.	20, 1895	62.50

(*b*) In addition to the foregoing amounts, the Trust Company on or about November 27, 1891, charged the Belt Company the sum of One Thousand Dollars ($1,000.00), as and for a commission in connection with the Belt Company; and the said amount was paid to the Trust Company by the Belt Company. The amount of this payment does not appear on the pretended statement presented by the Trust Company.

(*c*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of commissions in connection with the Consolidated Company:

Oct.	26, 1891	$522.50
Apr.	4, 1892	6,000.00
Oct.	20, 1891	30,000.00
Dec.	17, 1891	6,000.00
Oct.	27, 1891	402.50
Oct.	26, 1891	120.00
Nov.	13, 1891	320.00
Nov.	2, 1891	150.00
Nov.	2, 1891	80.00
Nov.	12, 1891	1,182.50
Nov.	16, 1891	463.18
Nov.	21, 1891	750.00
Nov.	23, 1891	4,455.00
Dec.	4, 1891	24.00
Dec.	7, 1891	24.00
Dec.	19, 1891	300.00
Jan.	9, 1892	30.00
Jan.	12, 1892	300.00
Jan.	30, 1892	750.00
Feb.	11, 1892	90.00
Feb.	26, 1892	60.00
Feb.	29, 1892	225.00
Mar.	11, 1892	30.00
Mar.	18, 1892	60.00
Mar.	19, 1892	750.00
Apr.	6, 1892	2,802.80
Apr.	12, 1892	1,200.00
July	13, 1892	240.00
Aug.	2, 1898	46.88
Feb.	8, 1899	46.00

274 (*d*) In addition to the foregoing charges that appear upon the said statement, the Trust Company took and appropriated to its own use the stock and bonds of the Consolidated Terminal Company under the guise of commissions as follows:

Dec. 17, 1891, 1000 shares of stock of the value of $32,220.00.

Dec. 17, 1891, 30 bonds of the value of $25,410.00.

Mar. 17, 892, 240 shares of the stock of the value of $7,732.00.

July —, 1892, 3100 shares of stock of the value of $103,333.33.

(*e*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of commissions in connection with the Union Terminal Company:

Oct.	7, 1892	$550.00
Dec.	31, 1892	500.00
Jan.	13, 1893	7,500.00
Jan.	23, 1893	3,200.00
Jan.	26, 1893	15,000.00
Apr.	5, 1893	6,250.00
Sept.	16, 1898	50.00

Oct.	6, 1898	100.00
Oct.	18, 1898	50.00
Jan.	17, 1899	231.25
Jan.	18, 1899	277.50
Feb.	17, 1899	230.00
Aug.	2, 1898	90.63
Feb.	8, 1899	117.00

(*f*) In addition to the foregoing charges the Trust Company charged the Belt Company under the guise of commissions and caused the Belt Company to pay the same in connection with the Union Company the following sums:

September, 26, 1892	$4,400.00
November, 10, 1892	800.00
December 31, 1892	550.00
January 7, 1892	250.00

The amount of these payments does not appear on the pretended statement presented by the Trust Company.

(*g*) In addition to the foregoing items appearing upon the pretended statement, the Trust Company took, appropriated and converted to its own use, under the guise of commissions, three hundred (300) shares of Union Company stock of the value of
275 Nine Thousand Eight Hundred Sixty-Four Dollars ($9,864.00); which does not appear upon said statement.

(*h*) In addition to the foregoing items the Trust Company took, appropriated and converted to its own use, under the guise of commissions for services rendered, the following stocks and bonds of Union Company:

October 21, 1892, 60 bonds of the value of	$54,000.00
1,500 shares of stock of the value of	49,320.00

(*i*) In addition to the foregoing items the Trust Company took, without consideration, appropriated and converted to its own use one thousand (1,000) shares of Union Company stock of the value of Thirty-Two Thousand Eight Hundred and Eighty Dollars ($32,880.00).

(*j*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of commissions in connection with the Air Line:

Mar.	17, 1892	$520.00
June	20, 1892	50.00
July	6, 1892	700.00

(*k*) In addition to the foregoing appearing on said statement there was taken and appropriated by the Trust Company and by it converted to its own use, on or about December 9, 1891, the following:

13 mortgage bonds of the Air Line of the value of $11,193.00.

500 shares of stock of the Air Line of the value of $15,950.00, for which no credit is given to the Belt Company in said statement.

(*l*) In addition to the foregoing appearing on said statement there was taken and appropriated by the Trust Company and by it converted to its own use in the year 1892, 500 shares of Air Line stock of the value of $15,950.00.

(*m*) In addition to the foregoing items the Trust Company in the year 1895 took, appropriated and converted to its own use under the guise of commissions and services for promotion in connection with the Air Line, 80 shares of stock of the East Kansas City Land Company (then the property of the Belt Company) of the value of Eight Thousand Dollars ($8,000.00).

(*n*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of commissions in connection with the Kansas City & Northern Connecting Railroad Company:

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July	19, 1896	$400.00
July	29, 1896	400.00
Oct.	1, 1899	50.00
Dec.	10, 1896	8,250.00
Dec.	19, 1896	3,012.00
Dec.	23, 1897	50,000.00
Dec.	23, 1897	15,791.00
Dec.	23, 1897	1,250.00
Feb.	9, 1898	250.00
Feb.	24, 1898	300.00
Sep.	8, 1898	950.00
Dec.	27, 1898	250.00
Apr.	25, 1899	62.50

Your orators further show that as above set forth the Trust Company, at all times while it was handling the stocks and bonds of the companies mentioned, absolutely dominated and controlled said companies, and was using them, and each of them, as its own instrumentality or dummy for its own benefit and profit; that the Trust Company occupied a fiduciary relation to said companies and that any contract or contracts made or claimed to have been made between the Trust Company and said companies respectively, providing for commissions, donations or services were unlawful, inequitable and oppressive, and neither said contracts nor the charges above made were ever submitted to or approved by the parties in interest in said companies; that the said charges and exactions made under the guise of commissions or services were not only exorbitant, but by reason of the relationship between the Trust Company and the said companies the Trust Company did not have the right in law to charge the said companies any commissions whatsoever for the sale or handling of said securities or for anything done or services performed on account of which said charges

were made; that the charges for said commissions contained in said pretended statement should be eliminated and the Belt Company should be credited upon said account with interest on said charges from the dates when they were made; and in respect to the charges for commissions not appearing upon said pretended statement, the Belt Company should be and is entitled to a credit from the Trust Company with interest from the date of the payment thereof; and the value of the stocks and bonds so appropriated by the Trust Company as aforesaid, together with interest thereon from the dates respectively of such appropriation, should be credited to the Belt Company upon said statement.

3. Your orators further show that upon the organization of the various companies above named, to-wit, the Suburban Com-
277 pany, the Consolidated Company and the Union Company, the Trust Company as above set forth caused these companies respectively to issue stocks and bonds, and thereupon the Trust Company undertook the handling and disposition of said stocks and bonds, and, in addition to the exaction of commissions as above stated, the Trust Company exacted and caused the Belt Company to pay certain other charges under the name of trustee's fees, which your orators allege are wrongful and unlawful charges, for the reasons hereinbefore and hereinafter set forth, said charges being as follows:

(*a*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of trustee's fees in connection with the Union Company, as follows:

Sept.	26, 1892	$13,200.00
Oct.	7, 1892	1,650.00
Nov.	10, 1892	2,400.00
Dec.	31, 1892	1,650.00
Jan.	7, 1893	750.00
Jan.	13, 1893	22,500.00
Jan.	23, 1893	9,600.00
Apr.	5, 1893	18,750.00
Feb.	27, 1893	375.00

(*b*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of trustee's fees in connection with the Consolidated Company:

Apr. 25th, 1892	$7,000.00

(*c*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of trustee's fees in connection with the Suburban Company, to-wit:

From September, 1891, to and including May, 1900, at the rate of $17.00 per month, aggregating	$1,326.00

(*d*) In addition to the foregoing charges that appear upon the said statement, the Trust Company took and appropriated to its own use, the following stocks of the Suburban Company under the guise of trustee's fees or services, as follows:

Sept. 12, 1892, 1 share of the value of $33.00.

Your orators further show that, as hereinbefore set forth, the Trust Company at all times while it was handling the stocks and bonds of the companies mentioned absolutely dominated and controlled said companies and was using them and each of them
278 as its own instrumentality or dummy for its own benefit and profit; that the Trust Company occupied a fiduciary relation to said companies and that any contract or contracts made, or claimed to have been made, between the Trust Company and the said companies respectively, providing for trustee's fees, were unlawful, inequitable and oppressive, and neither said contracts nor the charges above made were ever submitted to or approved by the parties in interest in said companies; that the said charges and exactions made under the guise of trustee's fees were not only exorbitant, but, by reason of the relationship between the Trust Company and the said companies, the Trust Company did not have the right in law to charge the said companies any trustee's fees whatsoever in connection with the sale or handling of said securities, or for anything done or services performed, on account of which said charges were made; that the charges for said trustee's fees contained in said pretended statement should be eliminated and the Belt Company should be credited upon said account, with interest on said charges from the date when they were made; and the value of the stocks so appropriated by the Trust Company as aforesaid, together with interest thereon from the date of such appropriation, should be credited to the Belt Company upon said statement.

4. Your orators further show that upon the organization of the various companies above named, to-wit, the Suburban Company and the Consolidated Company, the Union Company, the Air Line and the Northern Connecting Company, the Trust Company as above set forth cause- these companies respectively to issue stocks and bonds, and thereupon the Trust Company undertook the handling and disposition of said stocks and bonds and appropriated and converted to its own use large amounts of the stock of said companies under the pretense that said stock was taken by the Trust Company as a bonus.

(*a*) On or about August 8, 1890, the Trust Company took and appropriated, under the guise of a bonus, 2,200 shares of stock of the Suburban Company of the value of $72,600.00.

(*b*) Upon the following dates the Trust Company appropriated and converted to its own use, under the guise of a bonus, the following shares of stock of the Consolidated Company:

Dec. 1, 1891,	248 shares of the value of	.....	$7,990.56
Nov. 7, 1892,	16 shares of the value of	.....	515.52
Nov. 7, 1892,	104 shares of the value of	.....	3,350.88
Dec. 8, 1892,	388 shares of the value of	.....	12,501.36
Dec. 4, 1891,	24 shares of the value of	.....	773.28

279 (*c*) Upon the following dates the Trust Company appropriated and converted to its own use, under the guise of a bonus, stock of the Union Company, as follows:

Oct. 31, 1892,	230 shares of the value of.....	$7,595.28
Dec. 31, 1892,	9 shares of the value of.....	295.92
Dec. 31, 1892,	2 shares of the value of.....	65.76
Jan. 5, 1893,	5 shares of the value of.....	164.40
Jan. 7, 1893,	20 shares of the value of.....	657.60
Jan. 7, 1893,	2,400 shares of the value of.....	78,912.00
Jan. 23, 1893,	504 shares of the value of.....	16,571.52
Apr. 5, 1893,	1,000 shares of the value of.....	32,880.00
Jan. 20, 1894,	350 shares of the value of.....	11,508.00

(*d*) Upon the following dates the Trust Company appropriated and converted to its own use, shares of stock of the Kansas City & Independence Air Line under the guise of a bonus, as follows:

June 23, 1892,	70 shares of stock of the value of.....	$2,333.00
June 23, 1892,	7 shares of stock of the value of.....	223.30

(*e*) Upon the following dates the Trust Company took from the Belt Company and appropriated and converted to its own use the following shares of stock of the Kansas City & Northern Connecting Railroad Company, under the guise of bonus:

Oct. 9, 1896,	2,000 shares of the value of.....	$6,000.00
Sept. 21, 1897,	70 shares of the value of.....	210.00

And on the following dates the Trust Company took from the Belt Company and appropriated to itself and converted to its own use the second mortgage bonds of the Kansas City & Northern Connecting Railroad Company as follows:

July 20, 1896, 140 bonds.....	$63,000.00
Sept. 21, 1897, 4 9-10 bonds.....	2,205.00

Your orators further show that as hereinbefore set forth the Trust Company at all times while it was handling the stocks and bonds of the companies mentioned, absolutely dominated and controlled said companies, using them and each of them as its instrumentality or dummy for its own benefit and profit; that the Trust Company occupied a fiduciary relation to said companies and was the promoter and organizer of each and all of them; that there was no consideration whatever for the above mentioned stocks and bonds so taken by the Trust Company as between the Trust Company and the Belt Company, but that said stocks and bonds were so taken by the Trust Company solely by virtue of its domination and control over it; that in equity and good conscience the Trust Company should account to the Belt Company for the value of all of
280 said stocks and bonds so unlawfully taken by it from the Belt Company, and the Belt Company is entitled to credit

upon the pretended statement presented by the Trust Company for the value of said stocks and bonds so unlawfully appropriated as aforesaid, together with interest thereon from the dates respectively of such appropriations.

5. Your orators further show that upon the organization of the various companies above named, to-wit: The Suburban Company, the Consolidated Company, the Union Company, the Air Line, and the Northern Connecting Company, the Trust Company began the practice of loaning money to the said companies, taking the promissory notes of the company to which the money was so loaned, and charging such loan to the Belt Company; that from time to time moneys were advanced by the Trust Company to or for said companies, and the same were charged to the Belt Company in open account and from time to time the securities, consisting of stocks and bonds of said companies, were bought by the Trust Company from said companies, or sold by the Trust Company, for them, and the proceeds credited in open account to the Belt Company; that in this manner there were from time to time many notes of large amounts given by the Belt Company upon which the Trust Company charged the Belt Company with interest and discount in large sums; that interest on daily balances upon said open accounts was also computed, usually at the close of each month, and if the balance was in favor of the Belt Company an allowance was made of interest on the average daily balance for such month at the rate of two per cent. per annum, but if the balance was in favor the Trust Company, interest upon the average daily balance for such month was allowed at the rate of from seven per cent. to ten per cent. and the amount of such interest charged to the Belt Company in open account, and the interest so charged to the Belt Company in open account was included in the daily balances for subsequent months, and also in the promissory notes of the Belt Company taken from time to time, and in that manner the interest exacted by the Trust Company was compounded monthly upon daily balances, and at stated periods upon the said promissory notes.

Your orators further show that in the pretended statement of account presented by the Trust Company there are unlawful charges of interest and discount as follows:

(*a*) Between the dates of June 14, 1890, and June 4, 1900, there is charged in open account by the Trust Company against the Belt Company various items of interest on daily balances at the per cent. above stated, which after the deductions of interest
281 allowed the Belt Company on daily balances, amounts to the sum of $16,105.45, an itemized statement of which, showing the dates upon which said charges were made upon the pretended statement presented by the Trust Company, and the amount of each charge is set forth in a statement under the heading "Interest on Daily Balances," hereto attached and made a part hereof of Exhibit "2."

The item shown on the Exhibit in red represents the allowance of interest on daily balances where the same are in favor of the

Belt Company; the items in blue show the charges of interest in favor of the Trust Company and against the Belt Company.

(*b*) On May 16, 1892, there was charged in open account as shown by the pretended statement presented by the Trust Company in connection with the Air Line Company against the Belt Company Eighty-Five and 18-100 Dollars ($85.18), interest on open account.

(*c*) Between the dates of June 14th, 1890, and November 7th, 1899, there was charged by the Trust Company against the Belt Company for discount on said notes, the sum of Nineteen Thousand Eight Hundred Thirty-Two and 9-100 Dollars ($19,832.09); an itemized statement of which, together with the dates upon which said charges were made in the pretended statement presented by the Trust Company, with the amount of each charges, appears on said Exhibit "2" under the head of "Discount on Notes."

(*d*) Between the dates of June 14, 1890, and November 7, 1899, there was charged by the Trust Company upon its books against the Belt Company for interest on said notes above mentioned, the sum of Forty-Four Thousand Seven Hundred Sixty-Three and 48-100 Dollars, ($44,763.48), and same appears as charges against the Belt Company upon the pretended statement presented by the Trust Company, an itemized statement of which, with the dates upon which said charges were made, and the amount of each charge is shown on said Exhibit "2," under the heading of "Interest on Notes."

(*e*) During the year 1892 there were charged as shown upon the pretended statement of the Trust Company, in connection with the Air Line, against the Belt Company, items of interest upon notes given by the Air Line to the Trust Company as hereinbefore described as follows:

May 16, 1892	
June 17, 1892	$146.67
Dec. 8, 1892	437.50
	66.67

282 (*f*) Between the dates of September 1, 1896, and January 1, 1897, there were charged in open account, as shown by the pretended statement, by the Trust Company, against the Belt Company, certain items of interest upon alleged anticipated payments upon the subscriptions by various parties, including the Trust Company, to the bonds of the Northern Connecting Company, and that said items are as follows:

September 28, 1896	
October 7, 1896	$41.91
December 11, 1896	1,179.17
" " 1896	3.64
" " 1896	14.88
	17.22

(*g*) On August 11, 1892, there were charged in open account, as shown on the pretended statement by the Trust Company, in connection with the Consolidated Company, against the Belt Company,

certain items of interest upon alleged anticipated payments upon the subscriptions by various anticipated — to the bonds of the Consolidated Terminal Company, amounting to the sum of $10,195.93.

(*h*) In addition to the amounts appearing upon the pretended statement presented by the Trust Company between the dates September 15, 1896, and June 4, 1900, there were charged by the Trust Company against the Belt Company by reason of the Belt Company constructing the railroad of the Connecting Company, various items of interest on daily balances at the per cent above stated, which after deduction of interest allowed the Belt Company on daily balances amount to the sum of Twenty-Eight Thousand Three Hundred Thirty and 1-100 Dollars ($28,330.01), an itemized statement of which, showing the amount of each charge, is set forth in the statement, under the heading "Interest on Daily Balance," hereto attached and made a part hereof as *as* Exhibit "3;" the items shown on the exhibit in red represent the amount of interest on daily balances where the same are in favor of the Belt Company; the items in blue show the charges of interest in favor of the Trust Company, as against the Belt Company.

(*i*) In addition to the amounts appearing upon the pretended statement presented by the Trust Company between the dates of September 15, 1896, and June 4, 1900, there was charged by the Trust Company, or the Trust Company caused other persons to charge against the Belt Company, for interest on notes that the Trust Company caused the Belt Company to give by reason of the Belt Company constructing the Connecting Company, the sum of
283 Thirty-Six Thousand Four Hundred Nineteen and 86-100 Dollars ($36,419.86), an itemized statement of which, showing the said charges and the amount of said charges, is set forth in the statement under the heading of "Interest on Notes," hereto attached and made a part hereof as Exhibit "3."

(*j*) That the amount of compound interest so compounded as hereinbefore described by the Trust Company and charged against the Belt Company by the Trust Company amounts to the sum of Seventeen Thousand Nine Hundred Twenty-Nine and 44-100 Dollars ($17,929.44).

(*k*) In addition to the foregoing charges of interest and discount there were other charges of interest and discount made by the Trust Company against the Belt Company in the amount of One Hundred and Fifty Thousand Dollars ($150,000.00), which the Belt Company was caused by the Trust Company to pay from funds in its treasury.

Your orators further show that as hereinbefore stated, the Trust Company at all times, covering the period of the charges aforesaid, absolutely dominated and controlled the said companies and was using them, and each of them, as its own instrumentality or dummy for its own benefit and profit; that the Trust Company, as the promoter of said companies, and by reason of its control and domination over them, at all times occupied a fiduciary relation to said companies and was not entitled in equity and good conscience to make said excessive and unreasonable charges and exactions; that

by reason of the relationship between the Trust Company and the said companies as hereinbefore stated, the Trust Company did not have the right to charge the said companies any interest whatever upon daily balances, or otherwise, and that the charges for said items of interest contained in said pretended statement should be eliminated, and the Belt Company should be credited upon said account with interest on said charges from the dates when they were made, and there should be credited upon said acccount also the amount of compound interest and the interest which the Belt Company was caused to pay from its own funds to the Trust Company, together with interest on said payments from the time when they were made, respectively.

6. Your orators further show that the Trust Company during the period beginning with the year 1892 down to the year 1900, maintained what is called its "Building Department," which consisted of a limited number of employes, whose duty it was to make contracts for such building or construction work as the Trust Company might desire to have done in carrying out its various enterprises in connection with its auxiliary companies, including the Belt
284 Company, the Consolidated Company, the Union Company, the Air Line, the Elevator Company and Amusement Company Co.; that all of the work done for said companies could, and should have been done by said companies, respectively, but the Trust Company contrived the scheme of its Building Department in order that work of that character might be done by the Trust Company and large and exorbitant charges made therefor, from which the Trust Company might reap a large profit by causing the Belt Company to pay, not only the cost of such work and materials, but also large sums in addition thereto under the guise of superintendence; that the aforesaid plan was carried out to the extent that a large amount of work was done by the said Building Department, for the companies above named, and the Trust Company caused the Belt Company to pay not only the cost thereof, but from ten per cent. to fifteen per cent. additional under the guise of superintendence; that the amount of said superintendence so charged by the Trust Company to the Belt Company, together with the dates on which said charges were made, and the amount of each charge, is shown under the heading of "Superintendence," on Exhibit "2," hereto attached, and aggregates the sum of Forty Thousand Four Hundred Fifty-six and 32/100 Dollars ($40,456.32); that of said sum fifty (50) per cent. was clear profit to the Trust Company; that the Trust Company charged to the Belt Company the said sum of $40,456.32, and the same appears upon the pretended statement presen-ed by the Trust Company; that the Trust Company by reason of its relation to the said companies did not have the right in law to charge the said companies any sum whatsoever as superintendence in excess of the actual cost thereof, and did not have the right to profit out of said transactions; that the said profits of the Trust Company arising from said transactions should be eliminated from said pretended statement, and the Belt Company should be credited

upon said account with interest on the amounts so eliminated from the dates when the said charges were made.

7. Your orators further show to the court that in the year 1895 the Trust Company, under the pretense of increasing the earnings of the Air Line, caused the incorporation of the Fairmount Amusement Company, and the establishment and exploitation of Fairmount Park, and in so doing the Trust Company caused to be expended by the Air Line and by the Belt Company, large sums of money in the acquisition of a large tract of land near the railroad of the Air Line between Kansas City and Independence, and the construction of buildings thereon and the adaptation of said grounds for the purpose of a public park; that the moneys so furnished by the Air Line as aforesaid were afterward, by the direction
285 of the Trust Company, charged to and assumed by the Belt Company so that ultimately all of the expenses in connection with the exploitation of Fairmount Park were charged to the Belt Company, and the various items making the aggregate thereof appear as debits to the Belt Company upon the pretended statement presented by the Trust Company; that the result of the organization and operation of Fairmount Park was a net loss of Two Hundred Ninety-three Thousand Three Hundred Three and 68/100 Dollars ($293,303.68), all of which the Belt Company was required by the Trust Company to stand; that the scheme of Fairmount Park was a financial failure and the Trust Company knew, or should have known, that it would be such failure, and the conduct of the Trust Company in causing the Belt Company to organize and carry on said enterprise and to stand the loss arising therefrom was and is inequitable, unjust and oppressive, and the Trust Company should in equity and good conscience be required to stand said loss itself, and the amount of said loss should be eliminated from the charges against the Belt Company upon the pretended statement produced by the Trust Company, or if that is impossible by reason of inability to identify the various items going to make the deficiency, then the amount of said loss, together with interest thereon, should be credited upon said pretended statement.

8. Your orators further show to the court that the Trust Company caused the incorporation of the Missouri Elevator and Terminal Company on or about January 4, 1892, and after its incorporation the Trust Company caused to be constructed for it by the building department of the Trust Company three elevators, and caused the Elevator Company to operate said elevators and to execute upon its corporate property mortgages in large amounts to pay the purchase price of its properties.

(*a*) The operation of said elevator by the Elevator Company resulted in a loss, which was represented in part by a charge upon the books of the Trust Company against the Elevator Company in the amount of Three Hundred Ninety-One and 17-100 Dollars ($391.17); that the Trust Company on or about the 29th day of April, 1893, found that the Elevator Company was hopelessly insolvent and unable to pay said amount, and thereupon it charged said amount so due it from the Elevator Company, together with

other items alleged to be due from the Elevator Company, to the Trust Company, amounting in all to the sum of Fifteen Thousand Two Hundred Ninety-Six and 68-100 Dollars ($15,296.68) to the Belt Company, and said charge of $15,296.68 now appears in the pretended statement presented by the Trust Company as a
286 charge against the Belt Company; that the action of the Trust Company in so charging against the Belt Company the debt of the Elevator Company was wrongful, and said charge was without consideration, and the said charge should be eliminated from the said pretended statement.

(*b*) On or about June, 1893, and while the Trust Company, then holding all the stock of the Elevator Company in its name and in the names of its directors and officers and their wives, knew that the Elevator Company was hopelessly involved and could not be made a success, the Trust Company caused the Belt Company to go through the form of an agreement with the Elevator Company, by the terms of which the Belt Company was to acquire and take title to all of the elevators and other properties of the Elevator Company, except one thousand four hundred and sixty-one (1461) shares of stock of the Belt Co. theretofore exchanged by the Trust Company and its directors, officers and their wives, for Elevator stock, and in consideration thereof the belt Company was to issue to the Elevator Company 146.1 shares of the capital stock of the Belt Company and to assume the liabilities of the Elevator, all of which were then owing by the Elevator Company to the Trust Company; that said shares of stock were duly issued by the Belt Company and delivered to the Elevator Company and the liabilities of the Elevator Company were charged to the Belt Company, but the contract was never carried out in any other respect. The said 146.1 shares, upon being so received by the Elevator Company, together with the shares of the Belt stock above referred to, were caused by the Trust Co. to be delivered to it and its directors and officers and their wives, so that the Belt Company never at any time received any consideration for said 146.1 shares of Belt stock, of the reasonable value of Four Thousand Seven Hundred and Seventy Dollars ($4,770.00), which said amount should be allowed as a credit upon the pretended statement presented by the Trust Company, together with interest thereon at the rate of six per cent. per annum from said 8th day of June, 1893.

(*c*) From September, 1892, to September, 1894, the Trust Company caused the Belt Company to pay out from its own treasury to the Trust Company for the completion of the property of the Elevator Company the sum of Fourteen Thousand One Hundred Eighty-Five and 4-100 Dollars ($14,185.04), for which the Belt Company received no consideration. The said sum of $14,185.04 was paid out of funds of the Belt Company advanced to it by the Trust Company, and charged to the pretended statement presented by the Trust Company, and, therefore, said sum with interest thereon should be credited to the Belt Company on said statement.
287 (*d*) On or about September 1, 1894, the Trust Company caused the Belt Company to go through the form of an agree-

ment with the Elevator Company, by the terms of which the Elevator Company was to reacquire and take title to all the property of the Elevator Company that had been received by the Belt Company by reason of the pretended agreement of June, 1893, above mentioned, together with all improvements and additions made upon and to the said elevators and property by the Belt Company, amounting in value to the sum of Fourteen Thousand One Hundred Eighty-Five and 4-100 Dollars ($14,185.04), and in consideration thereof, the Elevator Company was to issue and did issue to the Belt Company 425 shares of the Elevator Company's stock, and was to re-assume and did re-assume Thirty-Two Thousand Dollars ($32,000.00) of the liabilities of the Elevator Company that had been assumed by the Belt Company by reason of the said agreement of June, 1893; and the Belt Company, in addition to the transfer of said property to the Elevator Company, was to continue its assumption of the balance of the liabilities of the Elevator Company, amounting to Fifteen Thousand Two Hundred Ninety-Six and 68-100 Dollars ($15,296.68), that had been assumed by the Belt Company by reason of said agreement of June, 1893. The stock of the Elevator Company so received by the Belt Company was worthless, as the Trust Company well knew, and the said $32,000 of liabilities re-assumed by the Elevator Company was evidenced by certain promissory notes of the Elevator Company secured by certain deeds of trust upon the elevators and properties of the said Elevator Company.

Between Sept. 1, 1894, and June 1, 1900, the excess of expenditures occasioned by the operation of the properties and elevators of the Elevator Company over the receipts therefrom amounted to Seventeen Thousand Eight Hundred Seventy-Seven and 92-100 Dollars ($17,877.92), and this loss to the Elevator Company, the Trust Company, solely by reason of its coercion, domination and control over the Belt Company, unlawfully caused to be charged to and paid by the Belt Company without any consideration therefor; the act of the Trust Company in having said charge made and paid was inequitable and oppressive and the Belt Company is entitled to a credit upon the pretended statement of the Trust Company for $17,877.92), with interest thereon, from the date of payment thereof.

(*e*) In addition to the charges appearing upon the pretended statement, the Trust Company unlawfully caused the Belt Company to pay to it, without consideration therefor, between December, 1894, and June, 1899, as interest upon the said $32,000 of notes
of the Elevator Company all of which were the obligations
288 of said Elevator Company, the sum of Ten Thousand Dollars ($10,000.00), of this amount so paid Two Thousand Dollars ($2,000) appear as charges against the Belt Company upon the pretended statement presented by the Trust Company; and the Belt Company was caused by the Trust Company to pay the balance, Eight Thousand Dollars ($8,000.00), to it from funds in its treasury; all of said payments were made solely by reason of the coercion, domination and control of the Trust Company and said pay-

ments are inequitable and oppressive; the Belt Company is entitled to a credit upon the said pretended statement for the said Two Thousand Dollars ($2,000.00) with interest thereon from the date of payment thereof; and the Belt Company is further entitled to a credit from the Trust Company for the said $8,000.00 with interest thereon from the date of payment thereof.

9. Your orators further state that in the year 1895, the Trust Company caused to be incorporated a railroad corporation under the laws of the States of Missouri, called the "Kansas City & Northern Connecting Railroad Company," herein referred to as the Connecting Company, for the purpose of constructing a line of railroad from Kansas City, Missouri, to Pattonsburg, Missouri, in order to connect with the railroads at that time running eastwardly to Chicago, Illinois, and northwardly to Council Bluffs, Iowa.

Afterwards, and in the same year, the Trust Company caused the Belt Company to enter into a contract with the Connecting Company, by the terms of which the Belt Company undertook to acquire the right-of-way and to construct the railroad of the Connecting Company between the points aforesaid, in consideration of which the Connecting Company agreed in said contract to execute, issue and deliver to the Belt Company, bonds and stocks of the Connecting Company; that the Belt Company was caused by the Trust Company to enter upon the execution of said contract and to construct the said railroad, and the Belt Company did secure the right-of-way and construct the railroad of the Connecting Company between Kansas City and Pattonsburg. In so doing the Belt Company was caused to expend large sums of money for right-of-way, material and for construction, and the stocks and bonds of the Connecting Company were wholly inadequate in value to reimburse the Belt Company for the money so expended, so that there resulted a large loss to the Belt Company in the matter of said contract, amounting to the sum of One Hundred Sixteen Thousand Six Hundred Forty-Four and 53-100 Dollars ($116,644.53), all of which of said deficiency was by the Trust Company charged to the Belt Company and the various items going to make the said deficiency appear upon the
289 pretended statement presented by the Trust Company as charges against the Belt Company.

Your orators further state that the action of the Trust Company in so requiring the Belt Company to enter into said contract and construct said railroad, resulting in said loss, was wrongful, oppressive and was done solely for the benefit of the Trust Company, that it might profit from the handling of the securities of the Connecting Company, which, under said contract, would be received nominally by the Belt Company, but in reality by the Trust Company; that the Trust Company knew and should have known that said venture would result in a large loss to the Belt Company, and the amount of said loss in equity and good conscience ought not to be charged to and borne by the Belt Company, and the same should be eliminated from the pretended statement presented by the Trust Company, together with interest thereon; or, if the same cannot be identified, then that credit be given for the amount thereof with interest.

10. Your orators further show that on January 1, 1897, July 1, 1897, January 1, 1898, and July 1, 1898, there fell due certain coupons upon bonds of the Kansas City & Northern Connecting Railroad Company, outstanding in the hands of various holders; that said coupons were the obligations, of said connecting Company and were not in any manner, obligations either direct or contingent on the part of the Belt Company.

(*a*) When the said coupons became due on said dates respectively the Kansas City & Northern Connecting Railroad Company was without funds to pay the same, and the Trust Company in order to bolster up and protect the credit of the Kansas City & Northern Connecting Company, and to prevent a default on its part in the payment of its interest, did take up and pay said coupons in the amounts and on or about the dates hereinafter stated, to-wit:

Jan.	18, 1897.	Interest allowed to Jan. 1, 1897, on $100,000 K. C. & N. C. R. R. bonds	$2,500.00
July	14, 1897.	Interest allowed on $51,000 K. C. & N. C. R. R. 5 per cent bonds due July 1, 1897	1,275.00
Aug.	3, 1897.	Interest on $100,000 K. C. & N. C. R. R. bonds, due July 1, 1897	2,500.00
Oct.	12, 1897.	Interest on $300,000 K. C. & N. C. R. bonds, due July 1, 1897	7,500.00
290			
Dec.	31, 1897.	Interest on $100,000 K. C. & N. C. R. R. bonds, due July 1, 1898	2,500.00
Dec.	31, 1897.	Interest on $700,000 K. C. & N. C. R. R. 5 per cent bonds, due Jan. 1, 1898, interest being computed from date bonds were sold	7,375.67
Dec.	31, 1897.	Interest paid on $51,000 K. C. & N. C. R. R. 5 per cent bonds	1,275.00
Aug.	13, 1898.	Interest on $10,000 K. C. & N. C. R. R. 5 per cent bonds, due July 1, 1898, paid by Trust Company to A. & P. Roberts	250.00
July	28, 1898.	Interest on $1,234,000.00 K. C. & N. C. R. R. 5 per cent bonds, due July 1, 1898	30,850.00
	Total		$56,025.67

(*b*) Your orators further show that the Trust Company by virtue of its domination and control over the Belt Company did cause the Belt Company to pay, and it did pay from the funds in its treasury, the interest upon certain bonds of the Kansas City & Northern Connecting Railroad Company, falling due as aforesaid, at or about the said dates, to the persons and in the amounts following, to-wit:

Oct. 14, 1897,	John H. Carr, interest on $4,000 K. C. & N. C. R. R. 5 per cent bonds, due July 1, 1897	$100.00
Oct. 13, 1897,	Estate of P. C. Hollis, interest on $5,000 K. C. & N. C. R. R. 5 per cent bonds, due July 1, 1897	125.00
Oct. .., 1897,	F. B. Hubbell, interest on $1,000 K. C. & N. C. R. R. bonds, due July 1, 1897	25.00
Oct. .., 1897,	Mrs. Frances A. Weeks, interest on $1,000 K. C. & N. C. R. R. bonds, due July 1, 1897	25.00
Oct. .., 1897,	Wm. H. Nicholson, interest on $5,000 K. C. & N. C. R. R. 5 per cent bonds, due July 1, 1897	125.00
Oct. .., 1897,	Wells-Fargo Company, interest on $100,000 K. C. & N. C. R. R. 5 per cent bonds, due July 1, 1897	2,500.00
... ... 1897,	N. Norton, Ass't Secretary, account various parties, interest on $249,000 K. C. & N. C. R. R. 5 per cent bonds, due Jan. 1, 1898	6,225.00
Total		$9,125.00

The amount of these payments does not appear on the pretended statement furnished by the Trust Company.

291 (c) Your orators further show that all of the foregoing payments made by the Trust Company are charged to the Belt Company in the pretended statement of account except the item of $9,125.00 in the amounts and at the dates above set forth and there is also charged to the Belt Company in said statement interest upon the said payment of $30,850.00, amounting to $167.95, and also the amount of $77.13 as commission or brokerage for paying said coupons.

The said charges made by the Trust Company against the Belt Company and entered on said pretended statement, including the item of Nine Thousand One Hundred Twenty-five Dollars ($9,125.00) are unlawful, inequitable and were caused to be paid by the Belt Company or made arbitrarily by the Trust Company without reason or excuse, but for the pretended reason that the claim of the Trust Company arising out of its payments of said interest could not be collected from the Kansas City & Northern Connecting —, because of its financial inability to make said payment, and that the Belt Company being in better financial standing could be made to pay same by charging it to the account of the Belt Company; and your orators are entitled to have said items so appearing in said pretended account eliminated as charges against the Belt Company. The aforesaid payments made by the Belt Company on account of said interest coupons were unlawful and inequitably made by the Belt Company as a result of the coercion and domination of the Trust Company, and not by reason of any liability therefor on the

part of the Belt Company, and the Belt Company is in equity and good conscience entitled to be credited with the amount thereof, together with interest thereon from the dates of payment at the rate of six per cent per annum.

(*d*) Your orators further show that on or about July 31, 1898, the Belt Company was the owner of the first mortgage bonds of the Kansas City & Northern Connecting Company, and also the owner of Three Hundred and Fourteen (314) coupons attached thereto, which said coupons were then due; that said coupons were the direct obligation of the Kansas City & Northern Connecting Railroad Company, due and payable to the Belt Company, said bonds being at that time in the control of the Trust Company. The Trust Company on or about said date, did wrongfully cause the said coupons, amounting in value to the sum of Seven Thousand Eight Hundred and Fifty Dollars ($7,850.00) to be taken from said bonds and cancelled as having been paid, and denied and still denies to the Belt Company the right to said coupons or the interest thereon; that said act of the Trust Company was wrongful and inequitable and operated to deprive the Belt Company of said sum of Seven
292 Thousand Eight Hundred and Fifty Dollars ($7,850.00) and interest thereon at six per cent from said date, for which in equity and good conscience the Trust Company should account to the Belt Company and said sum has been omitted by the Trust Company from its pretended statement.

11. Your orators further state that on or about September 25, 1893, the Belt Company was the owner of Two Hundred second mortgage bonds of the par value of One Thousand Dollars ($1,000) each, issued by the Kansas City & Independence Air Line and secured by a mortgage upon the property of that company. The Belt Company on that day was also the owner of Twenty-five Hundred (2,500) shares of stock of the par value of One Hundred Dollars ($100.00) each, issued by the Union Company. On said 25th day of September, 1893, a contract in writing was entered into between the Belt Company and the Trust Company, which recited that the Belt Company was the owner of the entire issue of the second mortgage bonds of the Kansas City & Independence Air Line, which issue consisted of Two Hundred (200) bonds of the par value of One Thousand Dollars ($1,000.00) each, subject to the interest which the Trust Company had as trustee in thirty (30) of said bonds, numbered from one seventy-one (171) to two hundred (200), both inclusive, aggregating the principal sum of Thirty Thousand Dollars ($30,000.00), and held in trust by the Trust Company under the mortgage or deed of trust, given by the Kansas City & Independence Air Line of date March 1, 1893, and also reciting that the Belt Company was the owner of Twenty-five Hundred (2,500) shares of the capital stock of the Union Terminal Railroad Company, of the par value of One Hundred Dollars ($100.00) each; and further reciting that the Belt Company was desirous of selling and disposing of the entire issue of said second mortgage bonds and the said 2,500 shares of stock for the purpose of raising money and means to properly extend, equip, repair, maintain and operate its road and to meet its

obligations then and thereafter incurred, and that the Trust Company had agreed to purchase said bonds and stock at and for the price and sum thereafter stated in said contract. It was, therefore, mutually agreed in said written contract that the Belt Company should sell and deliver and that the Trust Company should purchase and receive and pay for the entire issue of the second mortgage bonds of the Kansas City & Independence Air Line, aggregating the principal sum of Two Hundred Thousand Dollars ($200,000.00), and also Two Thousand Five Hundred (2,500) shares of the capital stock of the Union Terminal Railroad Company, of the par value of Two Hundred and Fifty Thousand Dollars ($250,000.00) at and for the price of the earned interest on said
293 bonds, at the time of their delivery to the Trust Company, and the sum of One Hundred and Fifty Thousand Dollars ($150,000.00), to be paid upon the terms and at the times hereinafter stated; that is to say, that the Belt Company should deliver to the Trust Company the said 2,500 shares of the capital stock of the Union Terminal Railroad Company upon the execution of said contract, and whenever the Belt Company should demand the Trust Company should take in amounts of Ten Thousand Dollars ($10,000.00), par value or multiples thereof so many of said second mortgage bonds as the Belt Company might deliver; and the Trust Company agreed to pay the Belt Company therefor upon said contract all of the earned interest on the bonds so delivered to it and seventy-five per cent (75) of the face value of th eprincipal sum thereof. It was further agreed in said written contract that said second mortgage bonds, numbered from one (1) to one hundred and seventy (170) both inclusive, aggregating the principal sum of One Hundred and Seventy Thousand Dollars ($170,000.00), should be delivered and paid for on or before eighteen (18) months from the date of said contract, and that so many of said bonds, numbered from one hundred and seventy-one (171) to two hundred (200), both inclusive, aggregating the principal sum of Thirty Thousand Dollars ($30,000.00), as should remain unsold by the Trust Company as trustees, under and by virtue of the terms of said mortgage or deed of trust, securing said bonds, on the first day of March, 1898, should be delivered and paid for within six months from said March 1, 1898.

(*a*) Your orators further show that in accordance with said contract there was delivered to the Trust Company by the Belt Company the entire issue of said second mortgage bonds, being two hundred (200) bonds, of the par value of One Thousand Dollars ($1,000.00) each, and the Trust Company gave to the Belt Company credit for one hundred and thirty (130) of said bonds at the sum or price of Seven Hundred and Fifty Dollars ($750.00) each, as follows:

Oct., 1893, 100 bonds at 75	$75,000.00
Mar., 1904, 6 bonds at 75	4,500.00
Jan., 1895, 6 bonds at 75	4,500.00
Mar., 1895, 6 bonds at 75	4,500.00
Dec., 1895, 6 bonds at 75	4,500.00
Mar., 1894, 6 bonds at 75	4,500.00
	$97,500.00

Your orators further state that the Trust Company failed, neglected and refused within the time limited in said con-
294 tract, or at any time thereafter, to purchase and pay for the remaining seventy (70) second mortgage Air Line bonds, of the par or face value of One Thousand Dollars ($1,000.00) each, as specified in said contract; but on the contrary, the Trust Company afterwards discovered that the said second mortgage bonds could not be sold upon the market, and were worthless, and it thereupon devised a plan or scheme to re-sell and unload the same upon the Belt Company; and accordingly to carry out said plan, it caused the Belt Company to enter into a pretended agreement rescinding said contract of September 25, 1893, and attempting to release the Trust Company from its obligation to take the remaining seventy (70) of said bonds all of which was inequitable and against good conscience and the same is not binding upon your orators.

(*b*) In further consideration of said fraudulent plan the said Trust Company caused entries to be made upon its books and upon the books of the Belt Company charging the Belt Company as and for a return of said 130 bonds so purchased by the Trust Company at Seven Hundred and Fifty Dollars ($750.00) each as aforesaid, as follows:

July, 1894, 80 bonds at 75	$60,000.00
June, 1896, 50 bonds at 75	37,500.00
	$97,500.00

(*c*) Your orators further show that the Trust Company in equity and good conscience should be held to account and pay to the Belt Company the contract price of the said seventy second mortgage bonds, being the amount of Fifty-Two Thousand Five Hundred Dollars ($52,500.00), together with interest thereon at 6 per cent from the 25th day of March, 1895.

(*d*) Your orators further show unto the court that the 2,500 shares of the Union Company stock, so delivered to the Trust Company under said contract as aforesaid, were appropriated by the Trust Company to its own uses and for its own benefit and that it never at any time returned said stock to the Belt Company or accounted for the proceeds thereof. On or about May, 1894, the Trust Company exchanged said stock with the Belt Company for 2,500 shares of the par value of $100.00 each of the capital stock of the Belt Company, which was worth at that time Sixty-Two Thousand

Five Hundred Dollars ($62,500.00); that the Trust Company received and thereafter disposed of the said stock of the Belt Company and has never accounted to your orators thereofor, as in equity and good conscience it is bound to do, together with interest thereon at six per cent per annum from the 25th day of March, 1895.

295 Your orators are entitled to have allowed to them upon the pretended account presented by the Trust Company a credit represented by the contract price of said seventy bonds, to-wit. the sum of Fifty-Two Thousand Five Hundred Dollars ($52,-500.00) with interest thereon, or if the court should find that said contract was duly rescinded, then your orators are entitled to a credit, represented by the value of said 2,500 shares of stock, to-wit, the sum of Sixty-Two Thousand Five Hundred Dollars ($62,500.00) and interest thereon.

Your orators further show that the act of the Trust Company in charging back to the Belt Company the said one hundred and thirty (130) bonds at Seven Hundred and Fifty Dollars ($750.00) per bond was unlawful and inequitable for the reason that said bonds were then worthless, as the Trust Company well knew, and that in equity and good conscience said charges should be eliminated from said pretended account.

12. Your orators further show that the Trust Company caused to be constructed the railroad of the Air Line and used for that purpose a corporation previously created by it, called the Kansas City Terminal Construction Company.

The Trust Company caused the Air Line to enter into a contract with said Construction Company for the construction and completion of the railroad of the Air Line; under the terms of said contract the Construction Company was to receive the stocks and bonds of the Air Line in certain amounts fixed in said contract. The Construction Company entered upon the construction *or* said railroad, but before the same was fully completed, the Trust Company caused the Air Line and the said Construction Company to go through the form of an agreement by the terms of which the Air Line was to accept the then partially completed railroad as and for full compliance with said contract, and was to turn over to the Construction Company the securities provided in said contract to be turned over, upon its final completion.

And it was further provided that the Air Line should assume all the liabilities of the Construction Company and should succeed to and take over all of its assets. This plan was carried out and the uncompleted railroad was turned over to the Air Line, the securities were delivered to the Trust Company and the Air Line assumed the liabilities and took over the assets of the Construction Company.

(*a*) Among the assets of the Construction Company was the subscription made by the Trust Company in the name of A. E. Stilwell, trustee, to the capital stock of the Construction Company in

296 the sum of Twenty Thousand Dollars ($20,000.00), which had been duly subscribed by the Trust Company, but upon which nothing had ever been paid. In the disposition of the securities received by the Construction Company as aforesaid, this unpaid

subscription on the part of the Trust Company was treated as paid, and a proportionate amount of the securities of the Air Line, to-wit: One Hundred and Ninety-Five (195) shares of stock, Twenty-Four and 375-1000 bonds (24.375) of the then aggregate value of Twenty-six Thousand Dollars ($26,000.00) was turned over to and received and retained by the Trust Company, but the Trust Company notwithstanding refused, and has ever since refused to pay such subscription, or any part thereof, but caused entries to be made upon its books and upon the books of the Air Line, cancelling said stock subscription by a fictitious charge. Your orators show, therefore, that by reason of the premises the Trust Company ought in equity and good conscience to account for and pay over to the Belt Company the amount of said subscription, to-wit: Twenty Thousand Dollars ($20,000.00) with interest thereon from the date that same was made, to-wit, March 30th, 1891, at the rate of six (6) per cent per annum to date, or that the Trust Company should account for and pay over to the Belt Company the reasonable value of the securities so wrongfully received by the Trust Company as aforesaid, together with interest thereon at the rate of six per cent per annum from the date of such delivery, to-wit: the 18th day of March, 1892, and that your orators are entitled to a credit upon the pretended statement presented by the Trust Company in the amount of said subscription, with interest, or in the amount of the value of said securities with interest, as your orators may elect.

Your orators further show that if it should be claimed by the Trust Company and made to appear that the subscription mentioned in the preceding paragraph as having been made by A. E. Stilwell, trustee, was not in fact and in law the subscription of the Trust Company, then your orators show that the said charge made by the Trust Company against the Air Line for the sum of Twenty Thousand Dollars ($20,000.00), some two years after the transactions mentioned in the preceding paragraph, was an unlawful and fictitious charge and fraudulent as against the Belt Company; that the reason assigned by the Trust Company for making said charge was that it was for services, when as a matter of fact, no services were rendered by the Trust Company, and the charge was merely an unlawful method adopted by the Trust Company to get rid of its liability on said stock subscriptions.

297 (*b*) Your orators further state that on or about May 17, 1892, when the Air Line and Construction Co. undertook, as above stated, to declare the contract between them for the construction of said Air Line road duly performed in all respects, the said Construction Co. had an overdraft of $2,436.08, and owed the Trust Co. in open account the sum of $13,436.08; the Trust Co., through its officers and agents, unlawfully and fraudulently caused the said overdraft of $2,436.08 and $600.00 of said open account to be charged in open account upon the books of the Trust Co. against the Air Line; and $10,400.00 of said open account that was paid by the Air Line to the Trust Co. does not appear on the pretended statement; and the charges afterwards, by the consolidation of accounts, becoming a charge against the Belt Co.; the said $600.00

and $2,436.08 items appear as debit charges against the Belt Co. in the pretended statement presented by the Trust Co. and the Belt Co. should be and is entitled to a credit for the said items on the pretended statement, including the item of $10,400.00, with interest thereon from the date of payment thereof.

13. Your orators further show that in December, 1891, a contract was entered into between the West Kansas City Land Company and the Consolidated Terminal Railroad Company, under the terms of which the Land Company agreed to sell to the Consolidated Company a strip of land twenty-eight (28) feet in width over and across certain land in Kansas City, Jackson County, Missouri, for a consideration of Ten Thousand Dollars ($10,000.00) of which amount Four Thousand Dollars ($4,000.00) was to be paid upon the delivery of a warranty deed and the balance three years thereafter; while the contract was in the name of the Consolidated Company, it was for the benefit of the Belt Company and the said payment of $4,000.00 was made by the Belt Company. The Belt Company in November, 1892, gave its note to the West Kansas City Land Company for Five Thousand Six Hundred Dollars ($5,600.00), being the balance of the purchase price of said land, and the Trust Company guaranteed the payment of said note and interest to the West Kansas City Land Company and took from the Belt Company the sum of $5,600.00 in cash and retained the same as a special deposit to cover its liability on said note and agreed to pay interest thereon at the rate of six (6) per cent per annum; that afterwards such proceedings were had that your orators, by the judgment and decree of the Circuit Court of Jackson County, Missouri, affirmed by the judgment of the Supreme Court of the state, were adjudged to pay and did pay said note and interest on June 13, 1901, amounting to Seven Thousand Nine Hundred Ten and 32-100 Dollars ($7,910.32); and thereupon the Trust Company be-
298 came in duty bound to return and refund to your orators the said sum of Five Thousand and Six Hundred Dollars ($5,600.00), and interest thereon; but the Trust Company has failed and refused and ever since has failed and refused to pay said sum to your orators, and the Trust Company has failed in its pretended account to give your orators credit therefor, to which in equity and good conscience it is entitled; that the same appears upon the pretended account submitted by the Trust Company as a charge against the Belt Company under date of November 28, 1892, which said charge is unlawful and should be expunged; and the interest thereon should be credited to the Belt Company.

14. Your orators further state that on or about November, 1899, a judgment in the sum of Five Thousand Dollars ($5,000.00) was rendered against the Belt Company in the suit of one Zumwalt to recover for personal injuries sustained by him. That the Belt Company thereupon appealed said case to the Supreme Court of the State of Missouri, and gave an appeal bond as by law required; that the Trust Company signed said appeal bond as surety and required the Belt Company to deposit with it the sum of Five Thousand Dollars ($5,000.00) to cover its liability as surety on said bond; that such

proceedings were had that the judgment in said case of Zumwalt was on or about the 19th day of May, 1903, reversed without being remanded, and thereupon the liability of the Trust Company, as such surety, ceased, but notwithstanding such release from liability the Trust Company has refused and still refuses to account for or pay over to your orators the said sum of $5,000.00, together with interest thereon, to which your orators in equity and good conscience are entitled; and the Trust Company has failed and omitted to credit your orators on its said pretended statement of account, with said sum of $5,000.00 to which, with interest thereon from said 29th day of November, 1899, your orators are entitled.

15. The orators further show to the court that it was the habit and practice of the Trust Company in the disposition of bonds and stocks of the Belt Company, the Consolidated Company, the Air Line and the Union Company, to make sales of said bonds and stocks at such prices as the Trust Company should decide upon, and then when such sales had been made, to credit the Belt Company with a less amount, representing to the Belt Company that the sale so made by the Trust Company as aforesaid, had been made at and for a much less price than the amount or rate at which the sale had actually been made. In other instances the Trust Company would have an opportunity to make an advantageous sale of stock or bonds, and with such sale in view would cause the Belt Company to go through the form of selling
299 such stock or bonds to the Trust Company, and the latter would then, or within a short time thereafter consummate the sale in contemplation. In this manner the Trust Company derived large profits from the transactions in addition to all the charges for commissions and services hereinbefore mentioned, the said profits consisting of the difference between the amounts at which the sales would be made by the Trust Company and the amounts reported by it to the Belt Company as the amount of the sale, and for which the Belt Company received credit, or the amount of the pretended purchase by the Trust Company; that the amount of said profits is to your orators unknown, but your orators are informed and believe, and so charge upon their information and belief, that the profits so received by the Trust Company, and unlawfully retained by it, exceed the sum of Two Hundred and Fifty Thousand Dollars ($250,000.00); that the Trust Company has never at any time accounted to the Belt Company for such profits so unlawfully retained by it, and your orators are entitled to have said profit ascertained and determined and the amount thereof, with interest thereon, credited upon the pretended statement presented by the Trust Company.

16. Your orators further show that, on the 24th day of August, 1893, the Belt Company was insolvent, as its directors, who were made up of the officers and directors of the Trust Company, then well knew; that notwithstanding such insolvency the said directors were caused by the Trust Company to go through the form of declaring a dividend payable in the capital stock of the Company and, accordingly, the Belt Company, acting under the domination

and control of the Trust Company and being coerced into such action, did declare a stock dividend and did deliver to its various stockholders its capital stock of the par value of Fifty-one Thousand Two Hundred Sixty-two and 20-100 ($51,262.20) Dollars and of the reasonable market value of Seventeen Thousand Eighty-seven and 40-100 Dollars ($17,087.40), all of which was unlawful and fraudulent as against the Belt Company and amounting to an appropriation by the Trust Company of the capital stock of the Belt Company in said amount; that of the said stock dividend so paid the Trust Company received as a holder of the capital stock of the Belt Company its stock of the par value of Four Thousand Six Hundred Eighteen and 20-100 Dollars ($4,618.20) and of the market value of One Thousand Five Hundred Thirty-nine and 40-100 Dollars ($1,539.40); your orators show, therefore, that in equity and good conscience they are entitled to a credit upon the pretended statement presented by the Trust Company in the
300 sum of $17,087.40 with interest thereon at six (6) per cent from the 1st day of November, 1893.

17. Your orators further show that, on the 7th day of April, 1894, the Belt Company was insolvent, as its directors who were made up of the officers and directors of the Trust Company then well knew; that notwithstanding such insolvency the said directors were caused by the Trust Company to go through the form of declaring a dividend payable in the capital stock of the Company and, accordingly, the Belt Company, acting under the domination and control of the Trust Company and being coerced into such action, did declare a stock dividend and did deliver to its various stockholders its capital stock of the par value of Seventy-eight Thousand Six Hundred Fifteen and 86-100 Dollars ($78,615.86) and of the reasonable market value of Twenty-six Thousand Two Hundred Five and 28-100 Dollars ($26,205.28), all of which was unlawful and fraudulent as against the Belt Company and amounting to an appropriation by the Trust Company of the capital stock of the Belt Company in said amount; that of the said stock dividend so paid the Trust Company received as a holder of the capital stock of the Belt Company, stock of the par value of Sixteen Thousand Three Hundred Thirty-eight and 20-100 Dollars ($16,338.20) and of the market value of Five Thousand Four Hundred Forty-six and 6-100 Dollars ($5,446.06); your orators show, therefore, that in equity and good conscience they are entitled to a credit upon the pretended statement presented by the Trust Company in the sum of Twenty-six Thousand Two Hundred Five and 28-100 Dollars ($26,205.28) with interest thereon at six (6) per cent from the 1st day of May, 1894.

18. Your orators further show that in November, 1897, the Belt Company was wholly insolvent as the Trust Company then well knew, but notwithstanding that fact the Trust Company caused the Belt Company to go through the form of declaring a dividend of one and one-half per cent upon all outstanding stock and a resolution was accordingly adopted by the directors of the Belt

Company declaring such dividend; that thereafter the Belt Company, so acting under the coercion and control of the Trust Company, as aforesaid, did pay out as and for such dividend the sum of Seventy-one Thousand Two Hundred and Fifty Dollars ($71,250.00) of which said amount the Trust Company, as a stockholder of the Belt Company, received a large amount. That the action of the Trust Company in so requiring said dividend to be paid was unlawful, wrongful and the amount so caused to be paid out by the Belt Company together with interest thereon should in equity and good conscience be allowed as a credit upon the pretended statement by the Trust Company.

301 19. Your orators further show that after the incorporation of the Union Terminal Railroad Company, the Trust Company caused it to execute its bonds in the sum of Two Million Dollars, and in order to secure the same to execute a mortgage upon all of its corporate property, then or thereafter acquired; that it was provided in said mortgage that the proceeds of all of the bonds, except one hundred and fifty (150) reserved for interest paying purposes, should be used in the construction and equipment of the railroad of said company; that after said railroad had been constructed the Trust Company caused the Union Company to deliver to the Belt Company and caused the Belt Company to deliver to the Trust Co. one thousand one hundred and sixty (1,160) Union Co. bonds of the par value of One Million One Hundred and Sixty Thousand Dollars ($1,160,000.00) and the cash value of One Million, Forty-four Thousand Dollars ($1,044,000.00); that although the Trust Company was the Trustee in said mortgage and knew of the authorized purpose for which said bonds could be used as aforesaid, it wrongfully sold said bonds to various investors and used the proceeds thereof to credit the account of the Belt Company, the debit side of which had been greatly augmented in amount by the fraudulent conduct on the part of the Trust Company in making to the Belt Company excessive and exorbitant charges for services, interest and commissions and upon other pretexts in the manner hereinbefore set forth; that the said bonds so wrongfully put afloat by the Trust Company by their terms drew interest at the rate of — (5) per cent per annum and the Belt Company which had theretofore been required by the Trust Company to guarantee said bonds was thereafter required and compelled by the Trust Company to pay interest in large amounts upon said bonds in the amount of Four Hundred and Thirty-two Thousand Dollars ($432,000.00); that the conduct of the Trust Company in the premises was wrongful and in violation of its trust and resulted in imposing upon the Belt Company the unnecessary burden of said interest payments which appear as charges to the Belt Company in the pretended statement by the Trust Company. That your orators are entitled in equity and good conscience to have said charges of interest eliminated from said statements or if the said charges in respect to the particular bonds cannot be identified with certainty in said account, then to have

said account credited with the amount so paid by the Belt Company together with [*in*] interest thereon from the respective dates of payment.

20. Your orators further show that on or about April 28th, 1892, the Trust Company sold to one Caroline A. Perkins three Consolidated Company bonds for twenty-five hundred and fifty
302 dollars ($2,550.00); that said bonds were the property of the Belt Company, but that the Trust Company fraudulently and wrongfully refused and neglected and has ever since refused and neglected to pay said proceeds of said bonds to the Belt Company, or to in any way account for them, and the Belt Company is entitled to credit for said sum as of said date, together with interest thereon.

21. Your orators further state that on or about the — day of —, 1890, the Trust Company charged against the Belt Company the sum of Five Thousand Dollars ($5,000.00) and credited the same to "Arkansas Lands;" that your orators are informed and believe that said charge was fictitious and fraudulent and that in truth and in fact said sum of Five Thousand Dollars was not then nor at any time advanced by the Trust Company to or for the Belt Company, and that the Belt Company received no benefit or consideration therefrom and that the said charge of Five Thousand Dollars in equity and good conscience ought to be eliminated from the pretended statement presented by the Trust Company and that the Belt Company should be credited with interest on said amount from the time when said charge was made.

22. Your orators further show to the court that about the year 1892, the Trust Company caused the incorporation of the Fruit Auction and Cold Storage Company under the laws of the State of Missouri; that the incorporators of said company were Arthur E. Stillwell, Arthur A. Mosher, Edward L. Martin and William S. Taylor; that the articles of incorporation of said company recited that one-half of the capital stock thereof, to-wit, Seventy-five Thousand Dollars ($75,000.00) had been paid up in lawful money of the United States, when in truth and in fact no part of said capital stock had been paid up; that the Trust Company caused said Cold Storage Company to engage in the business of the sale of fresh fruits in Kansas City, Missouri, and after said business had been conducted for a few months it went out of business owing the Trust Company a large sum of money; that thereupon and on or about the 13th day of February, 1894, the Trust Company, in order to recoup its losses sustained in the matter of said Fruit Auction & Cold Storage Company, appropriated to its own use two hundred and eighty-six (286) shares of the stock of the Belt Company of the value of Six Thousand Two Hundred Ninety-two Dollars ($6,292.00) and used the same to wipe out the debt owing by the said Cold Storage Company to the Trust Company; that the taking of said stock and its appropriation to wipe out the debt
303 of said Cold Storage Company on the books of the Trust Company was fraudulent and wrongful as against the Belt Company as was without any consideration whatsoever given

to it; the pretended statement presented by the Trust Company does not contain any credit for the value of said stock but your orators show that a credit for such amount with interest thereon should be allowed.

23. Your orators further state that in the pretended account presented by the Trust Company, there is, under date of September 13, 1898, a charge against the Belt Company of Two Thousand and Five Hundred Dollars ($2,500.00) for moneys represented to be paid by the Trust Company in unlawful stock transactions in the stock of the St. Joseph & Grand Island Railroad Company purchased as a speculation on margins alleged to have been carried on the account of the Belt Company; and in the same account, under date of September 15, 1898, there appears a charge of Two Thousand Dollars ($2,000.0) and on the 9th day of December, 1898, a charge of Two Thousand Dollars ($2,000.00) for similar unlawful transactions in margins in stock of the St. Joseph & Grand Island Railroad Company alleged to have been for the account of the Belt Company; that said transactions were unlawful and were beyond the corporate power of either the Trust Company or the Belt Company and it is inequitable and unfair that the said transactions and the loss resulting therefrom in the sum of Five Thousand Nine Hundred Eighty-nine and 50-100 Dolars ($5,989.50) should be charged against the Belt Company and said entries therefor are incorrect and should be expunged from the alleged account, and credit allowed for interest thereon.

24. Your orators further show that, in addition to the stock of the Belt Company taken and appropriated by the Trust Company as above set forth, the Trust Company did on or about September, 1890, take, appropriate and convert to its own use Four Hundred and Ninety-nine Thousand Dollars ($499,000) par value of the capital stock of the Belt Company, of the actual value at that time of One Hundred and Sixty-six Thousand Three Hundred Thirty-three and thirty-three one-hundredths Dollars ($166,333.33) for which the Trust Company has failed and refused to account upon its pretended statement or otherwise; and your orators are entitled to be credited upon the said pretended statement with the value of said stock as aforesaid, together with interest thereon from the date when the same was so appropriated.

25. Your orators further show that on or about the —, 1902, the Trust Company took, appropriated and converted to its own use 2,455 shares of the capital stock of the Union Company of the par value of Two Hundred Forty-five Thousand Five
304 Hundred Dollars ($245,500.00) and of the actual value of Forty-nine Thousand One Hundred Dollars ($49,100.00), for which the Trust Company has failed, neglected and refused to account on its pretended statement and your orators are therefore entitled to credit on said statement for said sum of Forty-nine Thousand One Hundred Dollars ($49,100.00) with interest thereon from said date.

26. Your orators further show that the Trust Company caused to be constructed the railroad of the Air Line and used for that

purpose a corporation previously created by it called the Kansas City Terminal Construction Company, as set forth in paragraph twelve herein; that the Trust Company caused the Air Line to enter into a contract with the said Construction Company for the construction and completion of the railroad of the Air Line; under the terms of said contract the Construction Company was to receive Three Hundred Thousand Dollars par value of the stock and Three Hundred Thousand Dollars par value of the first mortgage bonds of the Air Line. The Construction Company entered upon the construction of said railroad, but before the same was fully completed the Trust Company caused the Air Line and the said Construction Company to go through the form of an agreement by the terms of which the Air Line was to accept the then partially completed railroad as and for a full compliance with said contract and was to turn over to the Construction Company the securities provided in said contract to be turned over upon its final completion as aforesaid, and thereupon the said railroad was turned over to the Air Line and the said securities above mentioned, which had at all times remained in the custody of the Trust Company, were by the Trust Company appropriated to its own use; that the actual cost to the Trust Company of the construction of said Air Line was the sum of One Hundred Seventy Thousand Seven Hundred Forty-seven and twenty-nine-one-hundredths Dollars ($170,747.29), and the Trust Company realized from said transaction a profit of One Hundred Twenty-nine Thousand Two Hundred Fifty-two and seventy-one-one-hundredths Dollars ($129,252.71); that, by reason of the relation of the parties as hereinbefore more specifically set out, it is unjust and inequitable that the Trust Company should retain said profits or any of them, but it should be required to account to the Belt Company therefor and the same should be allowed as a credit upon the pretended statement presented by the Trust Company, together with interest thereon.

27. Your orators further show that in connection with the contract between the Belt Company and the Connecting Company aforesaid, and as a part of the obligation assumed by the Belt Company to procure the right of way for the railroad of the Connecting Company, the Belt Company was caused by the Trust Company to purchase and acquire certain lands along the line of said railroad in addition to the right of way and take the title thereto in a corporation which the Trust Company caused to be organized under the laws of the State of Missouri called the Northern Townsite Company, hereinafter referred to as the Townsite Company, one of the defendants herein, which corporation was at all times officered by the officers and employes of the Trust Company and at all times dominated and controlled by the Trust Company.

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a. The Trust Company caused the Belt Company to advance to the Townsite Company and also to advance in the purchase of lands which were conveyed to the Townsite Company a large sum of money, to-wit, the sum of $46,463.75; that all the lands now held by the Townsite Company were purchased with money

so caused to be furnished by the Belt Company and the greater portion of said lands still stand in the name of the Townsite Company; but certain lands heretofore standing in the name of the Townsite Company have been sold and the proceeds thereof are now held by your orators, Stuart R. Knott and Edward F. Swinney, as Receivers of the Townsite Company heretofore appointed by this court. That the Trust Company furnished to the Townsite Company the sum of $6,288.57 and no more. Your orators show, therefore, that by reason of the premises they are entitled to have the properties now standing in the name of the Townsite Company conveyed to them as and for the property rightfully belonging to the Belt Company and also to have the said moneys arising from the sale of said lands and also from the rentals thereof, transferred to them in like manner, together with any other assets of the Townsite Company arising or growing out of the moneys so furnished by the Belt Company as aforesaid; or at the option of your orators they are entitled to credit upon the pretended statement presented by the Trust Company with the amount of moneys so furnished by the Belt Company as aforesaid, with interest thereon from the dates when said moneys were so furnished.

(*b*) The Trust Company in connection with the affairs of the Townsite Company charged and collected a commission of 10 per cent on moneys handled or land sold for it and these charges made between July, 1896, and 1901, amounting to Ten Hundred and Eighty-five Dollars ($1,085.00) are unlawful and improper charges by reason of the relations of the companies to each other and should be eliminated from the pretended statement presented by the Trust Company.

306 28. Your orators further show that in the pretended statement submitted by the Trust Company under date of April 20th, 1891, there is a charge against the Belt Company in the sum of Three Thousand Eight Hundred Thirty-five and 50-100 Dollars ($3,835.50) and afterwards under date of November 19, 1891, a credit against the same charge of One Thousand Seven Hundred Eighty-one Dollars ($1,781.00), leaving a net charge against the Belt Company of Two Thousand and Fifty-four and 50-100 Dollars ($2,054.50), purporting to be charged for rent of engines Numbers 51 and 52 from January 20, 1891, to Oct. 31, 1891, 284 days, at $7.00, $1,988.00; also rental of engine No. 51, October 31st to November 19th, 19 days, at $3.50, $66.50; total $2,054.50. This charge of $2,054.50 should be eliminated from the pretended statement and credit allowed thereon as of date November 19, 1891, for the following reasons. In January, 1891, the Belt Company had a large credit balance with the Trust Company in excess of Two Hundred Thousand Dollars ($200,000), upon which it was receiving no interest from the Trust Company and such credit balance extended for many months thereafter. In January, 1891, the Trust Company caused the Belt Company to purchase two engines, being locomotives Nos. 51 and 52, and instead of permitting the Belt Company to pay for the same as

it should have done, the Trust Company gave to the vendors of the locomotives its own note and charged the interest on said note to the Belt Company, and afterwards, in November of the same year, the Trust Company caused entries to be made so as to show that it had purchased said engines in order that it might sell the same to the Kansas City Terminal Construction Company and the Consolidated Company, and thereupon unlawfully and oppressively charged to the Belt Company said sum of $2,054.50, pretending that the same was rental upon said engine at the rate of $3.50 each per day; that said charge of rental covers the period during which the engines were, as shown by the books of the Trust Company and also the books of the Belt Company, the property of the Belt Company. Your orators, therefore, claim that said charge should be eliminated from the pretended statement and that credit with interest should be allowed the Belt Company for said amount from the date when said charge was made.

29. Your orators further show that on or about July 1, 1898, the Trust Company caused the Belt Company to lease from the Second Street Improvement Company parts of lots 12, 13, 14 and 15 in block 10, King & Bouton's Re-survey, in Kansas City, Missouri, comprising a piece of land 25 by 75.4 feet, the rental named in said lease being at the rate of One Hundred Dollars ($100.00) per month, and the Second Street Improvement Company,
307 by the terms of said lease, reserved the privilege of cancelling the same upon thirty days' written notice; on the same day the Trust Company caused the Belt Company to lease all of said land to Wells, Fargo Express Company for Twenty-five Dollars ($25.00) per month, the Belt Company reserving the right to cancel said lease upon thirty days' written notice, provided, however, that if such notice should be given within two years from the date of the lease the Belt Company should pay to the Express Company the sum of One Thousand Dollars ($1,000.00). Your orators further show that said land was not necessary for a right of way or for the operation of the Belt Company but the Trust Company caused it to be leased to the Belt Company and by the latter sub-leased to the Express Company for the purpose of aiding the Second Street Improvement Company to the extent of Seventy-five Dollars ($75.00) per month, the Improvement Company being at that time one of the auxiliary companies of the Trust Company and dominated and controlled by it and officered by the officers and employees of the Trust Company.

Your orators further show that the act of the Trust Company in causing the said leases to be made, was wrongful and oppressive and imposed an unnecessary charge of $75.00 per month on the Belt Company; that between the dates of July, 1898, and December, 1899, the Belt Company was caused to pay to the said Improvement Company the sum of Eighteen Hundred Dollars ($1,800.00), and during the same period it collected from the Express Company under said lease the sum of Four Hundred and Fifty Dollars ($450.00), leaving a net expenditure as a result of the making of said lease in

the sum of Thirteen Hundred and Fifty Dollars ($1,350.00), for which, with interest thereon from the date of the payments made, your orators are entitled to credit upon the pretended statement presented by the Trust Company.

In consideration whereof and for as much as your orators are remediless in the premises except in a court of equity, your orators therefore pray the aid of this court;

(*a*) That an accounting be taken of the various transactions and dealings between the Trust Company and the Belt Company; or by the Trust Company for the use and benefit of and as trustee and agent for the Belt Company and that the Trust Company be required to pay the balance found to be due by it, if any, upon such accounting; that in taking such accounting all claims and demands alleged to be held by the Trust Company against the Belt Company in Kansas and Missouri, where the Trust Company used the Belt Company simply as an instrumentality and agency for its own use and
308 benefit, be charged against the Trust Company and it be held liable for all losses incurred or [claimbed] to have been incurred by the Belt Company about the same.

(*b*) That the said notes hereinabove described may be found and decreed by this court to have been executed in the fraudul-nt manner and for the fraudulent purposes above set forth and without consideration; and that said notes may be by this court directed to be surrendered up and canceled, and that each an- all of the stocks, bonds and other securities, including the assigned account above mentioned, fradulently delivered to the Trust Company by its officers and employes in the manner hereinabove set forth, ordered by this court surrendered and delivered up or reassigned to the Belt Company.

(*c*) That each and all of the property purchased with the money of the Belt Company and belonging in equity to it, the legal title to which is held in the name of any of the companies hereinbefore set forth, may be required by the decree of this honorable court to be conveyed to the Belt Company, or to its receivers for it.

And your orators pray for a continuance of the writ of injunction herein against the Guardian Trust Company, its agents, servants and employes, restraining and enjoining them and each of them from selling, transferring or in any wise disposing of the said notes above mentioned and so executed by the Belt Company to the Trust Company; and from selling, transferring or in any wise disposing of the said bonds and stocks and other property hereinabove described, delivered to said Trust Company as collateral security for said notes.

And it may please your honors to grant unto your orators the subpœna of the United States of America issuing out of and under the seal of this honorable court directed to the Guardian Trust Company, the Missouri Elevator & Terminal Company, the Fairmount Amusement Company, the Central Improvement Company and Thomas T. Crittenden, its receiver, the Northern Townsite Company, and the Cambria Steel Company, the defendants herein respectively therein and thereby commanding them on a day certain

therein to be named and under a certain penalty to be and appear before this honorable court then and there to answer (but not under oath, an answer under oath being hereby expressly waived), all and singular the premises, and to stand and perform and abide by such orders, directions or decrees as may be made in the premises,
309 and as shall seem meet and agreeable to equity and good conscience.

And your orators will ever pray.

SAMUEL W. MOORE,
THOMAS R. MARKS,
Solicitors for Complainants.

H. B. HURD,
Of Counsel.

STATE OF MISSOURI,
County of Jackson, ss:

E. F. Swinney, being first duly sworn, says that he is one of the Receivers of the Kansas City Suburban Belt Railroad Company, the complainants in the foregoing amended supplemental ancillary bill; that he has read the said bill of complaint and knows the contents thereof and that the allegations therein cont-ined are true so far as they relate to his own acts and the acts of his co-receiver; that so far as they relate to the acts of others, he believes them to be true.

E. F. SWINNEY.

Subscribed and sworn to before me this 22nd day of March, 1905.

SIDNEY SILVERMAN,
Notary Public, Jackson County, Missouri.

My commission expires August 5, 1905.

Afterwards, to-wit, on the 7th day of April, 1905, the following Order was filed:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

STUART R. KNOTT and EDWARD F. SWINNEY, as Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Critenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

310 Upon application of the complainants in the ancillary bill herein, Stuart R. Knot and Edward F. Swinney as Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, it is ordered that the said complainants have leave to file their amended and supplemental ancillary bill of complaint, and that when filed the same stand referred to Honorable Shannon C. Douglass, Special Master, with authority to settle the issues and complete the taking of testimony and make his findings of fact and conclusions of law thereon with all convenient speed.

(Signed) JNO. F. PHILIPS,
District Judge.

O. K.,
J. C. ROSENBERGER,
H. S. MECARTNEY,
For Guardian Trust Co.

Afterwards, to-wit, on the 1st day of May, 1905, the following Stipulation was filed:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,
vs.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, Defendant.

Bill.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Complainant,
vs.
GUARDIAN TRUST COMPANY et al., Defendants.

Intervening Petition.

It is agreed between the parties to the intervening petition of the Kansas City Southern Railway Company that it may file its amended intervening petition setting up, in addition to the matters now contained in its intervening petition on file, its claim against the Guardian Trust Company for alleged breach of trust as trustee in the mortgage made by the Union Terminal Railroad Company alleged to be accruing to it as the owner of all the bonds issued by the Union Terminal Railroad Company; and the Guardian Trust Company consents that the issues so made shall be referred to Shannon C. Douglass, Special Master and waives any objection it might make to said intervening petition on the ground of multifariousness or other formal matters; and the Guardian Trust Company further agrees to answer the said intervening petition within fifteen days from filing petition.

GUARDIAN TRUST COMPANY,
By J. C. ROSENBERGER &
H. S. MECARTNEY,
Solicitors.
S. W. MOORE AND
THOMAS R. MARKS,
Solicitors for The Kansas City Southern Ry. Co.

FRANK HAGERMAN,
For Cambria Co.

311 Afterwards, to-wit, on the 1st day of May, 1905, the following Order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

2468.

CAMBRIA STEEL COMPANY, Complainant,
vs.
KANSAS CITY SUB. BELT R. R. CO. et al., Defendants; THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Intervenor.

In accordance with the stipulation of the parties herein filed it is ordered that the intervenor The Kansas City Southern Railway Company have leave to file its amended intervening petition and that the issues made therein stand referred to Hon. Shannon C. Douglass to take the testimony and report his findings of fact and conclusions of law thereon with all convenient speed; that the defendants to said amended intervening petition shall have fifteen days from this date within which to file answer.

(Signed) SMITH McPHERSON, Judge

O. K.

J. C. ROSENBERGER,
H. S. MECARTNEY,
For Guardian Trust Co.
FRANK HAGERMAN,
For Cambria Co.

Afterwards, to-wit, on the 1st day of May, 1905, The Kansas City Southern Railway Company filed its amended intervening petition herein.

Said amended intervening petition is in the words and figures following:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2468. In Equity.

CAMBRIA STEEL COMPANY, Complainant,
vs.
THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants; The Kansas City Southern Railway Company, Intervenor.

312 *Intervening Petition of The Kansas City Southern Railway Company.*

To the Judges of the Circuit Court of the United States for the Western Division of the Western District of Missouri:

The Intervenor, The Kansas City Southern Railway Company, respectfully shows:

1. The intervenor is a corporation duly organized and existing under the laws of the State of Missouri as a railway corporation, having been duly incorporated according to law in March, 1900.

2. That the Kansas City Suburban Belt Railway Company, one of the defendants herein, being a railroad corporation duly organized and existing under the laws of the State of Missouri and being about to construct and equip a line of railroad in Jackson County, Missouri, did, on or about May 1, 1890, execute and deliver its deed of trust to the Missouri, Kansas & Texas Trust Company (now by change of name called the Guardian Trust Company, one of the defendants herein) as trustee, in which said mortgage or deed of trust it is recited that the said mortgage or deed of trust shall be a first mortgage and paramount lien upon said railroad and upon all the property and rights of property of the railroad company of every name, nature and description then held or that might be thereafter acquired including all the privileges and franchises thereto appertaining; that in and by said mortgage or deed of trust there was conveyed to said trustee to secure an issue of the first mortgage bonds of said railroad company in the principal sum of One Million Dollars ($1,000,000.00) all and singular *and* double track standard gauge railroad of the company (meaning thereby the Kansas City Suburban Belt Railroad Company) constructed and to be constructed from a point at the intersection of Second and Broadway streets in Kansas City in Jackson County, Missouri; thence in an easterly direction on and along said Second street to its point of intersection with Harrison street in said city; thence in a northeasterly direction to a point near Randolph avenue in said city; thence east for a distance of about one and one-half miles; thence in a south-

easterly and southerly direction to the southern limits of said city; thence in a general southwesterly direction to a point at or near the mouth of Brush Creek in said county of Jackson, being about twelve (12) miles of double track railroad, about ten (10) miles of which are within the corporate limits of Kansas City; also all the lands, tenements, easements and hereditaments acquired or appropriated or which shall be thereafter acquired or appropriated for the
313 purpose of a right-of-way for said railroad or for its tracks or switches; also all railroad tracks, railways and rights-of-way, depot grounds, station grounds and other grounds, bridges, viaducts, culverts and other structures, depots, station houses, engine houses, car houses, fuel houses, warehouses, machine shop and other shops, water tanks, turntables, superstructures, erections, fixtures, rolling stock, furniture, fuels, tools, implements, machinery and appliances and other facilities for maintaining and operating said railroad, as well such as are then owned or held by the company as also such as the company might thereafter construct or acquire for use in connection with its said railroad; also all the terminals, terminal rights, privileges, contracts, leases, connections and appliances which the company then owned and held and which it might thereafter own and hold for use in connection with its said railroad; also all of certain described lots, tracts and parcels of land situated in Kansas City in the County of Jackson, State of Missouri, more specifically described in said mortgage or deed of trust; also all and singular the rents, tolls, income, issues and profits of the said railroad, premises and property; and also all the estate, right, title and interest, legal and equitable and present and future of the company in and to the same and every part thereof; and also all the corporate and other rights, privileges, liberties and franchises of the company connected with or pertaining to the said railroad or the construction, acquisition, maintenance or use thereof as well those thereafter to be acquired as those then held.

That default was made in the payments required by the terms of said mortgage or deed of trust and, on September 6, 1900, proceedings were instituted for the foreclosure of said mortgage or deed of trust in the Circuit Court of the United States for Western Division of the Western District of Missouri; that the defendant, Guardian Trust Company, was a party to said proceedings.

Your intervenor further states that the Consolidated Terminal Railway Company, hereinafter referred to as the Consolidated Company, being a railroad corporation duly organized and existing under the laws of the State of Missouri, and being engaged in having its line of railway constructed, completed and equipped in Jackson County, Missouri, did for said purposes, on or about February 1, 1892, make, execute and deliver its deed of trust or mortgage to the Missouri, Kansas & Texas Trust Company (now by change of name called the Guardian Trust Company, one of the defendants herein) and the Provident Life & Trust Company of Philadelphia as
314 Trustees, in which said mortgage or deed of trust it is recited that the said mortgage or deed of Trust, shall be a first mortgage or paramount lien upon said railroad and upon all the prop-

erty and rights of property of the Railroad Company of every name, nature and description then held or that might thereafter be acquired, including all the privileges and franchises thereto appertaining; that in and by said mortgage or deed of trust there was conveyed to said trustee, to secure an issue of the first mortgage bonds of said Railroad Company in the principal sum of Seven Hundred and Fifty Thousand Dollars ($750,000.00), and bearing interest at the rate of five per cent (5 per cent) per annum, all and singular the standard guage railroad of the company, constructed and to be constructed from a point on the line of the Kansas City Suburban Belt Railroad, at or near the intersection of Grand avenue and Second street in Kansas City, Jackson County, Missouri; thence in a general westerly direction to a point on the state line between the State of Missouri and the State of Kansas, near the South bank of the Missouri river, being about two miles of standard guage railroad, and lying wholly within the said County of Jackson, and State of Missouri, and wholly within the corporate limits of Kansas City; also all the lands, tenements, easements and hereditaments acquired or appropriated, for the purpose of a right of way for said railroad or for its side tracks or switches; also all railroad tracks, railways, ways and rights of way, depot grounds, station grounds and other grounds, bridges, viaducts, culverts and other structures, depots, station houses, engines houses, car houses, fuel houses, warehouses, machine shops and other shops, water tanks, turntables, superstructures, erections, fixtures, rolling stock, furniture, fuel, tools, implements, machinery and appliances and other facilities for maintaining and operating said railroad, as well *as* such as were then owned or held by the company, as also such as the company may thereafter construct or acquire and own for use in connection with its said railroad; also all the terminals, terminal rights, privileges, contracts, leases, connections and appliances which the company then owned and held, and which it may thereafter own and hold for use in connection with its said railroad;

Also all and singular the rents, tolls, income, issues and profits of the said railroad, premises and property; also all the estate, right, title and interest, legal and equitable of the then present and future of the company in and to the same and every part thereof; and also all the corporate and other rights, privileges, liberties and franchises of the company connected with or pertaining to
315 the said railroad or the construction, acquisition, maintenance or use thereof, as well those thereafter to be acquired as those then held.

Your intervenors further show that afterwards, to-wit, on or about the 25th day of July, 1902, said Consolidated Company entered into articles of consolidation as authorized by and in accordance with the provisions of the statutes of the State of Missouri in such case made and provided; *that* the Kansas City Suburban Belt Railroad Company, a railroad corporation then and there duly organized and exi-ting under the laws of the State of Missouri, whose line of railroad connected with and formed a continuation of that of the Consolidated Company thereby forming a continuous

line of railroad running in the same general direction; that thereby there was formed and organized The Kansas City Suburban Belt Railroad Company hereafter referred to as the Belt Company and being one of the defendants herein.

That default was made in the payments required by the terms of said mortgage or deed of trust given by the Consolidated Company, and, on September 6, 1900, proceedings were instituted for the foreclosure of said mortgage or deed of trust in the Circuit Court of the United States for the Western Division of the Western District of Missouri; that the defendant, Guardian Trust Company, was a party to said proceedings.

The Intervenor further states that the Kansas City & Independence Air Line, one of the defendants herein, being a railroad corporation duly organized and existing under the laws of the State of Missouri and being about to construct and equip a line of railroad in Jackson County, Missouri, did, on or about March 1, 1892, execute and deliver its deed of trust to the Missouri, Kansas & Texas Trust Company (now by change of name called the Guardian Trust Company, one of the defendants herein), as trustee, in which said mortgage or deed of trust it is recited that the said mortgage or deed of trust shall be a first mortgage and paramount lien upon the railroad of said company and upon all its property and rights of property of every name, nature, and description then held or that might thereafter be acquired, including all the privileges and franchises thereto appertaining; that in and by said mortgage or deed of trust there was conveyed to said trustee to secure an issue of the first mortgage bonds, of said railroad company in the principal sum of Three Hundred Thousand Dollars ($300,000.00), all and singular the standard gauge railroad of the company (meaning the Kansas City & Independence Air Line),
316 and to be constructed from a point on the line of the Kansas City Suburban Belt railroad at or near the southeast corner of Section Twenty-five (25), Township Fifty (50), Range Thirty-three (33) West, in Jackson, Missouri; thence in a general easterly direction to the city of Independence in said county of Jackson, in the State of Missouri, being about six (6) miles of standard gauge railroad and lying wholly within the said County of Jackson and State of Missouri; also all the lands, tenements, easements and hereditaments acquired or appropriated, for the purpose of a right-of-way for said railroad or for its side tracks or switches; also all railroad tracks, railways, ways and rights-of-way, depot grounds, station grounds and other grounds, bridges, viaducts, culverts and other structures, depots, station houses, engine houses, car houses, fuel houses, warehouses, machine shops and other shops, water tanks, turn tables, superstructures, erections, fixtures, rolling stock, furniture, fuel, tools, implements, machinery and appliances and other facilities for maintaining and operating said railroad, as well such as the company then owned or held as also such as the company thereafter may construct or acquire and own for use in connection with its said railroad; also all the terminals, terminal rights, privileges, contracts, leases, connec-

tions and appliances which the company then owned and held and which it might thereafter own and hold for use in connection with its said railroad; also all and singular the rents, tolls, income, issues and profits of the said railroad, premises and property; and also all the estate, right, title and interest, legal and equitable and present and future of the company in and to the same and every part thereof; and also all the corporate and other rights, privileges, liberties said railroad or the construction, acquisition, maintenance or use thereof as well those thereafter to be acquired as those then held; that default was made in the payments required by said mortgage or deed of trust and on September 6, 1900, proceedings were instituted for the foreclosure of the said mortgage or deed of trust in the Circuit Court of the United States within and for the Western Division of the Western District of Missouri; that the defendant Guardian Trust Company was a party to said proceedings.

That such proceedings were had in the foreclosure suits above mentioned that the said causes were consolidated, and upon the 6th day of November, 1901, there was entered by said court a final decree of foreclosure and sale adjudging and decreeing that default had been made in the payment of the principal and interest upon the bonds secured by the mirtgages aforesaid and that the railroads,
properties and franchises embraced in each of said mortgages
317 should be sold as in and by the said decree provided, reference being hereby made thereto and to the record in said causes; that pursuant to said decree a commissioner was appointed to make said sale and the said commissioner did on December 31, 1901, at the place in the said decree specified duly sell at public auction to the intervenor, The Kansas City Southern Railway Company, it being the highest and best bidded at said sales, all and singular the railroads, property and franchises in said decree mentioned and directed to be sold and in said motrgages described as heretofore set forth, due notice of the time and place of said sales having been published pursuant to said decree, and the said decree was complied with in all things relating to said sales; that said commissioner did duly make and file his report of said sales on December 31, 1901, in the above entitled causes and court, which said report and sales were, after notice given, duly confirmed and made absolute, and the said commissioner did thereafter as directed by said court and on or about January 4, 1902, duly convey by commissioner's deed all and singular the railroads, franchises and property of every kind and description theretofore belonging to the said railroad companies and set forth and described in said mortgages including the property held by the said companies respectively at the date of said mortgages and also the property thereafter acquired by them and each of them to your intervenor, The Kansas City Southern Railway Company, which is now the lawful owner thereof.

3. Your intervenor further shows that the Union Terminal Railroad Company, one of the defendants herein, being a railroad corporation duly organized and existing under the laws of the State of Kansas, and being about to construct and equip a line of railroad in Wyandotte County, in the State of Kansas, did, on or about February

1, 1893, execute and deliver its deed of trust to the Missouri, Kansas & Texas Trust Company (now by change of name called the Guardian Trust Company, one of the defendants herein) and the Provident Life & Trust Company, of Philadelphia, as trustees, in which said mortgage or deed of trust it was recited that said mortgage or deed of trust should be a lien upon the railroad of said company and upon all the property and rights of property of the said company of every name, nature and description then held or that might thereafter be acquired including all the privileges and franchises thereto appertaining; that in and by said mortgage or deed *or* trust there was conveyed to the said trustees all and singular the standard gauge railroad of the said Union Terminal Company constructed and to be constructed from a point in the city of
318 Argentine in the County of Wyandotte in the State of Kansas, to a point on the north side of the Kansas river opposite the said city of Argentine; thence in a northwesterly direction by the most convenient and practical route, to a point at or near the Missouri river; thence along and down the valley of the Missouri and up the valley of the Kansas river to the place of beginning, so as to substantially encircle the city of Kansas City, Kansas, in said County of Wyandotte; also such branch or branches and spur or spurs as may be necessary to enable it to connect with the Kansas City Suburban Belt Railroad Company's railway at the state line between Missouri and Kansas where the said railway intersects said state line on or near the south bank of the Missouri river; the main line of the railway of the Union Terminal Railroad Company being about twenty-two miles in length and lying wholly within the said county of Wyandotte and State of Kansas; also all the lands, tenements, easements and hereditaments acquired or appropriated, for the purpose of a right-of-way for said railroad or for its side tracks or switches; also all railroad tracks, railways, ways and rights-of-way, depot grounds, station grounds and other grounds, bridges, viaducts, culverts, and other structures, depots, station houses, engine houses, car houses, fuel houses, warehouses, machine shops and other shops, water tanks, ties, rails, furniture, fuel, tools, implements, machinery, supplies and appliances, and other facilities for maintaining and operating said railroad as well such as were then owned or held by the company as also such as the company might thereafter construct or acquire and own for use in connection with its said railroad, and also the terminal, terminal rights, privileges, contracts, leases and connections and appliances which the company then owned and held and which it should thereafter own and hold for use in connection with its said railroad; also all and singular the rents, tolls, income, issues and profits of the said railroad, premises and property; and also all the estate, legal and equitable and present and future of the company in and to the same and every part thereof; and also all the corporate and other rights, privileges, liberties and franchises of the company connected with or pertaining to the said railroad or the construction, acquisition, maintenance or use thereof, as well those thereafter to be acquired as those then held; that default was made in the payments required by the terms of said mort-

gage or deed of trust and on September 6, 1900, proceedings were instituted for the foreclosure of said mortgage and deed of trust in the Circuit Court of the United States for the District of Kansas, First Division; the defendant Guardian Trust Company was a party *so* said proceedings; that such proceedings were had in said foreclosure suit that upon the 6th day of November, 1901, there was entered by the said court a decree of foreclosure and sale,
319 adjudging and decreeing that default had been made in the payment of the principal and interest upon the bonds secured by the mortgage aforesaid and that the railroad properties and franchises embraced in said mortgage should be sold as in and by the said decree provided, reference being hereby made thereto and to the record in said cause; that pursuant to said decree a commissioner was appointed by the court to make said sale, and the said commissioner did, on December 31, 1901, at the place in the said decree specified, duly sell at public auction to the intervenor, The Kansas City Southern Railway Company, it being the highest and best bidder at such sale, all and singular the railroad property and franchises in said decree mentioned and directed to be sold, including all property held by the said railroad company at the time of the execution of said mortgage, as well as property thereafter acquired and held as provided in said mortgage or deed of trust, due notice of the time and place of said sale having been published pursuant to said decree, and the said decree was complied with in all things relating to said sale; that said commissioner did duly make and file his report of said sale on December 31, 1901, in the above entitled cause and court, which said report and sale were, after notice given, duly confirmed and made absolute; and the said commissioner did thereupon and on the 4th day of January, 1902, as directed by said court, duly convey by commissioner's deed all and singular the railroad, franchises and property of every kind and description theretofore belonging to said company at the time of the execution of said mortgage or deed of trust, and also all property therein described thereafter acquired by said company to your intervenor, The Kansas City Southern Railway Company, which is now the lawful owner thereof.

4. Your intervenor further states that the Kansas City, Pittsburg & Gulf Railroad Company, being a railroad corporation duly organized and existing under the laws of the State of Missouri, and being engaged in the construction of a line of railroad from a point near Kansas City, Missouri, southwardly to the Gulf of Mexico, did, on or about April 1, 1893, execute and deliver its deed of trust to the Missouri, Kansas & Texas Trust Company (now by change of name called the Guardian Trust Company, one of the defendants herein), and the State Trust Company of the City of New York, as trustees, in and by which said mortgage or deed of trust there is conveyed to the trustees therein named all and singular the line of railroad constructed or thereafter constructed or acquired from Kansas City in the State of Missouri, southerly through the counties of Jackson, Cass, Bates and Vernon, and the northwest corner of

Barton County in the State of Missouri to the western line
320 of Barton County in said State of Missouri, and so on to the
City of Mena in the State of Arkansas; and all and singular the railroad, ways and rights-of-way, road beds, depot grounds and other lands and all tracks, bridges, viaducts, culverts, fences, depots, stations, station houses, engine houses, car houses, freight houses, wood houses, locomotive shops and other shops and all other structures and buildings whatsoever then held or owned or which should be thereafter in any wise acquired, held or owned by the said railroad company for use in the construction, maintenance or operation of its line of railroad or any extension, continuation, branch railroad or lines *or* railroad which it might thereafter purchase, construct or acquire in connection with its main line of railroad; also all locomotives, tenders and passenger, baggage, freight, cattle and other cars, and all other rolling stock and equipment whatsoever, and all machinery, tools and implements and all fuel, supplies and materials then or thereafter held, owned or acquired by said railroad company for constructing, maintaining, operating and repairing its said railroad or any extension or branch thereof; also all rights, privileges, powers, immunities and exemptions and all corporate and other franchises then owned, held and enjoyed by the said railroad company with respect to said main line or any part thereof or which should be thereafter owned, acquired, held or enjoyed by or conferred upon said railroad company connected with or relating to the said main line of railroad, its extensions, continuations and branches; also all leases, traffic contracts and arrangements of every kind and character whatsoever which said railroad company had or might thereafter enter into with any other railroad company forming part of the said line; also all and singular any tenements, hereditaments and appurtenances to said railroad or lines of railroad and each and every part thereof acquired and to be acquired, constructed and to be constructed then or thereafter belonging or in any wise appertaining; and all the reversion and reversions, remainder and remainders, estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity which the said railroad company then had or was entitled to or which the said railroad company, its successors or assigns should thereafter acquire or become entitled to concerning the said railroad or any extension, continuation or branch thereof or their rights, franchises and each and every part and parcel thereof with the appurtenances. Said mortgage or deed of trust was executed and delivered to said trustees to secure an issue of the first mortgage bonds of said railroad company in the principal sum of twenty-three million dollars ($23,000,000.00); that default was made and in the payments required by the terms of said mortgage or deed of trust and
on April 28, 1899, proceedings were instituted in the Circuit
321 Court of the United States for the Western Division of the
Western District of Missouri for the foreclosure of said mortgage or deed of trust; the defendant Guardian Trust Company was a party to said proceedings; that such proceedings were had in said action that on the 5th day of February, 1900, there was entered by

said court a decree of foreclosure and sale adjudging and decreeing that default had been made in the payments of the principal and interest upon the bonds secured by the mortgage or deed of trust aforesaid, and that the railroads, properties and franchises embraced in said mortgage should be sold as in and by the said decree provided, reference being hereby made thereto and the record in said cause; that pursuant to said decree a special master was appointed to make said sale and the said special master did, on March 19, 1900, at the place in said decree specified duly sell to a committee acting for your intervenor, the said committee being the highest and best bidder at said sale, all and singular the railroads, property and franchises in said decree mentioned, including the properties owned and acquired at the time of the execution of said mortgage or deed of trust as well as those thereafter acquired for use in connection with its said railroad, and directed to be sold, due notice of the time and place of said sale having been published pursuant to said decree and sale, and said decree was complied with in all things relating to said sale; that your intervenor by leave and order of court became the substitute bidder in the place of said committee; that said special master did duly make and file his report of said sale on March 20, 1900, in the above entitled cause, which said report and sale were, after notice given, duly confirmed and made absolute, and the said special master did thereupon, as directed by said court, duly convey by master's deed all and singular the railroad, franchises and property of every kind and description belonging to the said railroad company, including not only the properties described in said mortgage or deed of trust as then owned and held by the said railroad company but also the properties thereafter acquired for use in connection with the operation of said railroad, to your intervenor, The Kansas City Southern Railway Company, which is now the lawful owner thereof.

The mortgages or deeds of trust mentioned in the foregoing paragraphs are all duly and properly acknowledged and duly and properly recorded in the various counties in which the properties mentioned therein were respectively located at or about the dates of said mortgages or deeds of trust respectively.

5. The intervenor further shows that, about the year 1887, the defendant Guardian Trust Company (hereinafter called the Trust Company) conceived and entered upon the plan and pur-
322 pose to cause to be constructed a number of railroads in and about Kansas City in the State of Missouri, and Kansas City in the state of Kansas, and leading from or to said city; it was a part of the said plan and purpose of the Trust Company to cause said railroads to be built, constructed and operated by various corporations to be organized by the Trust Company and to elect certain of the officers, agents and representatives of the said Trust Company as the officers and directors of the said several railroad companies so as at all times to absolutely dominate and control the corporate action of the said railroad companies through their common directors and officers; it was a further part of the plans and purposes of the Trust Company to utilize and employ some one or more

of the said railroad companies to act for and on behalf of the Trust Company in building and operating railroads and in the issue of bonds and stocks so as to gather unto the Trust Company all the profits and other advantages accruing in the premises to foist upon the said railroad companies so utilized any and all losses, burdens or other liabilities which might result in the course of their operation; in carrying out its said plans and purposes the Trust Company assumed the position and duty of trustee and agent in constructing and operating said railroad and in managing and disposing of the bonds, stocks, funds and other assets of the said railroad companies and is held to the liability of trustee or agent for the use and benefit of the parties who might and did become concerned or interested therein; and that consequently the relation of the Trust Company to each and all of the said railroad companies and especially those hereafter named so far as the said Trust Company might employ the same, or either of them, as agents and instrumentalities to further its own plans and purposes, was that of a principal bound and charged with the duty to indemnify and protect such railroad company so employed and utilized in any particular transaction against any and all losses, burdens and liability arising in the premises; moreover the Trust Company was either the sole trustee in the mortgages above mentioned, or when joined as co-trustee with the Provident Life and Trust Company or the State Trust Company was the active trustee in the charge and management of the trust created by the several mortgages or deed of trust above described, and as such trustee owed an active duty at all times, during the continuance of such relation, to care for and in every way protect the interests of the bondholders secured by said mortgages, as well as to care for and protect the interests of the mortgagors themselves; the Trust Company in pursuance of the plans and purposes so conceived and entered upon by it, did
323 acquire the control of the Kansas City Suburban Railroad Company, hereinafter called the Suburban Company, in the year 1889, and caused it to issue the bonds secured by the mortgage aforesaid and to issue capital stock in a large amount and to cause said company to construct and thereafter to operate a railroad in Jackson County, Missouri, as described in the mortgage or deed of trust, of said company heretofore set forth; the Trust Company, in pursuance of the same plan, did in 1891, cause to be incorporated the Consolidated Terminal Railroad Company (hereinafter called the Consolidated Company), and did cause said Consolidated Company to issue bonds and a mortgage or deed of trust to secure the same, and to issue its capital stock in a large amount, and to construct a railroad in Kansas City, Jackson County, Missouri, connecting with the railroad of the Suburban Company, the two roads forming a continuous line of railroad from the state line between the states of Kansas and Missouri at a point in the eastern portion of Jackson County known as Belt Junction; that in December, 1891, the Trust Company caused to be incorporated under the laws of the State of Kansas the Union Terminal Railroad Company (hereinafter called the Union Company) and did cause it to issue

and execute the bonds and mortgage or deed of trust above referred to and issue capital stock in a large amount, and did further cause it to construct a railroad beginning at the state line between the states of Kansas and Missouri and extending southwesterly along the left bank of the Kaw, or Kansas river to a point at or near the town of Argentine, Wyandotte County, Kansas; in January, 1891, the Trust Company caused to be incorporated under the laws of the State of Missouri, the Kansas City & Independence Air Line (hereinafter referred to as the Air Line), and did cause the Air Line to issue and execute the bonds and mortgage above referred to and issue stock in a large amount and to construct and operate a railroad in Jackson County, Missouri, extending from a point on the line of the Suburban Company known as Air Line Junction to the City of Independence in the State of Missouri. Shortly after the issue of the bonds and stocks of the Consolidated Company the Trust Company caused it to consolidate with the Suburban Company, forming a new company called the Kansas City Suburban Belt Railroad Company (hereinafter referred to as the Belt Company); that the Trust Company caused the Union Company to execute a lease of all its property, rights and franchises to the Belt Company, and thereunder the Belt Company operated the line of the Union Company and its own line and continued so to operate the same until the institution of the foreclosure proceeding above referred to; the Trust Company, by virtue of its ownership and
324 control of the capital stock of the Belt Company, Air Line and Union Company, did at all times, cause its officers and directors to be elected as the officers and directors of said lines, and did thereby dominate and control all the affairs and business of said lines and caused them, and each of them, to do and perform all such corporate acts and things as the Trust Company from time to time deemed to be beneficial to its own interests; that the Trust Company in the year 1893, caused to be incorporated the Kansas City, Pittsburg & Gulf Railroad Company, hereinafter called the Gulf Company, and caused it to issue and execute the bonds and mortgage or deed of trust above referred to and issue stock in a large amount. The Trust Company also caused the Gulf Company to construct and operate a railroad extending generally from a point near Kansas City, Jackson County, Missouri, to the Gulf of Mexico and did cause the Gulf Company to enter into contracts with the Belt Company for the use of the latter's terminals at Kansas City; the Trust Company also caused its officers and directors to be elected officers and directors of the Gulf Company and at all times by that means did dominate and control the affairs of the Gulf Company and did cause it to perform such corporate acts and things as the Trust Company deemed to be for its benefit and advantage; that by reason of such domination and control the Trust Company at all times had a complete and intimate knowledge of all the affairs and transactions of all the companies above referred to in all their details, including the transactions hereinafter specifically mentioned.

6. Your intervenor further shows that in the year 1895, the Trust Company caused to be incorporated under the laws of the

State of Missouri the Central Improvement Company (hereinafter called the Central Company), the directors and officers of which were at all times made up from the directors and officers of the Trust Company, and the Central Company was at all times in all of its transactions dominated and controlled by the Trust Company, the purposes of the incorporation of the said Central Company were to hold the legal title to real estate that might be needed and acquired for right-of-way or other purposes necessary for and in connection with the operation of the various railroad companies so dominated and controlled by the Trust Company, in some instances the purpose being that upon the purchase of property by one of the said railway companies the title should be taken in the name of the Central Company in order that it might be enabled to give back a mortgage or deed of trust to secure a portion of the purchase money, which said mortgage or deed of trust would be a first lien and not subject to the first mortgage or deed of trust
325 lien upon the property of the railway companies respectively.

In pursuance of this plan large amounts of money were furnished to the Central Company by the Belt Company, by the Air Line and by the Gulf Company for the purchase of right-of-way and terminal properties necessary for the use and operation of the said railways respectively; and purchases were accordingly made of properties for the use and operation of said companies, a list of which properties so purchased is hereto attached marked "Exhibit A"; this statement shows the price paid for each particular piece of property and for which particular railroad company the said property was acquired and by which company the purchase price was paid: that the titles to said property so acquired were, for convenience merely, placed in the name of the said Central Company; in some instances the money so furnished to pay for such properties was furnished directly by the Belt Company or other companies for whose benefit the purchase was made to the vendors and in other instances the money was furnished direct to the Central Company, which issued to the company so furnishing such funds its capital stock representing approximately the amount of money so furnished. That in this way there were issued by the Central Improvement Company fourteen hundred and seven (1,407) shares, of which eight hundred and seventeen shares (817) are now held by the Belt Company, three hundred and thirty-four (334) shares are now held by the Union Terminal Company, twenty-two (22) shares are now held by the Air Line and two hundred and thirty-four (234) shares are now held by the Gulf Company, such companies ha-ing furnished from time to time for the purchase of property for the use and benefit of such companies the following amounts:

Belt Line	$129,571.30
Air Line	16,104.41
Gulf Company	23,673.89
	$169,349.60

that no money was ever received by the Central Company, except the money so furnished as aforesaid and it did not have at any time any assets or property except property so purchased as aforesaid: that the said fourteen hundred and seven (1,407) shares of stock were the only shares of stock ever lawfully issued by the Central Company; and by reason of the premises the said Central Company is, and was at all times, a mere trustee holding the legal title to the various properties, in trust, for the said railways, for whose use and benefit said lands were purchased as aforesaid; immediately upon the making of such purchases and the vesting of title in the Central Company the particular railroad company for which
326 such purchase was made became the equitable owner and entitled to a conveyance thereof; the said properties so purchased for the said railroad companies and to which the said railroad companies respectively were entitled to a conveyance were necessary for the use of such railroad company in connection with and in the operation of its railroad and came within the after acquired property clause of the mortgage placed upon said road, so that the equitable liens of said mortgages respectively attached to and became a charge upon the said properties in favor of their bondholders respectively. That sales of some of said properties have been made by the Central Company and by its receiver acting under order of this court and the proceeds thereof are now in the possession of said receiver. By the foreclosure proceedings above mentioned and decrees of sale had thereunder the intervenor acquired the equitable title to all of said properties so held by the Central Company, as aforesaid, and became and is now entitled to a conveyance of the same and to the proceeds of sales thereof now held by the said receiver, but the Trust Company denies the right of the intervenor to said property or to the stock of the Central Company, and pretends to hold the said stock of the Central Company as collateral security to an alleged indebtedness from the Belt Company to it, as hereinafter more specifically set forth.

7. Your intervenor further shows that prior to February 1, 1900, the Belt Company purchased and owned a large quantity of steel rails for use in the construction and repair of its railroad and in connection therewith; there were in the possession of the Belt Company on February 1, 1900, and prior thereto, approximately six hundred (600) tons, more or less, of said steel rails so owned by the Belt Company and approximately twenty tons of fastenings for use in connection therewith; by virtue of the after acquired property clause above referred to in the mortgage of the Belt Company, the said steel rails and fastenings became charged with a lien to secure the payment of the bonds so issued by the Belt Company, as aforesaid; upon the foreclosure of the said mortgage of the Belt Company and the sale had thereunder the equitable title to said rails passed to and vested in the intervenor, The Kansas City Southern Railway Company, and it became and is now the equitable owner thereof; the Trust Company claims to have acquired said steel rails and fastenings on or about February 1, 1900, as collateral security to an alleged indebtedness from the Belt Company to it and

the Trust Company denies the right and claim of your intervenor to said steel rails and fastenings, although it received the same with actual notice of the mortgage lien thereon; the value of said steel rails and fastenings was and is thirty-five dollars ($35.00)
327 per ton and the Trust Company should be required in equity to deliver said property to your intervenor, or if the said property has been sold by the Trust Company, then it should be required to account for and pay to your intervenor the proceeds or full value thereof.

8. Your intervenor further states that the railroad of the Union Company was a connecting railroad with the line of the Belt Company, the two railroads forming a continuous line of railroad and the Belt Company was, therefore, authorized by law to aid the Union Company in the construction of its road and to acquire the stock of the Union Company in the lawful execution of the corporate purposes of the Belt Company; prior to June 13, 1900, the Belt Company did acquire five thousand (5,000) shares of the capital stock of the Union Company and held said stock for the uses and purposes of its railroad as by law duly authorized to do; by virtue of the after acquired property clause in the mortgage executed by the Belt Company as above set forth, the lien of said mortgage in equity attached to said five thousand (5,000) shares of Union stock when so acquired by the Belt Company and inured to the benefit of the bondholders of the Belt Company as the Trust Company well knew. The Trust Company acquired possession of said five thousand (5,000) shares of Union Terminal stock so covered by said mortgage lien as aforesaid, and claims to hold the same as collateral security for an alleged indebtedness from the Belt Company to it, and denies the right of your intervenor to said stock or to the proceeds thereof. On or about June 14, 1900, the Trust Company claims to have sold said five thousand (5,000) shares of Union stock at and for the sum of twenty-five thousand dollars ($25,000.00) which sum was the fair value thereof at that time. By virtue of the said mortgage of the Belt Company and the foreclosure proceedings and sale thereunder your intervenor became entitled in equity to said five thousand (5,000) shares of Union stock, or twenty-five thousand dollars ($25,000.00), the value or proceeds thereof, together with interest thereon at six per cent per annum from said June 14th, 1900, which the Trust Company unlawfully withholds from the intervenor.

The Air Line owned and operated a railroad connecting with the railroad of the Belt Co., as hereinbefore stated, and the two formed a continuous line of railroad, and the Belt Company thereby, by virtue of the statutes of the State of Missouri, became entitled to aid the Air Line in the construction of its road and to purchase and hold the capital stock of the Air Line; prior to June 11, 1900, the Belt Co. had acquired and owned 4,944 shares of the capital stock of the Air Line; the Belt Co., also at the same time had acquired as aforesaid and held 14,997 shares of the Union stock

in addition to the five thousand shares above mentioned;
328 that the said Union stock and the said Air Line stock were acquired by the Trust Company claiming to hold the same as collateral security to an alleged indebtedness from the Belt Co. to it, but the said stocks had been acquired by the Belt Company prior thereto and were covered by the after acquired property clause in the mortgage of the Belt Company, as the Trust Company well knew, to secure the bonds of the Belt Company; and upon the foreclosure of said mortgage of the Belt Company and the sale thereunder to your intervenor the latter acquired the equitable title to said stock or to the value or proceeds thereof; the Trust Company claims that it did, on or about June 11, 1900, sell said 14,997 shares of Union stock and 4,994 shares of the Air Line stock at the sum or price of $9,996.65; and it holds the said stocks or the proceeds thereof and denies the right of your intervenor thereto; that your intervenor in equity is entitled to said stock or, if the same has been sold by the Trust Company, to have the Trust Company account to it for the value or the proceeds thereof together with interest thereon from June 11, 1900, at six per cent.

9. Your intervenor states that in the year 1896, the Trust Company caused to be incorporated a railroad corporation under the laws of the State of Missouri, called the Kansas City & Northern Connecting Railroad Company (hereinafter called the Connecting Company) for the purpose of constructing a line of railroad from Kansas City, Missouri, to Pattonsburg, Missouri, in order to connect with the railroads at that point running eastwardly to Quincy, Illinois, and northwardly to Council Bluffs, Iowa. The Trust Company, after the incorporation of said railway company, caused it to execute its bonds, secured by mortgage or deed of trust, in a large amount and to issue its capital stock in a large amount, and thereupon caused the Connecting Company and the Belt Company to enter into a contract, by the terms of which the Belt Company undertook to acquire the right-of-way and to construct the railroad of the Connecting Company, and as a consideration thereof, the Connecting Company agreed to execute issue and deliver to the Belt Company the bonds and stocks of the Connecting Company, that the proposed line of the Connecting Company formed a direct connection with the line of the Belt Company and the two lines formed a continuous line of railroad; in pursuance of said contract the Belt Company began the construction of the railroad of the Connecting Company and the acquisition of its right-of-way, and received as a consideration for so doing, a large amount of the first mortgage bonds and of the capital stock of the Connecting Company and held and owned a large amount in value of said bonds and stocks, for use in connection with the operation of its railroad on and prior to
329 July 20, 1899; that at various dates the Trust Company took and converted to its own use eleven hundred and thirty (1,130) of the first mortgage bonds of the Connecting Company which at that time belonged to the Belt Company and were of

the value of eight hundred forty-five thousand, four hundred and fifteen dollars ($845,415.00); that at the same time the Trust Company took and converted to its own use, sixteen (16) of the second mortgage bonds of the Connecting Co. which were at the time owned by the Belt Company, of the value of seven thousand, two hundred dollars ($7,200.00); that at the same time the Trust Company took and converted to its own use six thousand two hundred and fifty (6,250) shares of the capital stock of the Connecting Company, which were the property of the Belt Company, of the value of thirty-seven thousand five hundred dollars ($37,500.00). On or about July 20, 1899, the Trust Company took from the Belt Company four hundred and fourteen (414) first mortgage bonds of the Connecting Company and three thousand nine hundred and twenty (3,920) shares of the stock of the Connecting Company, which were at the time the property of the Belt Company, and claimed to hold the same as collateral security for an alleged indebtedness from the Belt Company to it. All of said bonds and stocks came under the after acquired property clause of the mortgage or deed of trust executed by the Belt Company and were charged with an equitable lien to secure the bonds of the Belt Company, as the Trust Company at all times well knew. By the foreclosure proceedings and sale to your intervenor as above referred to the equitable title to said stocks and bonds or to the proceeds thereof, when they had been sold by the Trust Company, vested in your intervnor which is now in equity the owner thereof. On or about September 30, 1899, the Trust Company claims to have sold said 3,920 shares of Northern Connecting stock and to have received therefor the sum of Nineteen Thousand, Eight Hundred Eighty-five and 71-100 dollars ($19,885.71); the Trust Company denies the right of your intervenor to said bonds and stocks, or the value or proceeds thereof, but claims that it has since the acquisition thereof sold all of said first mortgage bonds, including those above referred to as collateral and to have received therefrom the proceeds thereof in the sum of Nine Hundred Ninety-five Thousand Four Hundred and Fifteen Dollars, ($995,415.00) and your Intervenor is entitled in equity and good conscience to have the proceeds of all of said stocks and bonds above mentioned, accounted for and paid to it.

10. Your intervenor further shows that in the month of —, 1896, the Trust Company caused the Belt Company to enter
330 into a terminal contract with the Gulf Company, by the terms of which the Belt Company gave to the Gulf Company an entrance into Kansas City and certain valuable terminal rights and facilities; and the Gulf Company on its part undertook and agreed to pay to the Belt Company certain sums of money as rental for the rights and privileges granted to it in said contract; both parties entered upon the performance of said contract and continued so to do until April 1, 1899, when receivers for the Gulf Company were appointed by the Circuit Court of Jackson County, Missouri. At the time of the appointment of said

receivers there was due to the Belt Company from the Gulf Company under and by virtue of the terms of said terminal contract, a large sum claimed by the Trust Company to be in excess of One Hundred Thirty-three Thousand Dollars ($133,000.00). That said terminal contract, by virtue of the provisions of the after acquired property clause in the mortgage of the Belt Company heretofore set forth became charged in equity with a mortgage lien to secure the bonds issued by said company, and the rents, issues and profits at that time due the Belt Company under said contract also became charged in equity with the mortgage lien of the Belt Company to secure said bonds; that by virtue of the said foreclosure proceedings and sale thereunder to your intervenor the latter acquired all equitable right and title to said contract and to the rentals due thereon as the Trust Company at all times well knew. The Belt Company, on or about February 1, 1900, undertook to transfer and assign said account to the Trust Company as collateral security to secure an alleged indebtedness from the Belt Company to it and the Trust Company claims to be the assignee of said account, and refuses to cancel or re-assign said account to your intervenor as in equity and good conscience it should be required to do.

11. Your intervenor further states that, in connection with the contract between the Belt Company and the connecting company aforesaid, and as a part of the obligation of the Belt Company under said contract to procure the right of way for the railroad of the connecting company, the Belt Company purchased and acquired certain lands along the line of said railroad in addition to the right of way and took the title thereto in a corporation organized under the laws of the State of Missouri called the Northern Townsite Company (hereinafter referred to as the Townsite Company) which corporation was organized by the Trust Company and officered by the trust Company. In purchasing land for said right of way it became frequently necessary, in the economical handling of the matter, to purchase larger tracts out of which the right of way would be carved, and also to purchase lands
331 for townsites, and the title to the lands of this character that were purchased was taken in the name of the Townsite Company. All of the money used in purchasing said lands, amounting to the sum of Forty-six Thousand Four Hundred Sixty Three and 75-100 Dollars ($46,463.75) was furnished and provided by the Belt Company, except the sum of $46720.07, which was furnished and provided by the Trust Company. That the capital stock of the Townsite Company, to the extent of 439 shares, was by it issued to the Belt Company to represent the moneys contributed by it in the purchase of said lands; that the purchase of said lands was incidental to the construction of the railroad of the connecting line; and the title to said lands (except such as may be held to have been purchased with moneys furnished by the Trust Company) in equity belonged to the Belt Company and were covered by the after acquired property clause in the mortgage of the Belt Company as aforesaid; that by virtue of

the said foreclosure proceedings and the sale thereunder to your intervenor, the latter became vested with the title to said lands so owned in equity by the Belt Company and became entitled to the capital stock so issued by the Townsite Company to the Belt Company; that the Trust Company denies the right of your intervenor to said lands, or any part thereof, and to said capital stock, and claims to hold the said capital stock as collateral security to an alleged indebtedness from the Belt Company to it. By virtue of the premises your intervenor is entitled in equity and good conscience to a decree requiring the Trust Company to turn over to your intervenor all of the said capital stock representing moneys advanced by the Belt Company and to the cancellation of any and all of the capital stock of said Townsite Company issued without consideration, or to a conveyance to the Belt Company of all the properties and assets of the Townsite Company upon repayment to the Trust Company by your intervenor of the said sum of Six Thousand Seven Hundred and Twenty-Eight Dollars and Seven Cents ($6720.07), so advanced by the Trust Company to the Townsite Company.

12. Your intervenor further shows that, as above stated, the Trust Company at all times fully controlled and dominated all the corporate acts and doings of the Belt Company; that the Trust Company at all times caused its own officers and directors to be the officers and directors of the Belt Company, and was in a position to require, and did require, the said officers and directors of the Belt Company to do and perform the will and behest of the Trust Company in each and every act and deed. The Trust Com-
332 pany, while possessed with this power of domination and control, did not exercise the same for the interest or benefit of the Belt Company or its stockholders or bondholders whose bonds were secured by mortgage on the property of the Belt Company; nor did the Trust Company in any degree or in any way carrry out the duties imposed upon it as trustee in said mortgage, but on the contrary the Trust Company at all times controlled the acts and doings of the Belt Company in the interest and for the benefit of the Trust Company and exercised its powers and duties as trustee in said mortgage in its own interest and in violation of its trust.

On April 1, 1899, the Gulf Company, being then insolvent, defaulted in the payment of a semi-annual installment of interest then due and on the same day all its railroads and properties were placed in the hands of receivers appointed by the Circuit Court of Jackson County, Missouri; and on April 28, 1899, upon bill filed by the State Trust Company all the railroads and property of the Gulf Company were placed in the hands of receivers appointed by the United States Circuit Court for the Western Division of the Western District of Missouri, the suit and proceedings in the state court being then dismissed. Prior to said default the Trust Company, whose officers and directors were also the officers and directors of the Gulf Company as well as of the Belt Company,

knew that a default would occur and that receivers would be appointed; and the Trust Company also knew that if the Gulf Company became bankrupt or passed out of its possession and control the other auxiliary companies, to-wit, the Belt Company, the Air Line, the Union Terminal and the Consolidated Terminal, would soon likewise pass out of its control and domination; and the Trust Company, in violation of its duty as trustee in said mortgages and with a view of appropriating to itself whatever of value there was remaining in the possession of the said companies, contrived the plan of requiring said companies to turn over to it all of the personal property owned by said companies, of every nature and description, as and for security for alleged indebtedness from the Belt Company to it. In pursuance of this plan the Trust Company, on March 31, 1899, caused the Belt Company to turn over to it Ten Thousand Five Hundred (10,500) shares of the capital stock of the Union Company to secure an alleged indebtedness; and on July 20, 1899, the Trust Company caused the Belt Company to turn over to it, as collateral security to secure said alleged indebtedness, four thousand nine hundred ninety-eight (4,998) additional shares of stock of the Union Terminal Company, four thousand nine hundred and ninety-three (4,993) shares of the stock of
the Kansas City & Independence Air Line, eleven hundred
333 twenty (1,120) shares of stock of the Central Improvement
Company, four hundred and thirty-nine (439) shares of the stock of the Northern Townsite Company, four hundred and twenty-five (425) shares of the stock of the Missouri Elevator & Terminal Company, twenty-five (25) shares of the stock of the Fairmount Amusement Company, thirteen thousand nine hundred and twenty (13,920) shares of the stock of the Kansas City & Northern Connecting Company, sixty seven and nine-tenths (67.9) second mortgage bonds of the Kansas City & Northern Connecting Railroad Company, and also the right of the Belt Company to receive eighteen hundred and fifteen (1,815) additional shares of the Stock of the Northern Connecting Railroad Company; also two hundred and seven and five tenths (207.5) of the second mortgage bonds of the Kansas City & Northern Connecting Railroad Company. On September 30, 1899, the Trust Company caused the Belt Company to sell to it all of the stock of the Kansas City & Northern Connecting held by the Belt Company at the price of one and three-sevenths Dollars ($1 3-7) per share to apply upon the alleged indebtedness from the Belt Company to the Trust Company. On February 5, 1900, a decree of foreclosure and sale was rendered in the foreclosure proceedings in the United States Circuit Court for the Western Division of the Western District of Missouri in the case of State Trust Company against the Gulf Company; the Trust Company knew some time prior to the rendition of said decree that said decree would be rendered and accordingly on February 1, 1900, the Trust Company caused the Belt Company to pretend to hold a meeting of its directors and to specifically turn over all of the afore-mentioned stocks and bonds

to the Trust Company to secure said alleged indebtedness, and also to assign and transfer to the Trust Company by bill of sale as collateral security six hundred (600) tons, more or less, of sixty pound (60-lb.) steel rails owned by the Belt Company and stored in its yards at East Kansas City; and to assign and transfer to the Trust Company an account owned by the Belt Company against the Gulf Company in the sum of One Hundred Thirty-Three Thousand and fifty-eight and 4-100 Dollars ($133,058.04) as collateral security for the said alleged indebtedness. This transaction completely stripped the Belt Company and the other companies of all portable personal property and there was nothing left which could be appropriated by the Trust Company under the guise of taking additional security.

Your intervenor further states that the said acts of the Trust Company in causing the Belt Company to turn over said stocks, bonds, property and account to the Trust Company were unlawful and void and were solely due to the unlawful domination and
334 control exercised by the Trust Company over the officers and directors of the Belt Company as aforesaid; that the matters and things so done and transacted were not known to or approved by any independent board of directors or to the persons in interest owning the stocks and bonds of the Belt Company.

Your intervenor further states that the Trust Company by reason of its control of the Belt Company had intimate and exact knowledge of all the affairs and accounts, assets and liabilities of the Belt Company; although it was trustee in the mortgage of the Belt Company, and thus bound to a high degree of fidelity to the interests of the Belt Company and its bondholders, yet it used its knowledge of the affairs of the Belt Company to its own advantage in endeavoring and undertaking to protect what it claimed its own indebtedness rather than the other indebtedness of the Belt Company, both floating indebtedness and also that secured by the mortgage aforesaid, all of which was contrary to equity and good conscience and in violation of its duties as trustee; the Trust Company by virtue of its position as trustee in said mortgage and its relation to the bondholders and to the mortgagor is estopped to assert that it took said security to secure its own alleged indebtedness, but is deemed and held in equity to have received said collateral security above specifically described as trustee under the said mortgage of the Belt Company Line for the benefit of the outstanding bonds secured thereby. The equities, if any there be, in favor of the Trust Company are inferior and subordinate to the superior equity of your intervenor to the collateral security above described by virtue of the mortgage of the Belt Company and the purchase at foreclosure sale thereunder by your intervenor.

13. Your intervenor further shows that the Union Terminal Railroad Company duly executed its mortgage or deed of trust dated February 1, 1893, to the defendant Guardian Trust Company and to the Provident Life & Trust Company of Philadelphia as trustees, to secure the bonds of the Union Company, in the sum of two million dollars ($2,000,000.00); at the time of the execution of said

mortgage or deed of trust the Union Company had not constructed its railroad and was only the owner of a franchise for the construction and operation of a railroad along the left bank of the Kaw River from a point at or near Argentine, Kansas, to a point in Kansas City on the state line between the states of Kansas and Missouri; and the purpose of the issue of the bonds mentioned in the said mortgage or deed of trust was to provide funds with which to construct the railroad of said company as was expressly provided in said mortgage or deed of trust, and at all times known to the Trust
335 Company. After the execution of said mortgage or deed of trust the bonds of the Union Company in the sum of two million dollars ($2,000,000.00) were duly issued and placed in the custody of the Trust Company and it then became the duty of the Trust Company under the express terms of said mortgage, as well as by law, to see that as the bonds of the Union Company were sold the proceeds thereof used in the construction, completion and equipment of the railroad of the Union Company, so that as bonds should be sold the amount of value of the proceeds thereof should be added to the property of the Union Company in approximately an equal amount so that as the bonded indebtedness of the company should increase, the property of the company covered by said mortgage as security for said indebtedness should also increase at the same rate, and in that manner the outstanding bonded indebtedness of the company should be at all times amply secured but the trust company, unmindful of its duties as aforesaid, did from time to time sell the said bonds of the Union Company to innocent purchasers for value and did not unlawfully and improperly divert the proceeds of said sales from the purposes for which they were intended as aforesaid, and did unlawfully and improperly use the said proceeds to diminish from time to time the alleged indebtedness from the Belt Company to it, which in no wise increased or augmented the value of the property of the Union Company covered by said mortgage. Of the said issue of two million dollars ($2,000,000.00) par value of bonds of the Union Company the Trust Company thus diverted thirteen hundred and fifty (1350) bonds of the par value of one million three hundred and fifty thousand dollars ($1,350,000.00) and of the actual value of ($1,215,000.00) from the uses and purposes for which the bonds were issued, as the Trust Company at all times well knew and wrongfully and unlawfully neglected and refused to use the proceeds thereof in adding to the value of the physical property of the railroad company; and the Trust Company did wrongfully, in breach of its duty as trustee, from time to time sell and put afloat the said bonds of the Union Company in said amount after the completion and equipment of the Union Company and when there was no occasion or necessity for a sale or disposition of said bonds for the construction, completion or equipment of the said railroad; that the conduct of the Trust Company in this behalf was fraudulent as against the said bondholders of the Union Company, the proceeds of whose bonds were not used by the Trust Company to increase or augment the property covered

by the said mortgage, and constituted a breach of trust on the part of the Trust Company.

Your intervenor is the owner of all the said outstanding
336 bonds of the Union Company by purchase from bona fide holders for value thereof; that the property and franchise of the Union Company were sold at foreclosure sale, as hereinbefore stated, at the price of $1,500,000, which was in excess of the full value thereof; after crediting the proceeds of said sale upon the said bonds so held by your intervenor there remained and still remains due to your intervenor the sum of seven hundred seventy-three thousand two hundred forty-six dollars ($773,246.00) and interest thereon from January 1, 1902, at 5 per cent; that if the Trust Company had not wrongfully diverted the proceeds of said bonds from the use and purposes for which they were intended as above set forth the said mortgaged property would have been worth and would have sold for sufficient to have paid said bonds in full. Your intervenor was not advised of the foregoing acts of the Trust Company in diverting the proceeds of said bonds, until the facts in relation thereto were developed recently in the taking of testimony in support of the ancillary bill in this cause.

Wherefore your intervenor prays judgment against the Trust Company for the amount of said deficiency and interest.

14. Your intervenor further states that, on September 6, 1900, the Cambria Steel Company, a corporation organized and existing under the laws of the State of Pennsylvania, exhibited its creditor's bill in this case based upon a judgment and unsatisfied execution against the Belt Company. It is claimed by the said Cambria Company that the collateral security now held by the Trust Company being a part of the collateral security above described, is not covered by the mortgage executed by the Belt Line, but that said collateral security so held by the Trust Company may be subjected to the payment of the judgment of the Cambria Company; but your intervenor states that the claims of the Cambria Company under the said creditor's bill are subordinate and inferior to the claims of your intervenor as aforesaid. Your intervenor further shows that, on the — day of November, 1901, the Belt Company and its receivers filed their ancillary bill against the Cambria Company and the parties defendant herein, claiming that the alleged indebtedness asserted by the Trust Company against the Belt Company was fictitious and that no such indebtedness in fact existed; and further claiming that said indebtedness as well as the notes heretofore executed by the Belt Company to evidence the same, should be cancelled, and that the said collateral security held by the Trust Company should thereupon be returned to the said Belt Company and its [-ceivers.] Your intervenor shows that the claims of the
337 Belt Company and its receivers, for the reasons hereinbefore set forth, are inferior and subordinate to the claims of your intervenor. An injunction has been issued in this cause by this court restraining the Trust Company from disposing of said collateral until the final order and decree of this court as to all of said collateral security, except as to ninety-nine (99) first mortgage

bonds of the Connecting Company which have heretofore been sold and the proceeds thereof, amounting to forty thousand dollars ($40,000.00) are held in lieu of said bonds to await the final judgment and decree of the court.

Wherefore your intervenor prays:

a. For the judgment, order and decree of this court requiring the Central Improvement Company and its receiver to convey to your intervenor all the real estate or other property standing in its name and to turn over to your intervenor all the moneys held by the Central Improvement Company, or receiver, or owing to it, or them, arising from the sale or the proceeds of said property;

b. That the defendant, Guardian Trust Company, be required to account for and pay to your intervenor the value of the steel rails and fastenings mentioned in paragraph seven (7), together with interest thereon;

c. That the defendant, Guardian Trust Company, be required to account for and pay to the intervenor the value of the five thousand (5,000) shares of Union Terminal stock, together with the value of four thousand nine hundred and ninety-four (4,994) shares of the capital stock of the Air Line and also the value of the fourteen thousand nine hundred and ninety-seven (14,997) shares of the capital stock of the Terminal Company, together with interest thereon.

d. That the defendant, Guardian Trust Company, be required to account for and pay to your intervenor the value of the bonds and stock of the Kansas City and Northern Connecting Railroad Company mentioned in the preceding paragraph nine.

e. That the defendant, Guardian Trust Company, be required to assign to your intervenor the account of the Belt Company against the Gulf Company mentioned in the foregoing paragraph ten.

f. That the defendant, Guardian Trust Company, be required to release to your intervenor all of the capital stock of the Northern Townsite Company and that said Northern Townsite Company and its receivers be required to convey to your intervenor all of the property held by said Northern Townsite Company and its re-
338 ceivers, together with all the moneys in their possession or owing to them as the proceeds of the property formerly held by said Townsite Company upon repayment to the Trust Company for such sum as the court may find was contributed by said Trust Company for the purchase of property taken in the name of the Townsite Company.

g. That the defendant Guardian Trust Company be required to account for and pay to the intervenor the amount of the proceeds of the bonds of the Union Company diverted by it from the purposes for which said bonds were issued, as set forth in paragraph thirteen.

h. And for such other relief as may be equitable and just.

SAMUEL W. MOORE,
THOMAS R. MARKS,
Solicitors for Intervenor.

STATE OF MISSOURI,
County of Jackson, ss:

H. B. Johnson, of lawful age, being duly sworn upon his oath says, that he is the auditor of The Kansas City Southern Railway Company, and makes this affidavit for and on its behalf; that he has read the foregoing intervening petition and knows the contents thereof; and that the matters and facts therein stated are true as he verily believes.

H. B. JOHNSON.

Subscribed and sworn to before me this 28 day of April, 1905.
[SEAL.] CLARENCE R. HALL,
Notary Public in and for Jackson County, Missouri.

My commission expires Oct. 10, 1908.

Afterwards, to-wit, on the 15th day of May, 1905, the following order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, at Kansas City.

No. 2468.

CAMBRIA STEEL COMPANY, Complainant,
vs.
GUARDIAN TRUST COMPANY et al., Defendants.

Bill.

STUART R. KNOTT et al., Receivers for the Kansas City Suburban Belt Railroad Company et al., Complainants,
vs.
GUARDIAN TRUST COMPANY et al., Defendants.

Ancillary Bill.

339 KANSAS CITY SOUTHERN RAILWAY COMPANY, Intervenor,
vs.
GUARDIAN TRUST COMPANY, Respondent.

Intervening Petition.

Now on this day it is ordered that the time within which the Guardian Trust Company shall answer the amended intervening petition of the Kansas City Southern Railway Company is hereby enlarged to May 20th, 1905.

(Signed) SMITH McPHERSON, *Judge.*

Approved:
S. W. MOORE,
T. R. MARKS,
Solicitors for the Kansas City Southern Railway Company, Intervenor.

Afterwards, to-wit, on the 20th day of May, 1905, the following Order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

2468.

CAMBRIA STEEL COMPANY, Complainant,
vs.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY et al., Defendants; Kansas City Southern Railway Company, Intervenor.

Now comes Guardian Trust Company and files its answer to the amended intervening petition of The Kansas City Southern Railway Company and pursuant to stipulation on file, leave is given to file the same and it is ordered that same stand referred to Shannon C. Douglas, Esq., Special Master herein.

(Signed) SMITH McPHERSON, *Judge.*

Afterwards, to-wit, on the 20th day of May, 1905, the Answer of Guardian Trust Company to the Amended Intervening Petition of the Kansas City Southern Railway Company was filed. Said Answer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

No. 2468.

CAMBRIA STEEL COMPANY, Complainant,
vs.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERminal Railroad Company, Kansas City and Independence Air Line, Guardian Trust Company, Missouri Elevator and Terminal Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants; The Kansas City Southern Railway Company, Intervenor.

340 *The Answer of Guardian Trust Company to the Amended Intervening Petition of the Kansas City Southern Railway Company.*

The Guardian Trust Company, one of the defendants in the above entitled cause, and one of the respondents to the amended interven-

ing petition of the Kansas City Southern Railway Company, for its separate answer to said amended intervening petition, answering, says:

1. This respondent admits that the said intervenor is a corporation, duly organized and existing under the laws of the State of Missouri, as a railway corporation, and that it was incorporated, according to law in March, 1900.

2. This respondent admits that on or about May 1, 1890, The Kansas City Suburban Belt Railroad Company, hereinafter called the Suburban Company, a railroad corporation duly organized under the laws of the State of Missouri, executed and delivered its deed of trust to this respondent, as trustee, for the purpose of securing an issue of the first mortgage bonds of said railroad company in the principal sum of one million ($1,000,000.00) dollars; and this respondent admits that the provisions of said trust deed are substantially as set forth in said intervening petition, except that this respondent denies that it is recited in said mortgage that the same shall be a paramount lien upon all the property of the railroad company of every name, nature and description then held or that might thereafter be acquired. That default was made in the payments required by the terms of said mortgage or trust deed and that on September 6, 1900, proceedings were instituted for the foreclosure of said mortgage or trust deed, as is alleged in said amended intervening petition, and that this respondent was a party to said proceedings.

This respondent admits that on or about February 1, 1892, the Consolidated Terminal Railroad Company, a Missouri corporation, did make, execute and deliver its deed of trust to this respondent and to the Provident Life and Trust Company, of Philadelphia, as trustees, to secure an issue of the first mortgage bonds of said railroad company in the principal sum of seven hundred fifty thousand ($750,000.00) dollars; and this respondent admits that the provisions of said trust deed are substantially as set forth in said amended intervening petition, except that this respondent denies that it is recited in said mortgage that the same shall be a paramount lien upon all the property and rights of property of the railroad company of every name, nature and description then held or that might hereafter be acquired.

341 This respondent admits that default was made in the terms of said mortgage or trust deed, and that on September 6, 1900, proceedings were instituted for the foreclosure of said mortgage or trust deed as is alleged in said amended intervening petition, and that this respondent was a party to said proceedings.

This respondent admits that on or about July 25, 1892, said Consolidated Terminal Railway Company and said The Kansas City Suburban Belt Railroad Company entered into articles of consolidation in accordance with the provisions of the statutes of the State of Missouri in such case made and provided, and that said two companies thereby became consolidated and formed a new and separate corporation under the name, Kansas City Suburban Belt Railroad Company, hereinafter referred to as the Belt Company.

This respondent admits that the Kansas City and Independence Air Line, being a railroad corporation duly organized under the laws of the State of Missouri, did, on or about March 1, 1892, execute its deed of trust to this respondent as trustee to secure an issue of the first mortgage bonds of said last named railroad company in the principal sum of three hundred thousand ($300,000.00) dollars, and that the provisions of said trust deed are substantially as set forth in said intervening petition, except that this respondent denies that it is recited in said mortgage that the same shall be a paramount lien upon all the property and rights of property of the railroad company of every name, nature and description then held or that might thereafter be acquired. That default was made in the payments required by said last named mortgage, and that on September 6, 1900, proceedings were instituted for the foreclosure of said last named mortgage in the Circuit Court of the United States for the Western Division of the Western District of Missouri, and that this respondent was a party to said proceedings.

This respondent admits that the foreclosure suits, above mentioned, were consolidated, and that upon the sixth of November, 1901, a final decree of foreclosure and sale was entered in said consolidated suit and the property therein involved decreed to be sold; that pursuant to said decree a sale was made and that the Kansas City Southern Railway Company was the purchaser at said sale, but this respondent says that said mortgage was foreclosed and said suits were commenced and prosecuted and said sale made pursuant to and in accordance with the plan and scheme hereinafter described and under the circumstances hereinafter stated.

342 3. This respondent admits that the Union Terminal Railroad Company, being a railroad corporation organized under the laws of the State of Kansas, did on or about February 1, 1893, execute and deliver its deed of trust to this respondent and to the Provident Life and Trust Company, of Philadelphia, as trustees, and that the provisions of said mortgage or deed of trust are substantially as set forth in said intervening petition, except that this respondent denies that it is recited in said mortgage that the same shall be a paramount lien upon all the property and rights of property of the railroad company of every name, nature and description then held or that might thereafter be acquired. That default was made in the payment required by the terms of said mortgage and trust deed and that on September 6, 1900, proceedings were instituted for the foreclosure of said last named mortgage in the Circuit Court of the United States for the District of Kansas in the First Division; that such proceedings were had in said suit that upon the sixth day of November, 1901, a decree of foreclosure and sale was entered therein and the property and franchises embraced in said mortgage were decreed to be sold; that a sale was had pursuant to said decree, at which sale the Kansas City Southern Railway Company became the purchaser, but this respondent says that said mortgage was foreclosed and said suit was commenced and prosecuted and said sale made pursuant to and in accordance with the plan and

scheme hereinafter described and under the circumstances hereinafter stated.

4. This respondent admits that the Kansas City, Pittsburg and Gulf Railroad Company, being a railroad corporation organized and existing under the laws of the State of Missouri, did, on or about April 1, 1893, execute and deliver its deed of trust to this respondent and the State Trust Company of the City of New York, as trustees, to secure an issue of the first mortgage bonds of said last named railroad company, in the principal sum of twenty-three million ($23,000,000.00) dollars; that the provisions in said last named trust deed are substantially as set forth in said intervening petition; that default was made in the payments required by the terms of said last named mortgage or trust deed, and that on April 28, 1899, proceedings were instituted in the Circuit Court of the United States for the Western Division of the Western District of Missouri, for the foreclosure of said last named mortgage, and that such proceedings were had in that suit that on the fifth day of February, 1900, a decree of foreclosure and sale was entered therein, decreeing that the railroad's properties and franchises embraced in said mortgage should be sold; that pursuant to said decree said railroad's
343 properties and franchises were thereafter, on March 19, 1900, sold to said intervenor, but this respondent says that said property was foreclosed and said suit was commenced and prosecuted and said sale made pursuant to and in accordance with the plan and scheme hereinafter described and under the circumstances hereinafter stated.

This respondent admits that the several mortgages hereinabove referred to were all duly and properly acknowledged and recorded in the various counties in which the properties mentioned therein were respectively located at or about the dates of said mortgages respectively.

5. This respondent denies that about the year 1887, or at any other time it conceived and entered upon the plan and purpose to cause to be constructed railroads in and about Kansas City; it denies that it was part of said plan and purpose to cause said railroads to be built, constructed or operated by corporations to be organized by respondent and to elect certain officers, agents and representatives of respondent as the officers and directors of said railroad companies so as to dominate and control the action of said railroad companies. It denies that it was a part of its plans and purpose to utilize one or more of said railroad companies to act on behalf of respondent in building and operating railroads and in the issue of bonds and stocks, or either of them so as to gather unto the Trust Company the profits and other advantages accruing therefrom and to foist upon the railroad companies the losses or liabilities resulting therefrom. It denies that either in building said roads, or in the sale of stocks and bonds of said railroad companies it employed said railroad companies, or any of them, as its agents to further its own plans and purpose, and therefore denies that it was a principal, bound and charged with the duty to indemnify and protect said railroad companies against losses and liability arising in

the premises; but admits that it was in some cases sole trustee in the mortgages above mentioned; but denies that in any case it was active trustee therein. It denies that it, in pursuance of said plans and purposes, or for any other reason, or in any other circumstances acquired the control of the Kansas City Suburban Railroad Company (hereinafter called the Suburban Company) in the year 1889, or at any other time. Denies that it caused said Suburban Company to issue bonds, secured by mortgage. Denies that it caused said Suburban Company to issue capital stock in a large amount, or in any amount, and denies that it caused said company to construct and operate a railroad. It denies that in 1891, or at any other time it caused to be incorporated the Consolidated Terminal Railroad Company (hereinafter called the Consolidated Company); denies
344 that it caused said Consolidated Company to issue bonds and a mortgage or deed of trust to secure the same. Denies that it caused said company to issue capital stock and to construct a railroad or either of them.

It denies that in December, 1891, or at any other time, it caused to be incorporated the Union Terminal Railroad Company (hereinafter called the Terminal Company), or that it caused said company to issue and execute bonds and mortgage securing the same and capital stock, or any of them, as is alleged in said intervening petition.

It denies that it caused said company to construct a railroad.

It denies that it caused to be incorporated the Kansas City and Independence Air Line (hereinafter referred to as the Air Line). It denies that it caused the Air Line to execute and issue bonds and mortgage and to issue stock and construct a railroad, as alleged in said petition, or either of them. On the contrary, this respondent says that each and all of the said corporations were organized in the manner and under the circumstances set forth in the answer of this respondent, filed in this cause, to the bill called "Amended and Supplemental Ancillary Bill of Complaint," filed by Stuart R. Knott and Edward F. Swinney, as receivers of the Kansas City Suburbar Belt Railroad Company, which said answer is hereby referred to and made a part of the answer to said amended intervening petition.

This respondent denies that it at any time caused the said Consolidated Company to consolidate with the Suburban Company, forming a new company called "Kansas City Suburban Belt Railroad Company" (hereinafter referred to as the Belt Company) but this respondent says that said companies did, of their own accord and volition effect said consolidation on or about July 25, 1892, and that the Consolidated Company so formed was called "Kansas City Suburban Belt Railroad Company."

Respondent denies that it cause- the Terminal Company to execute a lease of all its property, rights and franchises, or any part thereof, to the Belt Company, and that thereunder the Belt Company operated the line of the Terminal Company and its own line. On the contrary, this respondent alleges that said lease was made without the interference of this respondent and wholly at the volition of the parties to said lease.

This respondent denies that by virtue of its ownership and control of the capital stock of the Belt Company, Air Line and Terminal Company, it did at all times, or at any time cause its officers
345 and directors to be elected as the officers and directors of said lines, or any of them. It denies that it dominated and controlled the affairs and business of said lines, or caused them or either of them to perform such corporate acts and things as this respondent deemed beneficial for its own interest. On the contrary this respondent says that the directors and officers of said companies were elected by the stockholders of said respective companies in the free exercise of their own judgment, in the same manner as the directors and officers of any other company are elected; that in some instances a part of the officers and directors of said several corporations were also at the time officers and directors of this respondent, but that in such instances such officers and directors had no personal interest in procuring for this respondent any undue advantage over the other companies, and did not procure any such advantage.

This respondent denies that in the year 1893, or at any other time, it caused to be incorporated the Kansas City, Pittsburg and Gulf Railroad Company (hereinafter called the Gulf Company), or caused it to issue and execute bonds, mortgages and stock, or any of them, as is alleged in said amended intervening petition. It denies that it caused the Gulf Company to construct a railroad from KansasCity to the Gulf of Mexico or any [*any*] part thereof. It denies that it caused the Gulf Company to enter into contracts with the Belt Company for the use of the latter's terminals at Kansas City. On the contrary it says that said contract between the Belt Company and said Gulf Company was freely made and entered into by the parties thereto, without any interference on the part of this respondent, and that said contract was made in the manner and under the circumstances stated in said answer to said ancillary bill.

This respondent denies that it caused its officers and directors to be elected officers and directors of the Gulf Company, and by that means, or by any other means dominated and controlled the affairs of the Gulf Company and caused it to perform such corporate acts as this respondent deemed to be for its benefit and advantage. On the contrary it says that said Gulf Company was managed and cotnrolled by directors and officers, freely and voluntarily elected by the stockholders thereof in the usual and ordinary manner.

This respondent denies that it had complete and intimate knowledge of all the affairs and transactions of all the said companies, as is alleged in said amended intervening petition.

6. Respondent denies that in the year 1895, or at any other time it caused to be incorporated the Central Improvement Com-
346 pany. It denies that the directors and officers of said Central Company were at all times made up from the directors and officers of this respondent, or that this respondent in all or any of the transactions of said Central Company dominated and controlled the said Central Company. On the contrary, this respondent says that the directors and officers of said Central Company were freely elected by the stockholders of said company and that while some

of the directors and officers of the Central Company were also officers and directors of this respondent, yet they had no personal interest in procuring any benefit or advantage for this respondent at the expense of the Central Company, and did not procure any such advantage.

This respondent admits that the Central Improvement Company was organized, but it says that it was organized at the instance and by the procurement of the Belt Company and the Gulf Company, for the purpose of securing and acquiring the title to various tracts of land in and about Kansas City, but it is true that the Belt Company furnished some of the money paid for said land bought by the Central Company. It is also true that the Gulf Company advanced some money for the same purpose, but whether or not the list of said properties so purchased by the Central Company is correctly shown on "Exhibit A" attached to said intervening petitions, this respondent is not advised and therefore neither admits nor denies the same. This respondent, however, denies that the titles to said real estate, so purchased, were for mere convenience placed in the name of the Central Company; but says that said Central Company was duly organized for the purpose of acquiring said lands, and that it did acquire title to the same and whatever interest said Belt Company, Air Line or said Gulf Company have, or had, in said lands is represented by the stock in said Central Company which was issued to them when said moneys were advanced.

This respondent denies that said Belt Company or said Gulf Company, or any other company or person advancing money to said Central Company became the equitable owner of the land which was purchased by the money so advanced; but on the contrary says that the interest of the company, or the person so advancing money is represented by the stock issued by the Central Company.

This respondent further shows that the said Belt Company, Air Line Company and Gulf Company, or their assigns, hold substantially all of the stock of said Central Company, and in that sense they are the beneficial owners of the property of said Central Improvement Company, subject, however, to any liens
347 thereon for unpaid portions of the purchase price thereof or for other valid liens; but this respondent has not now, and never has had, any interest in the property of the Central Improvement Company, except that it holds a mortgage on a certain piece of property owned by said Central Improvement Company to secure certain promissory notes, aggregating the principal sum of $5,000.00, which mortgage was a subsisting lien upon the property at the time the Central Company bought it, and which mortgage was subsequently purchased and is now held by this respondent.

This respondent denies that the properties so purchased by the Central Company were necessary for the use of said respective railroad companies in connection with the operation of their respective roads, and it denies that such property came within the "After Acquired" property clause of said mortgages, or either of them. It denies that the equitable liens of said mortgages, or either of them attached to and became a charge upon said properties in favor of

the bond holders. It is not advised as to whether any of said properties have been sold by the receiver of said Central Company.

This respondent denies that by the foreclosure proceedings, above mentioned and decrees of sale thereunder, the intervenor acquired the equitable title to all of said properties, or any part thereof so held by the Central Company, and it denies that said intervenor became and is now entitled to the conveyance of the same and to the proceeds of the sale thereof. On the contrary, this respondent says that no part of said property was covered by said mortgages, or any of them; that said property was not in any way appurtenant or necessary to the operation of said railroads, or any of them and that in and by the said foreclosure proceedings said intervenor obtained no title to said lands or any part of the same, and that said monies were advanced and said lands purchased after the consolidation aforesaid.

7. This respondent denies that on or about February 1, 1900, the Belt Company had purchased and then had in its possession, approximately 600 tons of steel rails and fastenings. On the contrary, this respondent says that there was less than 361 tons of said rails and fastenings.

This respondent denies that by virtue of the "After Acquired" property clause in the mortgage of the Belt Company, said rails and fastenings became charged with a lien to secure the payment of the bonds; and denies that upon the foreclosure of said
348 mortgage and the sale thereunder that the equitable title of said rails passed to and vested in the intervenor, or that it became the equitable owner thereof. On the contrary, respondent says that said intervenor obtained no title whatever, either legal or equitable to said rails by means of said foreclosure proceedings and sale.

This respondent further says that said mortgage did not by its terms cover said rails, and further that said rails were purchased after the consolidation of the said Consolidated Company and the Suburban Company, forming the new company called the Belt Company and long after the execution of said mortgage, and further that said rails were not appurtenant to the operation of said railroad.

This respondent admits that it formerly held said rails as collateral security to the indebtedness hereinafter referred to from the Belt Company to this respondent, but it denies that the value of said rails and fastenings was of the value stated in said petition, and that such rails and fastenings were subsequently sold by this respondent for the sum of approximately eleven thousand ($11,000.00) dollars, and that respondent has credited the net proceeds thereof on its accounts against said Belt Company; that notwithstanding said company had assigned said rails and fastenings to this respondent as collateral security, said company afterwards refused to deliver the same to respondent, and respondent was compelled to bring a suit of replevin therefor in the Circuit Court of Jackson County, Missouri, and said suit was subsequently determined in favor of this respondent; and that such judgment (which was en-

tered on the — day of ——), is res judicata and cannot be here inquired into.

8. This respondent admits that the railroad of the Terminal Company was a connecting railroad with the line of the Belt Company and that the Belt Company was authorized to aid in the construction of the line of the Terminal Company. It admits that the Belt Company acquired 5,000 shares of the capital stock of the Terminal Company; but denies that by virtue of the "After Acquired" property clause in the Belt Company mortgage that the lien of the mortgage in equity or in any other manner attached to the 5,000 shares of the Terminal stock so acquired by the Belt Company, or that said lien inured to the benefit of the bondholders of the Belt Company.

Respondent admits that it acquired possession of said 5,000 shares of Terminal stock as collateral security, but denies that it was collateral security to an alleged indebtedness, but on the con-
349 trary says it was a just and bona fide indebtedness of said Belt Company to this respondent.

Respondent admits that about June 14, 1900, it sold said 5000 shares of stock for $25,000.00, which sum was the fair and full value thereof at that time. Respondent denies that by virtue of said mortgage of the Belt Company and the foreclosure and sale thereunder, that the intervenor became entitled in equity to said 5000 shares of stock, or the proceeds thereof, or any part thereof. On the contrary, this respondent says that said mortgage did not by its terms cover said stock; that said stock was not in any manner appurtenant to the operation of said railroad; that said stock was acquired after the consolidation, as aforesaid, and that the said intervenor, by said foreclosure proceedings acquired no title or interest whatever in and to said stock, or the proceeds thereof.

Respondent admits that the Air Line owned and operated a railroad connecting with the railroad of the Belt Line, and that the two formed a continuous line of railroad, and that the Belt Company become and was entitled to aid the Air Line in the construction of its road and to purchase and hold the stock of the Air Line.

Respondent admits that prior to June 11, 1900, the Belt Company acquired and owned 4,994 shares of the capital stock of the Air Line, and also 14997 shares of the Terminal Company's stock, in addition to the 5000 shares above mentioned. It denies that it acquired said stock as collateral security to an alleged indebtedness from the Belt Line, to it, but on the contrary says that the respondent held said stock as collateral security to a bona fide indebtedness owing from the Belt Company to this respondent. This respondent denies that said stocks, or any part thereof, were covered by the "After Acquired" property clause in the mortgage of the Belt Company and denies that upon the foreclosure of said mortgage and sale thereunder that the intervenor acquired the equitable title to said stock or to the value or proceeds thereof. On the contrary this respondent says that no part of said stocks *were* covered by the terms of said mortgage; that said stocks were in no way appurtenant or necessary to the operation of said railroad and the

said stocks were all acquired after the consolidation aforesaid and therefore that said intervenor acquired no right, title or interest to said stocks, or any part thereof by means of said foreclosure proceedings.

This respondent admits that on or about June 11, 1900, it sold said 14,997 shares of Terminal stock and 4994 shares of Air Line stock for the sum of $9,996.65, which sum was the full and
350 fair value of said stocks at the time, but denies that said intervenor is entitled to any accounting for the value or proceeds of such sale.

9. This respondent denies that in the year 1896, or at any other time, it caused to be incorporated the Kansas City Northern Connecting Railroad Company (hereafter called the Connecting Company) for the purpose alleged in the intervening petition, or for any other purpose. It admits that said Connecting Company was organized for the purpose of constructing a railroad from Kansas City, Missouri, to Pattonsburg, Missouri, in order to connect with the railroads at that point running to Quincy, Illinois, and to Council Bluffs, Iowa.

Respondent denies that it caused said Connecting Company to execute bonds, mortgage and stock, or any of them, as alleged in said intervening petition, and denies that it caused said Connecting Company to enter into a contract, under which the Belt Company undertook to acquire the right-of-way and construct the railroad for said Connecting Company, and under which said Connecting Company agreed to give the Belt Company its bonds and stocks.

This respondent admits that such a contract was made between said companies, but it was made freely and of their own accord and without the interference of this respondent.

This respondent admits that pursuant to such contract the Belt Company began the construction of a railroad for the Connecting Company and the acquisition of its right-of-way and received as a consideration for so doing a large amount of the first mortgage bonds and of the capital stock of the Connecting Company, and that the Belt Company so held said stock and bonds on and prior to July 20, 1899.

This respondent denies that at various dates, or at any date it took and converted to its own use any bonds or stocks belonging to said Belt Company.

Respondent denies that about July 20, 1899, it took from the Belt Company mortgage bonds and stocks in the Connecting Company belonging to the Belt Company as collateral security for an alleged indebtedness from the Belt Company, to respondent, but on the contrary says that it did take said bonds and stock as collateral security to a bona fide indebtedness due to it from the Belt Company.

Respondent denies that said bonds or stocks, or any of them, came under the "After Acquired" property clause of the mortgage made by the Belt Company and denies that they, or any of them were charged with an equitable lien to secure the bonds of the
351 Belt Company. It denies that by means of the foreclosure proceedings and sale to the intervenor that the equitable title

to said stocks and bonds, or the proceeds thereof, vested in equity in the intervenor. On the contrary this respondent says that said mortgage did not by its terms cover said bonds and stocks, or any part thereof; that said bonds and stocks were not necessary or appurtenant to the operation of said railroad; that all of said stocks and bonds were acquired after the consolidation, as aforesaid, and that said intervenor acquired no right, title or interest of any kind whatsoever in and to said stocks and bonds by means of said foreclosure proceedings.

This respondent admits that on or about September 30, 1899, it sold 13,920 (not 3920) shares of Northern Connecting Company's stock, which it at one time had held as collateral, as aforesaid, for the sum of $19,885.70, which sum was the full and fair value of said stock, at the time. That prior to said sale, this respondent had accepted said stock as part payment on its said indebtedness at the same price for which respondent afterwards sold said stock.

10. This respondent denies that in 1896, or at any other time, it caused the Belt Company to enter into a Terminal contract with the Gulf Company, by the terms of which the Belt Company gave to the Gulf Company an entrance into Kansas City and valuable terminal rights and facilities, and whereby the Gulf Company undertook and agreed to pay to the Belt Company certain rentals for such rights as were granted to the Gulf Company in said contract. On the contrary, this respondent says that said contract was entered into by said parties freely and as the act of said companies represented by their independent and adult officers and board of directors.

This respondent admits that said parties operated under said contract until April 1, 1899, when receivers for the Gulf Company were appointed; that at said last named time there was due to the Belt Company from the Gulf Company under said contract about the sum of $133,000.00.

This respondent denies that said terminal contract, by virtue of the provisions of the "After Acquired" property clause in the said mortgage of the Belt Company became charged in equity with a mortgage lien to secure the bonds issued by said Belt Company, and denies that the rents, issues and profits, or any part thereof at that time due the Belt Company under said contract became charged in equity with such lien. It denies that by virtue of said foreclosure proceedings and sale thereunder to the intervenor that the latter acquired all equitable right and title, or any right and title to said contract and rentals due thereon.

352 Respondent admits that the Belt Company, on or about February 1, 1900, did transfer and assign to it the said account against the said Gulf Company as collateral security to a bona fide indebtedness from the Belt Company to this respondent.

This respondent says that said intervenor acquired no right, title or interest whatever to said contract, or the rentals thereunder by virtue of said foreclosure proceedings, because said contract and rentals thereunder are not covered by the terms of said mortgage, and because it is in no way appurtenant to the operation of

said railroad; and because said contract was made and said rentals accrued after the said consolidation, as aforesaid.

11. This respondent denies that the Northern Townsite Company (hereinafter referred to as Townsite Company) was either organized or officered by the Trust Company. On the contrary, this respondent says that said Townsite Company was organized by its own stockholders for the purpose of acquiring and dealing in certain lands along the line of the railroad of the Connecting Company.

This respondent admits that all the money used by the Townsite Company in purchasing its lands was furnished by the Belt Company and by this respondent, but it denies that the sum of $46,463.75 was furnished and provided by the Belt Company and this respondent but on the contrary says that a much smaller amount was furnished.

Further answering, it says that the total amount of money furnished by the Belt Company for the purchase of said lands in which the Townsite Company had or claimed to have any interest was $6,286.57, and that the Belt Company received therefor 439 shares of the capital stock of the said Townsite Company, at the par value of $100.00 each, and that the total amount of money furnished by this respondent for the same purpose was $6720.07, and that it received 489 shares of the capital stock of said Townsite Company.

This respondent denies that in equity the said lands represented by the money furnished by the Belt Company belong to the Belt Company and were covered by the "After Acquired" property clause in the said mortgage. It denies that by virtue of said foreclosure proceedings and sale thereunder to the intervenor that the intervenor became vested with the title to said lands, or any part thereof, and denies that said intervenor thereby became entitled to the capital stock so issued by the said Townsite Company, to the Belt Company, or any part thereof.

353 This respondent denies that it holds the capital stock so issued to the Belt Company as collateral security to an alleged indebtedness from the Belt Company to it, but on the contrary says that it holds said stock as collateral security to a bona fide indebtedness from the Belt Company to this respondent. This respondent says that said intervenor is not entitled, either at law or in equity, to any interest or title in said lands, or said stock, because the same are not covered by the terms of said mortgage, because they are not appurtenant to the operation of said railroad and because they were acquired after the consolidation, as aforesaid.

12. This respondent denies that it at any time dominated and controlled the acts of the Belt Company, or that it caused its officers and directors to be the officers and directors of the Belt Company. Denies that it required the officers and directors of the Belt Company to perform the will and behest of this respondent in any respect, but on the contrary alleges that the officers and directors of said Belt Company at all times exercised their independent judgment and acted in good faith for the best interests of the said Belt Company.

This respondent further says that in all respects and at all time- it

fully and in good faith performed the duty imposed upon it as trustee in said mortgage, and that at no time did it control the acts and doings of the Belt Company in its own interest.

This respondent admits that about April 1, 1899, the Gulf Company was insolvent; that it defaulted in payment of interest and that it was placed in the hands of receivers, as alleged in said petition, but it denies that it knew that a default would occur prior to the time default was made, and denies that it knew that if the Gulf Company became bankrupt that the so-called auxiliary companies would pass out of its control and denies that said so-called auxiliary companies were ever in its control. It denies that in violation of its duty as trustee of said mortgages and with a view to appropriate to itself whatever value there was remaining in possession of said auxiliary companies it contrived the plan to require said companies to turn over to it all or any part of the personal property of said companies as and for security for an alleged indebtedness from the Belt Company to it, but on the contrary it alleges that at all times it acted in good faith and that in procuring the collateral security, as hereinafter stated, it acted in goood faith towards the Belt Company and its creditors.

This respondent denies that on March 31, 1899, and July 20, 1899, or at any other time, it caused the Belt Company to
354 turn over to it collateral, as alleged in said intervening petition, but respondent says that said Belt Company did turn over to this respondent as collateral security to a bona fide debt then owing to this respondent from said Belt Company, collateral security as is shown in the said answer to said amended ancillary bill.

This respondent denies that on September 30, 1899, or at any time it caused the Belt Company to sell to it all or any part of the stock of the Kansas City and Northern Connecting Company held by the Belt Company, at the price of one and three-sevenths dollars per share or at any other price to apply upon an alleged indebtedness from the Belt Company to this respondent, but on the contrary this respondent says that said sale of said stock was a fair and open sale at a full fair value of said stock, and that the indebtedness upon which the same was applied was a bona fide indebtedness from the Belt Company to this respondent.

Respondent admits that a foreclosure decree was entered on February 5, 1900, in the case of State Trust Company against the Gulf Company.

Respondent denies that it knew prior to the rendition of said decree that the same would be rendered.

It denies that on February 1, 1900, or at any time it caused the Belt Company to pretend to hold a meeting of its directors and to specifically turn over all of the stocks and bonds, as alleged in said amended intervening petition, or any part thereof, to secure an alleged indebtedness, and to assign and transfer to respondent the said steel rails, and to assign and transfer to respondent the account owned by the Belt Company, against the Gulf Company as aforesaid, as collateral security for an alleged indebtedness. On the contrary, this respondent says that the meeting of said board of directors of

said Belt Company was held at their own volition, and without an interference or direction from this respondent, and that the action of the said board of directors in turning over said collateral security was the free act of the directors of said Belt Company.

Respondent denies that the action of the Belt Company in turning over said stocks, bonds and property to it as collateral was void and denies that such action was due to the pretended unlawful combination and control exercised by respondent over the officers and directors of the Belt Company, but on the contrary says that said action was the voluntary act of said officers and directors in the exercise of their independent judgment.

355 This respondent denies that by reason of its control of the Belt Company it had knowledge of the affairs and situation of the Belt Company, but it admits that it did, by reason of its connection with said Belt Company, have considerable knowledge of the affairs and situation of the Belt Company, and denies that it used its knowledge of the affairs of the Belt Company to its own advantage rather than for the purpose of the other indebtedness of said Belt Company, but on the contrary it says that it acted in good faith in protecting its own interests and in doing so did not violate any duty which it owed as trustee or to the bondholders, or any other creditors of said Belt Company.

This respondent denies that on account of its position as trustee in said mortgage that it is estopped to assert that it took said security to secure its own indebtedness, and denies that it is deemed in equity to have received said collateral as trustee under said mortgage of the Belt Company. On the contrary it says that said mortgage for the reasons hereinbefore stated, did not cover said securities and property or any part thereof.

Further this respondent says that most of said transactions were had and done more than ten years prior to the filing of said intervening petition, and that each and all of said transactions were had and done more than five years prior to the filing of said petition, and the intervenor ought not to be permitted after so long a time to come into a court of equity and question the same; that whatever pretended rights, equities and causes of action accrued to the intervenor, by reason of said transactions, accrued to it more than five years before the institution of this suit, and respondent hereby pleads, to each and all of said transactions, the statutes of limitation of the State of Missouri, to-wit, sections 4271, 4272 and 4273, of the Revised Statutes of the State of Missouri for the year 1899, which said statutes are now and have been during all the times herein mentioned in full force and effect, and respondent pleads, as to the same, all other statutes of limitation of the State of Missouri. Respondent further say that ever since the organization of the said intervenor and its creation as a corporation it has had full knowledge of all the facts and circumstances in connection with the taking of said collateral security and the sale of stocks and bonds as aforesaid, and the real estate transactions aforesaid, and of all of the other matters and things in its said petition complained of, and has made no protest against the same and has taken no steps to enforce any rights

which it has or claims to have in and to said stocks and bonds or the proceeds thereof, or said real estate or any of them; that said
356 intervenor has been guilty of laches in the premises and should not now be permitted to come into a court of equity and assert any claim to said money or property or any part thereof or to question any of said transactions and respondent claims the same benefit from these defenses as if it had formally pleaded the same in bar of and had demurred to the said intervening petition.

13. This respondent admits that the Union Terminal Railroad Company executed its mortgage dated February 1st, 1893, that respondent was one of the trustees named in said mortgage, and that the same was executed to secure bonds of the Union Company in the sum of Two Million Dollars ($2,000,000.00); that at the time the Union Company had not constructed its railroad, that the purpose of the bond issue was to provide funds to construct said railroad, but as to whether such purpose was expressly provided in said mortgage this defendant neither admits nor denies, but asks that said mortgage, or a certified copy thereof, be produced in evidence.

This respondent denies that bonds in the sum of Two Million Dollars ($2,000,000.00) were issued and placed in the custody of respondent, but on the other hand says that the amount so placed with it was a much less amount, and that the amount of said bonds so delivered to it, the prices at which they were delivered and the circumstances are fully set forth in respondent's said answer to said supplemental and amended ancillary bill.

Respondent denies that either by law or by the express terms of said mortgage it was the duty of respondent to see that as said bonds were sold, proceeds thereof should be used in the construction, completion and equipment of said railroad. On the contrary respondent says that there was no such duty imposed either by the terms of said mortgage or by law.

Respondent denies that it sold any of said bonds and unlawfully diverted the proceeds of said bonds, or any part thereof, from the purposes for which they were intended. It denies that it used said proceeds or any part thereof to diminish the indebtedness due to it from the Belt Company. It denies that it thus diverted 1,350 of said bonds of the par value of $1,350,000.00, or any part thereof, from the uses and purposes for which said bonds were issued. It denies that in breach of its duty as trustee or in any manner, or at any time, it sold or put afloat said bonds or any of them after the completion and equipment of the said Union Terminal Company; it denies that any of the transactions conducted by it in
357 respect to said bonds were fraudulent as against bond holders of said Union Company; on the contrary respondent says that said bonds were sold by said Union Company itself for its own purposes, and that in the main the said bonds were acquired by the Belt Company, which had guaranteed the payment of principal and interest of said bonds, and was the owner of all the capital stock of the said Union Company, and operated its line, and that afterward the Belt Company, in the usual course of business, sold said bonds for full value to respondent and to others, and respondent avers that

such bonds as were bought by it from either the Belt Company or the said Union Company were bought for full value, and in most cases for far more than their full value.

Respondent neither admits nor denies that the intervenor is the owner of all of said outstanding bonds of said Union Company, and asks that strict proof be made thereof, but states that if it be that the intervenor, is the holder and owner of all of said outstanding bonds of said Union Company, intervenor is not a bona fide holder of the same for value; that said bonds came into the possession of the intervenor in the manner hereinafter stated and not otherwise; respondent admits that the property and franchises of the Union Company were sold at the aforesaid price of $1,500,000, but it denies that such price was in excess of the full value thereof; on the contrary respondent says that said price obtained at said foreclosure sale was much less than the real value of said property.

This respondent denies that said intervenor did not learn of the transactions had and done by this respondent in respect to said Union Company bonds until recently, when testimony was taken in support of the ancillary bill in this cause. Further this respondent says that most of said transactions in respect to said Union Company bonds were had and done more than ten years prior to the filing of said intervening petition, and that each and all of said transactions were had and done more than five years prior to the filing of the original bill in this suit and more than five years prior to the filing of said intervening petition, and that if any rights, equities or causes of action accrued to the intervenor as it is pretended, by reason of such transactions, the same accrued to it more than five years before the institution of this suit, and that intervenor ought not now to be permitted after so long a time to question the said transactions, and respondent hereby pleads to each and all of said transactions the statutes of limitations of the States of Missouri, to-wit, Sections 4271, 4272 and 4273, of the Revised Statutes of the year 1899 of said State of Missouri, which statutes are now and were at all
358 times herein mentioned in full force and effect, and pleads as to the same all other statutes of limitations of said state. Respondent further says that ever since the organization of said intervenor it has had full and complete knowledge of all the facts and circumstances in connection with the handling and sale of said Union bonds by this respondent, and has made no protest against the same and has taken no steps to enforce any rights which it had or has or pretends to have in and to said bonds or the proceeds thereof, or by virtue of ownership of said bonds or by reason of any other thing connected with said bonds and the transactions had in respect of the same by this respondent; that said intervenor has been guilty of laches in the premises and should not now be permitted to come into a court of equity and assert any claims against this respondent on account of said transactions or any of them in respect to said Union Company bonds, and respondent craves the same benefit from these defenses as if it had formally pleaded the same in bar of said intervening petition or had demurred to the same, and respondent states that whatever Union Company bonds were acquired

by the said intervenor were acquired by it through the reorganization committee hereinafter mentioned in consummation of the reorganization plan hereinafter mentioned, which plan is fully set out in a certain pamphlet, put forth and promulgated by the said committee, a true copy of which is attached to and made part of the supplemental answer of this respondent and its receiver to the said bills of complaint in said foreclosure suits exhibited in this court by the said Provident Life and Trust Company, and for brevity respondent prays leave to refer to the same; that the said intervenor acquired said Union bonds through the said committee, in pursuance of the said reorganization plan and agreement, and that said intervenor was caused to be incorporated by the said committee for the purpose among other things of issuing its stocks and bonds in exchange for stocks and bonds of the said Union Company and other companies, as in said plan and agreement set forth, and that said intervenor is the successor company which the said committee proposed by said plan to organize, as in said plan set forth, and respondent states that the owners and holders of said Union Company bonds from which the said committee acquired the same, were, at all times herein mentioned, thoroughly familiar with all the facts and circumstances surrounding the issuance of said bonds and of all of respondent's transactions in reference thereto, and that the said committee at all time-, after it acquired the said Union Company bonds and up to the time it delivered the same to the said intervenor, was at all times familiar with the said transactions and all the facts and circumstances surrounding the same, and that no steps
359 were ever taken by either the said bondholders or the said committee to enforce any rights which they are in said petition now claimed to have had in respect to the said Union bonds or in respect to respondent's transactions in regard thereto.

14. This respondent admits that on September 6th, 1900, the Cambria Steel Company filed its bill in this case, and that the allegations of said bill are substantially as set forth in said intervening petition. That in November, 1901, the Belt Company, by its receivers, filed their ancillary bill herein, and that the allegations therein are substantially as set forth in said intervening petition.

This respondent admits that an injunction has been issued in this cause, restraining respondent from disposing of said collateral until the final order and decree of this court as to all of said collateral, except 1899 first mortgage bonds of the Connecting Company, as is alleged in said intervening petition.

This respondent further answering, says that the indebtedness from said Belt Company to this respondent is evidenced by certain promissory notes, executed by said Belt Company, and by an open account, as set forth and fully stated in the said answer to said amended ancillary bill.

15. This respondent, the Guardian Trust Company, further shows that on or about the 14th day of June, A. D. 1899, William F. Harrity, B. M. Baker, August Hecksher, Edward Wagner, Samuel R. Shipley, Silas W. Pettit and Winthrop Smith entered into an agreement for the reorganization of the Kansas City, Pittsburg & Gulf

Railroad Company, Kansas City Suburban Railroad Company, and the Port Arthur Channel and Dock Company and their so-called subsidiary or auxiliary companies, including said Kansas City Suburban Belt Railroad Company, Union Terminal Railroad Company, Consolidated Terminal Railroad Company, and Kansas City and Independence Air Line Railroad Company; that said persons calling themselves a reorganization committee formed a so-called "plan or reorganization," which was promulgated under date of November 7, 1899, and invited all holders of bonds and stocks of said several companies above named, to deposit the same with said reorganization committee under said plan of re-organization which proposed to organize a new corporation to be known as the Kansas City Southern Railway Company, which should acquire the properties of all said above named corporations, and issue in payment therefor the bonds and stocks of said re-organized or new corporation in the proportions and on the terms and in the manner set out in the said plan
360 of re-organization, which is hereby referred to and ready to be produced upon the hearing of this cause.

16. That after the promulgation of said plan on November 7, 1899, there was deposited with said re-organization committee the proportion of bonds and stock required by said plan to make the same operative; and on the 20th day of December, 1899, said plan was declared operative; that thereafter said committee caused to be organized and incorporated the Kansas City Southern Railway Company under the statutes of the State of Missouri for the purpose of acquiring title to the properties of said corporations named in the foregoing paragraph, and the stocks and bonds of said new corporation were thereafter exchanged for the stocks and bonds of said several corporations in the proportion and manner set out in said re-organization plan; that by means of said exchange said Kansas City Southern Railway Company came to be the owner of practically all the bonds and stocks of said corporations above mentioned, and particularly of the said Kansas City Suburban Belt Railroad Company, and said corporation caused to be elected directors and officers of said Belt Railroad Company, who conducted the same and managed and operated it in the interests of and as a component part of the railroad system of said Kansas City Southern Railway Company.

17. This respondent further shows that the organization of said Kansas City Southern Railway Company and exchange of its stocks and bonds above alleged for the stocks and bonds of said Belt Railroad Company, and the other steps taken in pursuance of said reorganization plan, effected a consolidation of said Kansas City Southern Railway Company and said Kansas City Suburban Belt Railroad Company under the statutes of the State of Missouri; or a consolidation de facto, and that said Kansas City Southern Company is estopped to deny such consolidation, or to claim that the same was not legally complete; and that said Kansas City Southern Railway Company thereby became and is liable for all the debts incurred by said Belt Railroad Company to the same extent as said last mentioned company, including the debts of this respondent heretofore mentioned and alleged in this answer.

18. Further answering this respondent shows that said re-organization committee, when working out said plan of re-organization expressly represented to this respondent that, in consideration of the debt due and owing from said Belt Company to this respondent, said committee would provide for the payment of all debts and obligations due to this respondent from all of said corporations proposed to be included in said re-organization plan, and particularly
361 said Belt Railroad Company, and expressly promised this respondent that said committee would pay or cause to be paid all debts of every character due to this respondent from said several corporations proposed to be consolidated, and particularly from said Belt Railroad Company; and that the said new and re-organized company would pay such debts; that certain members of said re-organization committee, constituting a so-called purchasing committee, purchased at the foreclosure sale of said Kansas City, Pittsburg and Gulf Railroad Company, all its assets, right-of-way, rolling stock, etc., and thereafter assigned said bid to said Kansas City Southern Railway Company which said company entered into a contract with said re-organization committee, wherein and whereby it assumed and agreed to complete and carry out all the obligations undertaken and assumed by said re-organization committee; that under and by reason of said agreement and contract said Kansas City Southern became liable and agreed to pay all the obligations of said Belt Railroad Company to this respondent, and is still so liable.

19. That said Kansas City Southern was at the time of the foreclosure and sale of the Belt Company's assets the holder and owner of practically all the bonds and stock of said Belt Company; that, in order to obtain and control the stock of said Belt Company, said Kansas City Southern Railway Company exchanged its stock in the proportions and in the manner specified in said plan of re-organization, which is hereby referred to, for the stock of said Belt Company, and thereupon proceeded to secure a foreclosure of said bonds of said Belt Company; that said scheme of re-organization and exchange of stocks aforesaid resulted in the stockholders of the Belt Railroad Company securing a large amount of stock of said Kansas City Southern Railway Company, which was at that time and is yet very valuable, and was at that time and is yet of much greater market value than the total claims of this respondent against said Belt Railroad Company; that said scheme legally implied the payment by said Southern Company of all the claims of this respondent against said Belt Comapny.

20. This respondent therefore alleges and shows that if said scheme of re-organization and exchange of securities was intended by said re-organization committee and by said Kansas City Southern Railway Company and its officers to deprive this respondent of all security and opportunity of collecting its said claims against the Belt Railroad Company, while preserving and securing to the stockholders of said company said advantage and valuable interests through said scheme of transfer of stocks that said foreclosure of said properties of said Belt Company, would have been a fraudulent scheme, and in that case should be held void and in-
362 valid, so far as this relator is concerned, and the property thereby transferred to said Kansas City Southern Railway

Company should be held subject to the debts and claims of this respondent and subjected to their payment, even if it should be held by the court that a legal consolidation or actual or de facto consolidation, was not brought about as hereinabove alleged, whereby said Kansas City Southern Railway Company became legally obligated to pay the claims of this respondent against said Belt Railroad Company.

21. All of which matters and things hereinbefore stated this respondent is ready to aver, maintain and prove as this Honorable Court may direct. Wherefore respondent prays that the so-called intervening petition of the said Kansas City Southern Railway Company may be dismissed as without equity, and for its costs in this behalf most wrongfully expended.

HARRY S. MECARTNEY AND
JULES C. ROSENBERGER,
Solicitors for Guardian Trust Company.

Afterwards, to-wit, on the 1st day of June, 1905, the Answer of the Guardian Trust Company to the Amended and Supplemental Ancillary Bill of Complaint filed.

Said answer was in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company and Northern Townsite Company, Defendants.

Bill.

2468.

STUART R. KNOTT and EDWARD F. SWINNEY, as Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainant-,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

363 *Answer of the Guardian Trust Company to the Amended and Supplemental Ancillary Bill of Complaint.*

Now comes the defendant, Guardian Trust Company, and now and at all times hereafter saving and reserving to itself all benefit

and advantage of exceptions which can or may be had or taken to the many errors, uncertainties and other imperfections in the said bill contained, for its separate answer thereto, or to so much thereof as and such portions thereof, as this defendant is advised it is necessary or essential for it to answer unto, answering and pleading says:

1. That it is true as alleged in the said amended and supplemental ancillary bill that on November 30th, 1900, Francis M. Black was appointed receiver for the Guardian Trust Company in a certain cause wherein W. W. Bierce et al. were complainants and said trust company was defendant, then pending in this court, and that since the filing of said bill the receiver for the Guardian Trust Company has been discharged and the said Trust Company is now in the possession of its corporate property and is managing its own business.

2. This defendant admits that Wash Adams, Esq., was heretofore appointed receiver for the Missouri Elevator and Terminal Company, but states that the property and assets of said Missouri Elevator and Terminal Company have since been taken out of the hands of said Wash Adams, receiver, and said receiver has been discharged, and this defendant admits that at the time of the filing of the original ancillary bill Wash Adams was the duly qualified and acting receiver of the Central Improvement Company and that since said bill was filed the said Adams has resigned and Thomas T. Crittenhen has been appointed as his successor and is now the duly qualified and acting receiver of said Central Improvement Company.

3. This defendant admits that the Cambria Steel Company heretofore filed its original bill of complaint in this court against the Kansas City Suburban Belt Railroad Company and the several other defendants above named in which said original bill said Steel Company set up a judgment which it had on the same day obtained against the said Belt Railroad Company and that in said bill of complaint the said Steel Company seeks to subject certain alleged rights, claims and alleged property and assets, alleged to belong to the said Belt Railroad Company and some of the other defendants to the payment of its said judgment.

364 4. This defendant admits that on the same day that the said bill of complaint was filed by the said Cambria Steel Company four certain bills of complaint were filed in this court by the Provident Life and Trust Company of Philadelphia, two of said bills being filed against the Kansas City Suburban Belt Railroad Company, as the sole defendant, another of said bills being filed against the Union Terminal Railroad Company, a Kansas corporation, and the said Belt Railroad Company as defendants, and the other of said bills being filed against the Kansas City & Independence Air Line, a Missouri corporation, and the said Belt Railroad Company. Each of said bills sought to foreclose a first mortgage upon a certain Railroad described in the said bills of complaint, respectively, and which said several described pieces of railroad property had for a long time been operated by the said Belt Company as a continuous and allied system, and this defendant admits that the said

Belt Railroad Company was the owner practically all of the capital stock of said several railroad companies; admits that upon the same day that said bills of complaint were filed an application was made for the appointment of a receiver for all of the property of said Belt Railroad Company and of the said Air Line Company and of the said Union Terminal Company, and that on the same day, to-wit, on September 6, 1900, by an order entered of record in *in* said causes, Stuart R. Knott and Edward F. Swinney, complainants in said amended ancillary bill were appointed receivers of said Belt Railroad Company and of said Air Line Company and of said Union Terminal Railroad Company and that thereupon the said Knott and Swinney, as such receivers, took possession of all the property and franchises of said Belt Railroad Company and of the said Air Line Company and Union Terminal Company, and that as such receivers they did operate the said railroads until the same were sold under the decrees of this court, rendered in said foreclosure suits, which suits had been consolidated, and that at such sales the Kansas City Southern Railway Company became the purchaser of all of said railroad properties and said railroad properties under the said decrees of foreclosure were conveyed to the said Kansas City Southern Railway Company, which has ever since owned and operated the same.

5. For convenience the Kansas City Suburban Belt Railroad Company as it existed prior to its consolidation hereinafter mentioned, with the Consolidated Terminal Railroad Company is hereinafter referred to as the Suburban Company and after said consolidation as the Belt Company, the Union Terminal Railroad Company, as the Union Company; the Kansas City and Independence Air Line, as the Air Line; the Consolidated Terminal Company, as the Consoli-
365 dated Company; the Missouri Elevator and Terminal Company, as the Elevator Company; the Central Improvement Company, as the Improvement Company; the Fairmount Amusement Company, as the Amusement Company; the Northern Townsite Company, as the Townsite Company; the Kansas City & Northern Connecting Railroad Company, as the Northern Company.

6. Further answering this defendant states that it was incorporated under the laws of the State of Missouri in the year 1889, and not in the year 1883, as alleged in the said amended ancillary bill; that this defendant was originally incorporated under the name of "Missouri, Kansas and Texas Trust Company," but afterwards changed its name in the manner provided by statute to "Guardian Trust Company."

7. This defendant states that it is true that in the month of January, 1887, a corporation was formed under the laws of the state of Missouri, known as the Kansas City Suburban Belt Railroad Company for the purpose of building a belt line of railroad to encircle the cities of Kansas City, Missouri, and Kansas City, Kansas. This defendant says that it is untrue, and hence it denies that it caused the said Suburban Company to be incorporated but on the contrary avers that the said Suburban Company was organized and incorporated some two years before this defendant company was created, and

this defendant had nothing to do with the organization of the said Belt Company.

8. It is also untrue that the servants, employes, officers or directors of this defendant in any way became or were the officers or directors of the Suburban Company, nor did they or any of them become such until several years after the latter company's incorporation, and it is untrue that this defendant at all times or at any time dominated and controlled the said Belt Company, or the Suburban Company.

9. This defendant denies that it, by reason of its alleged domination, or for any reason whatever, or in any way caused the Suburban Company to issue and deliver to this defendant all of its capital stock, and denies that this defendant caused the said Suburban Company to execute its bonds in the sum of one million dollars, or any other amount, and denies that this defendant caused said bonds to be delivered to it, and denies that this defendant proceeded to sell or otherwise dispose of said bonds and stock, and to apply the proceeds thereof, except as hereinafter stated. And this defendant denies that it has ever refused or failed to fully account to the said Belt Company for any property, choses in action, moneys or other
366 things of the said Suburban Company or Belt Company, which may have come into its hands at any time and by any means, but state that the contrary is true; that this defendant has frequently, from time to time fully accounted to the Belt Company and said Suburban Company for all moneys, property, effects and assets which may, in any way, have come into its hands of this defendant, belonging to the said Belt Company or to said Suburban Company.

10. This defendant further answering the said ancillary bill concerning its connection with the said Suburban Company, states and shows to the court as follows: The said Suburban Company was incorporated in January, 1887; that it soon after said date authorized the issuance of $1,500,000.00 of its capital stock; that said Suburban Company for the first two years of its existence had done considerable preliminary work in the way of procuring franchises to use certain streets in Kansas City, along which to build its railroad from a point near Second and Broadway streets in Kansas City, Missouri, in an easterly direction to a point near Cecil Station on the Missouri, Pacific Railroad in what is known as the East Bottoms, being a distance of about four and one half miles, and had also done considerable work in making surveys and locating its said line, and in the way of constructing a portion of its roadbed, but it had been unable to make any arrangements whereby it could dispose of its securities or otherwise raise money with which to build and complete its road or any considerable portion of it. Being in that condition it did, about April or May, 1889, apply to A. E. Stilwell, who was then one of the vice presidents of this defendant, and who then did not have and never prior thereto had had any connection with or interest whatever in the said Suburban Company, but who had an extended and favorable acquaintance with men of capital, and was recognized as having skill in soliciting and procuring capitalists to subscribe to and invest in such enterprises. And the said Suburban Company at said time requested him, that he, said Stilwell, use his efforts to procure

the money with which to build and complete the said portion of its road from Second and Broadway streets to Cecil Station.

11. That negotiations were then had between the said Stilwell and the said Suburban Company, which resulted in a contract between the said Company and the said Stilwell, whereby the said Company agreed to issue and deliver to the said Stilwell $450,000.00 of its first mortgage bonds, out of a total issue, as then contemplated of $500,000 00 and $900,000.00 of its capital stock if the said Stilwell would build or cause to be built the said portion of the said railroad. That said contract was duly authorized by the Board of Directors
367 of the Suburban Company at a meeting lawfully called, and by its stockholders at a meeting duly called and convened on May 31st, 1889. That at the time of the making of said contract, none of the directors or stockholders of the Suburban Company, except E. L. Martin had any connection with or interest in this defendant company, and none of the directors, officers and stockholders of this defendant company, except E. L. Martin, had any interest in or connection with said Suburban Company. That said contract was made at arms' length between said parties, free from any domination, direction or control whatever on the part of this defendant, and that a large majority of the board of directors of the said Suburban Company continued to be composed of persons wholly disconnected with this defendant, until the said portion of said railroad was completed and paid for in accordance with the terms of said contract.

That the said Stilwell thereupon procured subscribers to the stock of and the incorporation of a construction company, known as the Kansas City Terminal Construction Company, under the laws of the State of Missouri, which did the work of carrying out the said contract which the said Suburban Company had made with him, the said Stilwell.

12. That, in order to comply with the said construction contract on its part, and to build additional portions of its road, the said Suburban Company duly authorized the issue of $1,000,000.00 of bonds and authorized the execution of a mortgage upon all of its property then owned or subsequently to be acquired, to secure the payment of said bonds, and that this defendant was one of the trustees named in said mortgage; but defendant denies that said Suburban Company in and by said mortgage conveyed all of the property then held or which should thereafter be acquired by it. That upon the performance of the said contract for the construction of the said portion of said road between Second and Broadway streets and Cecil station, the Suburban Company caused to be issued and certified by this defendant as trustee $500,000.00 of its first mortgage bonds, all of which the said Suburban Company used in paying the said construction company for its work in building the said portion of said road, and in compensating some of its officers and directors for services rendered and money advanced and expended by them theretofore; but this defendant had nothing to do with or any connection with the said $500,000.00 of bonds except to certify them as trustee, at the request of the Suburban Company, and to deliver them on its direction. That at the same

time the said Suburban Company issued and delivered to the said construction company and to its said officers and promoters,
368 for their said labor and services 7,000 shares of its capital stock, which capital stock then had no value, but this defendant had nothing to do, either directly or indirectly with the disposition of said $500,000.00 in bonds, or the said 7,000 shares of stock.

13. That when the said Kansas Terminal Construction Company received said shares of stock, under its said contract, as aforesaid, it then held and owned a majority of the outstanding stock of the Suburban Company, and it, the said construction company, distributed the said stock to its own stockholders by way of dividends or as a distribution of its assets, whereby the stockholders of the said construction company became stockholders, and the holders of a large majority of the outstanding stock of the Suburban Company, and thereafter, as such stockholders, they elected directors of the Suburban Company of their own choice, which choice fell upon persons who were mainly either directors, officers or employes of this defendant, but it is untrue, as alleged in the said amended ancillary bill, that this defendant had anything to do with causing its officers, directors or employes to be elected as the officers or directors of the said Suburban Company, but the stockholders of the said Suburban Company chose their own directors, and this defendant held but little, if any, stock of the Suburban Company, and had but little, if any, voice in the choice of such directors. It was in this way, as above stated, that the persons who were directors and officers of this defendant came to be directors and officers of the Suburban Company and not otherwise.

14. After the Suburban Company had thus disposed of five hundred thousand dollars of its bonds and 7,000 shares of its stock, it had remaining in its treasury undisposed of five hundred thousand dollars in bonds, and 8,000 shares of stock, with which to build an extension of its road from said Cecil Station to Brush Creek, in Jackson County, Missouri. The Suburban Company desired to build and did build this extension itself, without the intervention of a contractor, and the Suburban Company requested the defendant to sell and dispose of the said $500,000.00 of bonds remaining in its treasury and so much of the said stock as might be necessary in order to raise the money for the purpose of building the said extension. That said stock was wholly without any value, and could not be sold for anything, and that on account of the incomplete condition of the property and the uncertainty of its outcome this defendant was unable at that time to sell and dispose of said bonds without great sacrifice, and having faith in the enterprise and in its future value, this defendant bought the said five hundred thousand dollars of bonds from the said Suburban Company at and for an agreed price of ninety-three
369 per cent of their face value, or $930.00 for each $1,000 bond, with the understanding and agreement, however, that this defendant was to have a discount from said price of three per cent on the face of said bonds. The reason of this was that the Suburban Company was perfectly willing to dispose of its bonds at 93 per cent and give to any one who would sell them a commission therefor of 3

per cent, and to give a large amount of stock in addition thereto as a bonus, to any purchaser, because said stock was then without value, and inasmuch as this defendant could not find purchasers for the bonds, it was agreed that this defendant might itself take the bonds at the price named, of 93 per cent with the said discount of 3 per cent.

15. That this defendant thereupon, for the purpose of enabling the Suburban Company to proceed promptly with its work, did take said $500,000.00 in bonds at said price, with 2,200 shares of the capital stock of said Suburban Company as a bonus, and paid the said Suburban Company $465,000.00 therefor.

16. That defendant fully paid and accounted to the said Suburban Company for the total purchase price of said $500,000.00 of bonds and 2,200 shares of stock. That the price paid therefor by this defendant was a full and fair price, and far more than could have been obtained from other sources at that time. This defendant carried these bonds for several years, before it was able to sell them, and then sold them at various times and in various amounts and quantities, at about the same price that it had paid for them. The facts as above stated constitute all of the business transaction- by and between the said Suburban Company and this defendant, in respect of said stock and bonds prior to and up to the time that the said Suburban Company consolidated with the Consolidated Terminal Railway Company of Kansas City, as stated in the said amended ancillary bill.

17. That all of said transactions above referred to occurred more than ten years prior to the filing of the said amended ancillary bill; that all of the facts and transactions above referred to were public, open and were known to, acquiesced in and ratified and approved by all of the officers, directors and stockholders of the said Belt Company, more than ten years ago. Wherefore this defendant pleads the statute of limitations of the State of Missouri, hereinafter set out in bar of this suit, and says that the complainants should not now be allowed to inquire into transactions closed and approved so long ago.

18. That about the time or soon after the consolidation above mentioned, the Suburban Company increased its capital
370 stock to $2,250,000.00; that several years afterward and after the consolidation above mentioned and after a large portion of the railroad of said Suburban Company and Belt Company had been completed and was in operation and had begun to show that it had or soon would have some value as a money earner, this defendant from time to time bought from the Suburban Company and Belt Company certain of its shares of stock for the purpose of supplying the Suburban Company, afterward the Belt Company with needed money, and also from time to time sold for and on account of the said Belt Company and Suburban Company certain other shares of its capital stock; that the prices at which defendant bought said stock of the said companies and the prices at which defendant sold said stock for the account of the said companies were fair and reasonable and all that the stock was worth, and that the commission charged by this defendant for its services in selling such securi-

ties was a fair and reasonable commission; that all sales made by this defendant for the account of the Belt Company or Suburban Company were immediately reported to the Belt Company or Suburban Company and the proceeds accounted for, and that immediate payment was made by this defendant to the Belt or Suburban Company for all stock bought by defendant from the said companies, and that all and singular said transactions were known to, acquiesced in and ratified by the officers, directors and stockholders of the Suburban Company and the Belt Company from time to time as the transactions were had and done; that said transactions took place or were settled more than five years before this litigation was commenced and defendant plears the statute of limitation of Missouri as to same.

18½. This defendant further answering denies that it caused a corporation known as the Consolidated Terminal Railway of Kansas City, to be formed for the purposes alleged in said ancillary bill, or for any purpose whatever and avers that this defendant had nothing to do with the formation or organization of the said Consolidated Terminal Railway Company of Kansas City.

19. This defendant denies that it had anything to do with electing or causing to be elected its officers, servants or employes as the officers and directors of the said Consolidated Company, and denies that this defendant at all times or at any time dominated or controlled the Consolidated Company; denies that this defendant caused the Consolidated Company to issue and deliver to it its entire capital stock, or any part of it, or its bonds aggregating the sum of $750,000.00 or any other amount, and denies that defendant at any time proceeded to sell or dispose of the bonds and stock of the
371 said Consolidated Company, and to apply the proceeds thereof in any manner or to any extent, except as hereinafter stated. And this defendant denies that it ever failed or refused to fully and fairly account to the Consolidated Company or the Belt Company for any of the property, assets or choses in action of the Consolidated Company which came into the hands of defendant, but states the contrary to be true, that defendant at all times when requested, and without request, fully and fairly accounted to the Consolidated Compay and afterward to the Belt Company for everything that defendant received in which the Consolidated Company had any interest.

20. This defendant further answering states that the facts concerning the affairs of the said Consolidated Company, so far as this defendant knows or had any concern or connection therewith are as follows: After the Suburban Company had caused its said one million dollars of bonds to be exhausted in building and equipping its road from Second and Broadway to Brush Creek, it was without means to build any other extensions or additions to its road, and whilst it is true that it had the lawful power, under its charter, to build and construct an extension of its road from Second and Broadway westward to the state line between Kansas and Missouri, yet it did not have the financial ability to do so, and inasmuch as its mortgage previously given covered all property therein described which it then had or might afterwards acquire, it could not in its

own name issue any new mortgage on any extension which would be a first lien thereon. For these reasons and because the Suburban Company saw it was necessary to extend its road to and connect it with the packing houses and other large shipping industries in the West Bottoms in said Kansas City, it found it necessary to extend its road from Second and Broadway to the State Line between Missouri and Kansas, and in order to do this the Suburban Company, itself, through its officers and agents, caused the said Consolidated Terminal Railway Company of Kansas City to be formed and incorporated, and caused it to issue $750,000 of stock and $750,000 of first mortgage bonds, and to give a mortgage which was a first lien upon all of its property therein described then owned or afterwards to be acquired, to secure said bonds, and made the defendant Trust Company one of the Trustees under said mortgage, and caused the officers and employes of the Suburban Company to be chosen as the Directors and Officers of the Consolidated Company. That the said Consolidated Company was simply an artificial arm of the Suburban Company itself, created for its own purposes, and to build extensions and additions to its road. That the Suburban Company was wholly without means to defray the expenses of building said exten-
372 sion or any part thereof and that its only means of raising the necessary money therefor was to dispose of the stock and bonds which it had caused the Consolidated Company to authorize and issue and at the instance and request of the Suburban Company, this defendant undertook to act as the agent of the Belt Company in procuring the necessary franchises and rights-of-way and in placing the said bonds and stock of said Consolidated Terminal Railway Company and in advancing money to defray the expenses of the said extension of said road to the State Line.

21. That the stock which the Consolidated Company was authorized to issue was, of course, without any value at that time, and the said company and the Suburban Company authorized this defendant to give the said stock to purchasers of the bonds as a bonus, at the ratio of 8 shares of stock with each bond, and the said companies promised to pay to this defendant, in consideration of its services in selling and disposing of the said bonds and stocks and acting as such financial agent for the Belt and Consolidated companies in respect to such bonds and stocks, a sum equal to twelve per cent of such of said $750,000 of bonds as this defendant might sell, three-fifths of which amount was to be paid in cash out of the proceeds of such sales, and the other two-fifths was to be paid in stocks and bonds of the said Consolidated company, at the same valuation at which others of said bonds and stock could be disposed of by this defendant to other people, which was fair and reasonable commission and one which the said company could well afford to pay under the circumstances in order to raise the money it needed.

22. That pursuant to the agreements above set forth the defendant, at the request of the Consolidated Company, sold the bonds of the Consolidated Company and that with each of said bonds 8 shares of stock of the said Consolidated Company went as a bonus, in accordance with the agreement aforesaid. Part of said bonds were sold by

this defendant for the account of the Consolidated Company and part of said bonds were bought by the Trust Company from the said Consolidated Company, in accordance with the agreement aforesaid, but that the Trust Company received with the bonds bought by it from the Consolidated Company far less than eight shares of stock with each bond which were given as a bonus by the Consolidated Company to all others who bought bonds of said company; that this defendant from time to time paid to and paid out for the Consolidated Company all of the proceeds of the sales of said bonds and stock less such charges for services, commissions and expenditures as were made by this defendant, and the said Consolidated Company accepted and received the benefit thereof; that all sums of
373 money charged by this defendant to the Consolidated Company were immediately reported by the Trust Company to the Consolidated Company and approved by the Consolidated Company and that all such charges appear not only on the books of this defendant but also on the books of said Consolidated Company, and that this defendant has fuly, promptly and faithfully accounted for all and singular its transactions with the Consolidated Company; that all of — charges made by this defendant to the said Consolidated Company were fair and reasonable, and that all of the transactions had between this defendant, the Consolidated Company and the Belt Company in respect to the said bonds and stock of the said Consolidated Company, as well as in connection with any and all other business matters between them, were fully known to, approved by, acquiesced in and ratified by all of the officers, directors and stockholders of the said Consolidated Company and of its successor, the Belt Company, more than five years prior to the institution of this suit, and complainants ought not after so long a time be permitted to question the same and respondent pleads as to the same — statute of limitations of the State of Missouri, hereinafter set out in bar of the complainant's suit.

23. This defendant further answering states that it is true that as alleged in said amended ancillary bill, on or about the 25th day of July, 1892, the said Consolidated Company and the said Suburban Company entered into Articles of Consolidation, under the Statutes of the State of Missouri, whereby the said two companies became one consolidated corporation which was thereafter known as "Kansas City Suburban Belt Railroad Company," and called in the amended ancillary bill and herein the "Belt Company."

24. This defendant denies that at the time of the consolidation of said two companies, or at any other time, this defendant caused its officers and employes to be elected to the positions of officers and directors of the said Belt Company, but state that the stockholders of the said two companies after their consolidation elected their own officers and directors, without any interference or influence on the part of this defendant. It is true, however, that certain persons who were connected with this defendant were chosen as some of the directors and officers of the said Belt Company, but this defendant denies that it at any time, or in any manner, as alleged in the ancillary bill, dominated or controlled the actions of the Belt company.

25. This defendant, further answering admits, as stated in the amended ancillary bill of complaint, that it was found ad-
374 visable about the 30th day of December, 1891, to have a corporation formed under the laws of the State of Kansas, for the purpose of building and holding the title to a further extension of the said Suburban Company's railroad system from the state line westward and southward to Argentine, in the State of Kansas, but denies that it caused the said Union Company to be organized for that purpose or any other purpose, but states the fact to be that the said Union Company was caused to be organized for that purpose by the Suburban Company.

26. And this defendant denies that it caused its officers and employes to be elected as the officers and directors of the said Union Company, but states that the Suburban Company which was the sole owner of the capital stock of the Union Company, caused the officers and directors of the said Union Company to be elected, without any interference or domination whatever on the part of this defendant.

27. This defendant denies that it caused all of the stock, or any of the stock of the said Union Company to be issued to the said Belt or Suburban Companies and denies that it caused the said Union Company to execute its first mortgage bonds in the amount of $2,000,000 or any other amount, but admits that the said Union Company did authorize the issuance of $2,000,000 of bonds, and executed its first mortgage to secure the same, and made this defendant one of the trustees in said mortgage. The said Union Company, though in fact an independent corporate entity, was really organized by the Suburban Company for its use and benefit and for the purpose of building the said extension to said Belt Company's railroad. This defendant denies that the said bonds were issued and delivered to it for the use and benefit of the Suburban Company except as hereinafter stated.

28. This defendant denies that it ever failed or refused, when requested, to fully and fairly account to the said Union Company, the Suburban Company or the Belt Company for any and all disposition made by it of any of the bonds, stock or property of either of said companies, but states that upon the contrary it has fully and frequently accounted to the said companies for all property, choses in action, money or assets of whatever nature which came into its hands in which either of said companies had any interest.

29. That the said Union Company, the Belt Company and the said Suburban Company were under the necessity of disposing of the said bonds and stock of the said Union Company for the purpose of raising the money with which to acquire and construct the
375 said extension into the state of Kansas, as they had no other means of raising the money for that purpose. That at the special instance and request of the said Union Company and of the Suburban Company, and later the Belt Company, the defendant undertook and agreed to act as financial agent for them in and about the matter of disposing of said stocks and bonds of the Union Company, and financing said enterprise, and to render such services and advance such moneys as might be necessary to procure the necessary

franchises therefor, and to establish and put in operation warehouses, factores and other like industries along the line of the said railroad, and the said Suburban Company, Belt company and the said Union Company agreed to pay this defendant a reasonable compensation for its services, advancements and responsibilities in that behalf.

30. That it was impossible to find purchasers for said bonds at a greater price than 82 per cent of their face value, and only then provided considerable quantities of the stock of the said Union Company should go with the bonds as a bonus, but said stock, as a matter of fact, at that time, and for several years after, was without any value. That this defendant immediately after the organization of the said Union Company, in pursuance of the request and agreement above stated, proceeded to finance the said Union Company and to sell its said bonds and stock, or to buy them when other purchasers could not be found in time to supply the needed money, and to render important and valuable services in connection with the securing of franchises for the building of the road, and advance from time to time, such money as might be needed therefor, and this defendant continued to act as such financial agent and to render such services until the said extension of such road by means of the Union Company was completed, which extended over a period of several years.

31. That it was understood and agreed between this defendant company and the said Union Company, Suburban Company, and later the Belt Company, that in case this defendant could not find purchasers for said bonds fast enough to supply money needed for the construction of said road, that this defendant might itself buy such of said bonds as it was willing to buy, at the same price that like bonds were being sold to other persons, and might deduct from the price thereof a sum equal to what would be a fair commission for selling the bonds to others, that is to say, the defendant, in case it bought any of said bonds, was to account to the Union Company or the Suburban Company for the price of said bonds,
376 in the same manner and upon the same terms as it was to account to them for bonds sold to other people.

32. That this defendant, pursuant to the agreement aforesaid, sold for and on account of the Belt Company, bonds of the Union Company of the par value of upwards of $440,000 and accounted to the Suburban Company, the Belt Company and the Union Company for the proceeds of all such sales, and that being unable to sell and dispose of the bonds of the Union Company to others fast enough to provide the money as it was needed by the Suburban Company, later the Belt Company, this defendant, under the agreement and arrangement above stated, from time to time purchased of the Belt Company bonds of the Union Company of the par value of $1,496,000 and that immediate payment was made by this defendant to the Belt Company of the price of all bonds bought by this defendant of the Belt Company; that of the bonds bought by this defendant from the Belt Company it bought 350 bonds of the par value of $1,000 each at par and 350 of said bonds of the par value of $1,000 at $950 each, which was far more than the bonds

were worth, and which was greatly in excess of the price at which other persons were willing to buy said bonds; that on October 21, 1892, this defendant accepted from the Belt Company and Union Company 60 of said Union Company's bonds at $82 and 1,500 shares of Union Company's stock in part payment for its services in and about the matters aforesaid; that whenever any charge was made by this defendant to the Belt or Suburban Company for services or commission or any other thing such charge was immediately stated and rendered to the Belt or Suburban Company, and all such charges were approved and agreed to by the Belt Company; that this defendant fully, promptly and faithfully accounted to the Belt and Suburban Company in respect to all and singular its transactions with the Belt or Suburban Company in relation to the securities of the said Union Company, and the said Suburban Belt Company and the said Union Company received the benefit of said transactions; that all of the charges made by this defendant for its services in the premises were reasonable and fair, and all of the transactions had between this defendant and the Union Company, the Suburban Company and the Belt Company in relation to the said bonds and stock of the said Union Company, as well as in connection with any and all of the business between them were fully known to, approved by, acquiesced in and ratified by all of the officers, directors and stockholders of the said Union Company, Suburban Company and the said Belt Company, and all of said transactions were had and done more than five years prior to the institution of this suit, and complainant ought not to be permitted after so long a time to
377 question the same, and this defendant as to all and singular the said matters complained of pleads the statute of limitations of the State of Missouri hereinafter set out.

33. This defendant further answering denies that it, on the 23rd day of January, 1891, or at any other time caused a corporation known as the Kansas City & Independence Air Line to be incorporated or formed. Said Air Line was incorporated, however, for the purpose of building a line of railroad connecting with the line of the said Suburban Company, and running to the City of Independence, Missouri, and the capital stock of said company was, after being increased, fixed at $500,000. This defendant denies that it at any time caused its officers and employes to be elected as the directors and officers of the said Air Line, and denies that it caused said Air Line to issue its first mortgage bonds to the amount of $300,000, or any other amount, but states that the Air Line did issue its first mortgage bonds to that amount, and secured the same by a first mortgage upon all of its corporate property, and made this defendant one of its trustees under said mortgage. This defendant denies that it at any time dominated or controlled the said Air Line; denies that this defendant caused the said Suburban *or* Belt Companies to acquire all, or any, of the bonds or stocks of the Air Line, and denies that it caused the Suburban Company to deliver the said bonds and stock to it, the said defendant, and denies that this defendant proceeded to dis-

pose of the same and to apply the proceeds thereof, for the corporate purposes of the Suburban *or* Belt Companies, or for any other purpose except as hereinafter stated; denies that this defendant has ever refused upon request to account to said Belt Company or Suburban Company for the disposition made by it of any of said bonds, or stock or the proceeds realized therefrom, but, upon the contrary, states the fact to be that this defendant has frequently, fully and truly accounted to the Suburban Company, the Belt Company and to the Air Line Company for the disposition of all of the property, assets or choses in action of either of said companies which in any way came into the hands or under the control of this defendant.

34. This defendant, further answering, states that the facts concerning the Air Line Company and its connection with it and with the Belt Company are as follows: That on the 23rd day of January, 1891, at the suggestion and by the procurement of the Suburban Company, the Air Line Company was incorporated with a capital stock of $150,000, and with eleven directors, a majority of whom were directors of the said Suburban Company, for the purpose of building a railroad from a point on the line of the Sub-
378 urban Company's road, to the city of Independence, Missouri, a distance of some six or eight miles, for the use and benefit of the said Suburban Company. That the said Air Line Company soon after increased its capital stock to $500,000 and issued its first mortgage bonds, as aforesaid, to the amount of $300,000; that the said Air Line afterwards entered into a contract with a construction company known as the Kansas City Terminal Construction Company, for the building and completion of its said road, whereby it promised to pay to the said construction company, in consideration of the construction of said road, $250,000 of its first mortgage bonds, and 2,000 shares of its capital stock. That said road was built by said construction company under said contract.

35. That at the special instance and request of the Air Line and said Suburban Company the defendant rendered valuable services in procuring franchises for the use of public highways by said Air Line, and in acting as the financial agent for the said Air Line, and in from time to time advancing it money and selling certain of its bonds and stocks for its account, and purchasing certain other of its bonds and stocks in order to furnish the money for its requirements; that said bonds were not reasonably worth to exceed 80 per cent of their face value and the said stock had no market or other value at all.

36. That the said Air Line settled with the said Kansas City Terminal Construction Company for building its said line by deliverng to said Construction Company certain first mortgage bonds and certain shares of stock which had been issued by the Air Line as aforesaid, but defendant avers that the said Construction Company accepted in full payment for its work, under said construction contract, a less amount of stock and bonds than was specified in the contract as drawn, and that thereupon the said Construction

Company distributed said stocks and bonds among its stockholders; that it is true that this defendant from time to time, in order to furnish the said Construction Company with the necessary funds for the construction of said Air Line, sold for said Construction Company and for its account certain of said bonds and stock and fully accounted for the proceeds of all such sales; that after setting in full with said Construction Company the Air Line still had in its treasury certain of its first mortgage bonds and certain shares of stock, and that at the special instance and request of the Air Line and of the Suburban Company this defendant from time to time sold to others certain of said stocks and bonds in order to supply the said Air Line with money for its requirements, and that this defendant immediately, fully and faithfully accounted to said Air Line for the proceeds of all such sales as and when the
379 said transactions were had and done; that this defendant also at the special instance and request of the Air Line and said Suburban Company from time to time, by reason of the fact that it was unable to sell bonds and stock to others fast enough to supply money that the said Air Line and Suburban Company needed bought from said Air Line certain of said stocks and bonds at the same or greater prices than said bonds and stocks were being sold at to others; that this defendant made immediate payment to the Air Line for all such stocks and bonds bought by it as aforesaid as and when such purchasers were made; denies that it constructed or caused to be constructed the said Air Line, but on the contrary states that said Air Line was constructed by said Construction Company at the procurement of said Suburban Company and of said Air Line and for the purposes of the said Belt Company; denies that it at any time dominated or controlled the said Air Line, but on the contrary states that said Air Line was at all times controlled by its own adult stockholders, officers and directors, nearly all of whom were directors of said Suburban Company, later the Belt Company. This defendant states that whatever was paid it by the said Air Line in compensation for the services of this defendant in acting as the financial agent of said Air Line, and in procuring franchises and for commissions in the sales of said bonds and stock, was paid pursuant to an open, fair agreement and understanding had at the time and that such compensation was fair and reasonable; that this defendant from time to time, as the transactions took place, paid to and paid out for and on account of the said Air Line and said Belt Company all of the proceeds of all of the said bonds and stock so sold by it and also all of the purchase price of all of said bonds and stock so purchased by it, and the said Air Line and the said Belt Company or its predecessor the Suburban Company accepted and received the benefit thereof, and this defendant has fully and truly accounted therefor; that all and singular the transactions had between this defendant and the said Air Line and Belt Company in relation to the stock and bonds and the money of the said Air Line, as well as in connection with all other business between them, were

fully known to, approved by, acquiesced in and ratified by all of the officers, directors and stockholders of the said Air Line and of the said Belt Company both before and after the consolidation herein above mentioned, and more than five years prior to the commencement of this suit, and the complainants should be held estopped from now questioning transactions settled so long
380 ago, and respondent pleads the statute of limitations of the state of Missouri hereinafter set out in bar of the said matters.

37. This defendant, further answering, denies that it at all times up to and about the month of April, 1900, or at any other time, in any way dominated and controlled the affairs of the Suburban Company or its successor the Belt Company by reason of the alleged facts set forth in said amended ancillary bill, or by any other reason or means whatever; denies that it caused its officers, directors and employes to be elected as the officers and directors of the said companies, or in any way induced or influenced the stockholders of said companies to choose such persons as their officers or directors; denies that the officers and directors of said Companies were mere dummies acting as the agents of this defendant, but state that they were chosen by the stockholders of said companies and were acting independently for and on behalf of the said companies at all times. This defendant admits that it attended to the disbursement of a large amount of the moneys which were realized from the sale of the bonds and stocks of the said several companies hereinabove mentioned, but denies that it attended to the disbursements of all of said moneys, and states that whatever disbursements of such moneys were made by this defendant were made at the spec[illegible] stance and request of the said companies and for their use [illegible] benefit, and were fairly made and fairly and fully accounted for. This defendant does not know what the total cost of the lines of all of the said railway companies hereinabove named amounted to, and has no means now of ascertaining the same, as all of the books and papers connected therewith are in the possession of the complainants in the said amended ancillary bill, and have been for nearly five years; denies that there was actually delivered to and disposed of by it securities, stocks and bonds of said companies aggregating in value more than $5,000,000 as alleged in the ancillary bill; denies that this defendant or its said receiver have ever at any time refused to account to the said companies or to their receivers for the proceeds derived by this defendant from the sale of any of the said bonds and stocks, or for the disposition made by it of any of the proceeds thereof, but, upon the contrary, states that it has frequently, and at all times duly and fully accounted for all of said stocks and bonds, and for all of the proceeds thereof which came into its hands or over which it had any control; denies that it pretends to claim that it is retaining any money above the actual cost of the said several railroad properties for the purpose of paying for this defendant's commissions and services in the matter of the sale and disposition of said bonds or stock, or any of them, except as hereinbefore
381 stated, and this defendant again states that each and every of said transaction-, and each and all of said charges for com-

missions and services were fair, reasonable, fully accounted for and satisfactory to the Belt Company and acquiesced in, ratified and approved by all of the officers, directors and stockholders many years prior to the institution of this suit.

38. This defendant, further answering, denies that it on or about the 30th day of June, 1896, or at any other time prior or subsequent thereto, either in its own name, or in the name of any of its officers, or in the name of any corporation controlled by it, or in any other manner whatsoever, had entered into any contract whereby it was obligated to construct a line of railroad from Kansas City, Missouri, to Pattonsburg, Missouri, for the purpose alleged in the amended ancillary bill, or for any other purpose, but states that this defendant was never in any way obligated or bound to build the said railroad from Kansas City to Pattonsburg, or any part thereof, and never assumed any obligation in connection therewith; this defendant denies that it at any time caused the Kansas City & Northern Connecting Railroad Company hereinafter called the Northern Company to be incorporated, and denies that it caused certain of its officers and employes to be elected as officers and directors of the said Northern Company, and denies that this defendant at all times, or at any time, dominated or controlled the affairs of the said Northern Company; denies that this defendant set about to discover a way in which it could cause the said railroad to be constructed without incurring any liability itself; denies that it had anything to do with the construction of the said railroad except as the financial agent of the Belt Company, as hereinafter stated; denies that it conceived the idea or purpose of having the Belt Company undertake the construction of the said railroad; denies that it by any means whatever caused or attempted to cause a contract to be entered into between the said Belt Company and the said Northern Company, whereby the Belt Company agreed to construct the said railroad for the Northern Company.

39. This defendant admits that the Belt Company did enter into a contract with the Northern Company whereby the Belt Company agreed to build said railroad for said Northern Company from Kansas City, Missouri, to Pattonsburg, Missouri, and that the "Exhibit A" heretofore filed by this defendant in its answer to the original bill of the Cambria Steel Company in this cause, is a true copy of the said contract between said Belt Company and the said Northern Company; denies that it had anything whatever to do with the making of the said contract, or that it in any way controlled or dominated or in any way influenced either of the parties thereto to enter into the same; denies that the said Northern Company's railroad was constructed in any way for the use and benefit of this defendant; denies that this defendant had any interest whatever in the building of the same; denies that the said Northern Railroad has been of any benefit or value to this defendant; denies that the said Northern Railroad has been of no benefit or advantage to the Belt Company, but, upon the contrary states that it has been of large benefit to said Belt Company, and that it was necessary and useful for the corporate uses and purposes of the said Belt Company and de-

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nies that the said railroad was built for the purposes and ends of this defendant, or that it had any interest whatever in the same.

40. This defendant denies that all of the money paid out by the Belt Company for the construction of the said Northern Railroad passed through the hands of this defendant, but states, however, that much of said money did pass through the hands of this defendant, for the reasons and to the extent hereinafter stated, but not otherwise; it denies that all of the bonds and stock which were to have been delivered to the said Belt Company under the terms of the said contract, passed through the hands of this defendant, but states that some of said bonds and stocks did pass through the hands of this defendant, for the purposes and to the amount hereinafter stated, and not otherwise. This defendant admits that it proceeded to sell and dispose of some of the said bonds and stock as hereinafter stated, but this was at the special instance and request of the Belt Company and as the financial agent of the said Belt Company, and not otherwise.

41. This defendant denies that it ever at any time when requested failed to account to the said Belt Company for the amount realized by it from the sale of any of said Northern Company's bonds and stock; denies that it has stated or pretended that the construction of the said Northern road by said Belt Company resulted in a loss to that company of about $300,000 or any other sum; but this defendant states that it frequently, at all times when requested, and without request, fully accounted to the said Belt Company for the proceeds of all of said bonds and stock which passed through the hands of this defendant and for any and all moneys which came into its hands or under its control, belonging to the said Belt Company, or in which the Belt Company had any interest; denies that it is, or ought to be in any way chargeable with the amount of any loss which may have resulted to the Belt Company, if any did result, on account of
383 its contract to build the said Northern Railroad, denies that this defendant is in any way responsible therefor, or should be held accountable therefor.

42. This defendant, further answering, states that the facts connected with the building of the said Northern road are as follows: The business of the Belt Company was not that of a trunk line, but consisted in switching for trunk lines and for industries situated along its line, and in furnishing terminal facilities for other railroads that might want to enter Kansas City, and had no terminal facilities of their own, hence it was to the advantage and interest of the Belt Company to encourage and assist as many industries as possible to locate along its line, and also to assist and encourage other trunk lines of railroad to enter Kansas City, and to use the terminals of the said Belt Company for the purpose of entering, either by aiding said trunk lines to build in to Kansas City, or by building out to meet them.

43. That in 1896, although all of the several portions of the said Belt Company's railroad system had been constructed, and operated for several years, yet the Belt Company found that it had been and still was unable to earn enough from its business to pay a fair return

on its investment, hence it conceived the idea of building a railroad from Kansas City to Pattonsburg, there to meet the Omaha, Kansas City & Eastern Railroad, and the Omaha & St. Louis Railroad, and at an intervening point to meet the Chicago Rock Island & Pacific Railroad, and thereby to furnish to those three railroads an entrance into Kansas City, which railroads would use the tracks and other terminal facilities of the Belt Company and pay a large and profitable rental therefor, and furnish a large and profitable switching business to the Belt Company. It was also thought by the Belt Company that it could make a large profit in constructing the said Northern railroad on its own account. So it was that the Belt Company caused the Northern Company to be organized, without any suggestion or domination by this defendant whatever, and the Northern Company was organized for the purpose of building a railroad from Kansas City to Pattonsburg, for the use and benefit of the Belt Company, and for the reasons above stated. The Belt Company caused some of its directors, officers, employees and stockholders to be chosen as the directors and officers of the Northern Company and the said company afterward authorized the issuance of first mortgage bonds to the extent of $20,000 per mile of the road to be built and second mortgage income bonds in the amount of $15,000 per mile for each mile of road to be built, and made this defendant one of the trustees under both of the mortgages securing such bonds,
384 and authorized the issuance of — shares of capital stock.

44. The Belt Company had no means whatever with which to carry out its contract for constructing the said railroad, except such as it might be able to realize from the sale of the bonds and stock of the Northern Company, and at the special instance and request of the Belt Company and the Northern Company, this defendant undertook to act as their financial agent in the sale and disposition of such of the bonds and stock of said Northern Company as it could find purchasers for, and at such price as it might be able to obtain. That the said second mortgage income bonds had no market value, and only in one or two exceptional cases was this defendant able to sell any of the said second mortgage income bonds for any money, but found it necessary in selling the first mortgage bonds to deliver to the purchaser some of the second mortgage bonds as a bonus. The capital stock of the Northern Company had no market or other value.

45. That this defendant for and on account of the said Belt Company and Northern Company and at their special instance and request from time to time sold bonds and stock, issued by the said Northern Company, at the highest and best prices which could be obtained therefor; that this defendant was unable to find purchasers for said stock and bonds as fast as the money was needed by the Belt Company and Northern Company to meet their demands in the construction of said Northern railroad, and it was understood and agreed between them and this defendant that this defendant should have as many of said bonds as it was willing to buy at the prices name by them and that this defendant should have the right to deduct from the purchase price thereof in settle-

ment an amount equal to what would be a fair commission in case such bonds had been sold by this defendant to other persons; that in pursuance to said understanding and for the purpose of furnishing and supplying money to the Northern Company and the Belt Company for the building of said connecting road this defendant did buy from the said Belt Company certain of said bonds and stock at prices then and there agreed upon, which prices were fair and reasonable and fully as much if not more than the prices at which the securities of said Northern Company were being sold for to others. This defendant avers that it has fully, faithfully and promptly accounted to the said Belt Company and to the said Northern Company in all and singular the transactions had between them in connection with the bonds and stock of the said Northern Company and in connection with every other matter or thing; that this defendant from time to time paid to and
385 paid out for and on account of the said Northern Company and the said Belt Company all of the proceeds of all the said bonds and stock so sold by it and also all of the purchase price of all of the said bonds and stock so purcha-ed by it, and the said Northern Company and the said Belt Company accepted and received the benefit thereof; that all moneys received by this defendant for its services in the premises and for its commission in selling and disposing of the said bonds and stock and for its services in advancing money to the said Belt Company for the purpose of building the said Northern Company's road were and are fair and reasonable, were fully agreed upon at the time and have long since been settled and closed, and complainants should now be held estopped from questioning the same.

46. That on or about the first day of April, 1900, there was an entire change in the officers and management of the said Belt Company and the persons who were at that time chosen as its officers and directors were in no way connected with or interested in this defendant Trust Company, but were hostile to it, but that nevertheless the said Belt Company received and accepted the proceeds and benefits of the contract for the building of said Northern Company's road, and that since the said change in the management of the Belt Company as well as prior thereto, the Belt Company has claimed the stock and bonds, payable under the said construction contract, as its own property, and the said Belt Company, both prior to and since the said change in its management, has continued to exercise acts of ownership and control over such of said bonds and stock of said Northern Company as remained in the treasury of said Belt Company, as aforesaid, and this defendant says that all and singular the dealings and transactions between it and the said Belt Company in respect to the securities issued by the Northern Company and in relation to any and all other matters complained of in the ancillary bill were fully known to, acquiesced in, approved and ratified by the officers, directors and stockholders of the said Belt Company, and that by reason of the premises complainants are estopped to complain and are estopped from asserting that the said contract for the construction of the Northern road was in fact the contract of

this defendant and not of the Belt Company, and are estopped from claiming that this defendant should in any way be held responsible for any alleged loss that arose, if any, on account of the carrying out of the said contract by the Belt Company, and are estopped to claim that this defendant has not fully and truly accounted for all moneys or property coming into its hands as aforesaid, and this defendant avers that it has fully and fairly accounted to the Belt Company in all of the transactions aforesaid.

386 That an operating contract was entered into between the Belt Company and the Northern Company for the use by the latter of the terminal facilities of the Belt Company and that under said contract large and increasing profits and revenues accrued to the Belt Company; that said contract was ratified and adopted by said Knott and Swinney, receivers of said Belt Company, and complainants herein, and was afterwards adopted by the Kansas City Southern Railway Company, purchaser of the property and franchises of the Belt Company at the foreclosure sale hereinabove mentioned.

47. This defendant, further answering, denies that the Belt Company at any time advanced any money to this defendant, or that the defendant took out of the earnings or assets of the Belt Company any sums of money whatever, which it pretended to expend for and on behalf of the Belt Company, or otherwise; denies that the Belt Company ever advanced or delivered to it any money, at any time or times, except such as it was able, from time to time, to deliver to this defendant, in part payment of the indebtedness which the Belt Company from time to time owed to this defendant. The fact is that the Belt Company never was in a position to advance any money to anybody; it needed all the money it had and frequently more too, for its current requirements, and instead of the Belt Company's advancing any money to this defendant for any purpose whatever, the contrary is true, that this defendant advanced money to the Belt Company on several occasions to keep said Belt Company from bankruptcy and to keep it a going concern. This defendant denies that it was ever requested by the Belt Company, or by anyone else, to account for any money alleged to have been so advanced or so taken out of the treasury of the Belt Company by it; that, as a matter of fact; there never was any ground or basis for supposing that this defendant had ever wrongfully gotten any of the Belt Company's money.

48. This defendant, in further answering, denies that it during the times hereinbefore mentioned, or at any time took upon itself the business of paying out practically all of the moneys which were paid out for the benefit of the said Belt Company, but states that this defendant did, from its own funds, frequently, and at various times advance large sums of money to and for the use and benefit of the Belt Company because the said Belt Company had at such times no money itself with which to meet demands that from time to time were pressing, and to make improvements and betterments that were absolutely necessary for its success as a money earning institution.

387 49. This defendant denies that it took upon itself the duty of buying for the Belt Company practically all or any of the property which the said Belt Company needed to acquire in its business of operating said railroad, and denies that it used any money of the Belt Company for any such purpose; denies that it caused other corporations to be formed for the purpose of holding the legal title to any properties purchased for the use and benefit of the Belt Company; denies that it caused the capital stock of any such corporations to be issued to the Belt Company; and then turned over to this defendant, or to be issued to this defendant direct, or otherwise, for any purpose whatever; denies that this defendant caused its own servants, agents and employes to be elected and continued as the officers and directors of any such companies, at any time; denies that this defendant, in the manner alleged in the amended ancillary bill or in any other manner, controlled the affairs of the Belt Company or controlled the actions and affairs of any of the said alleged subsidiary companies; denies that this defendant caused the Missouri Elevator & Terminal Company to be incorporated for the purpose alleged in the amended ancillary bill or for any other purpose.

50. This defendant states that the Elevator Company was organized by the procurement of the Belt Company for the purpose of acquiring and erecting grain elevators along the line of the Belt Company, so as to furnish such facilities as would increase the business and earnings of the Belt Company. That said Elevator Company acquired certain lands in what is known as the East Bottoms of Kansas City, Missouri, and caused to be erected thereon three elevators, one of which has since been destroyed by fire. That this defendant advanced to the said Elevator Company large sums of money for the erection of said elevators, and received from the said Elevator Company three mortgages or deeds of trust, one on each of said elevators, two for $12,000 each, and one for $8,000, which sums were justly due and owing to this defendant. That one of the said elevators was consumed by fire, and the amount of insurance thereon was collected by Wash Adams, the receiver of the Elevator Company and was paid by him to this defendant company and its receiver, and was duly credited upon the note which was secured by the mortgage on that elevator, leaving a balance still due on account of that mortgage of $4,251.50; that on the remaining two mortgages, one for $12,000 and the other for $8,000 nothing has been paid, and the interest on all of them has been long in default, and this defendant still holds said mortgages on said property.

388 51. The said Belt Company, from time to time, advanced some money to the Missouri Elevator & Terminal Company, which went into the construction of the said elevators, and was the owner of 425 shares of the capital stock of the said Elevator Company of the par value of $100 each, which is all of the stock which the said Elevator Company has ever issued. It is true that the said elevator property was purchased and the said elevators built for the use and benefit of the Belt Company, but it is untrue that it was done by this defendant, and inasmuch as the Belt Company is the

owner of all of the outstanding stock of the Elevator Company, it is in this sense true that all of the property of the Elevator Company belongs to the Belt Company, subject, however, to the lien of the mortgages thereon to this defendant, as before stated.

52. This defendant has not and never had any interest in any of the property standing in the name of the said Elevator Company except as the holder of the said mortgages. This defendant denies that it ever failed or refused to account to the Belt Company for all of its transactions in connection with the said Elevator Company's property, and denies that it ever received any funds from the Belt Company, for the purpose of constructing said elevator; denies that it caused the Belt Company to assume *of all* the outstanding debts and liabilities of the said Elevator Company, but states that if the Belt Company did assume such outstanding debts and liabilities, it was a proper thing for it to do, as it is and was by reason of its being the sole stockholder in the said company, the beneficial owner of all of the property of the Elevator Company, subject to the said debts and liabilities, and there is no reason, in law or equity, why the Belt Company should be reimbursed for paying its own debts, or discharging obligations upon its own property if it did discharge any such obligations. This respondent admits that Wash Adams, Esq., was appointed receiver of the Elevator Company, as alleged in the amended ancillary bill, and that he has since been discharged as such receiver.

53. This defendant denies that it caused the Improvement Company to be organized for the purpose of holding the legal title to various pieces of real estate in Kansas City, Missouri, or elsewhere, purchased for the use and benefit of the said Belt Company, and the Kansas City, Pittsburg & Gulf Company, or either of them, or for any other purpose; it denies that it dominated the Improvement Company or that it caused its servants and employes to be elected as the officers and directors of the said Improvement Company; it denies that any money whatever was at any time paid *and* by the Belt
389 Company to this defendant, for the purpose of purchasing any pieces of real estate to be held by the said Improvement Company; denies that any shares of stock of the Improvement Company were ever at any time issued to this defendant; denies that this defendant ever had any interest in or owned any of the stock of the Improvement Company; denies that any request or demand has ever been made by the Belt Company or anyone else, to or on this defendant for an accounting for any funds alleged to have been advanced to this defendant by the Belt Company for the purpose of buying land for the Improvement Company, or for an accounting for the alleged disposition of any of the stock of the said Improvement Company.

54. It is true that a corporation known as the Central Improvement Company was organized, but this was not done at the instance of respondent, but was done by the procurement of the Belt Company and the Kansas City, Pittsburg & Gulf Railroad Company for the purpose of securing and acquiring title to various tracts of land

in and about Kansas City. It is true that the Belt Company furnished some of the money to be paid upon the purchase price of the land bought by the Improvement Company; it is also true that the Kansas City, Pittsburg & Gulf Railroad Company advanced some money for the same purpose. Upon such money being furnished from time to time by the said Railroad Company to the Improvement Company the latter company issued to the Belt Company at different times 1120 shares of its capital stock and also issued certain shares of its stock to the Kansas City, Pittsburg & Gulf Railroad Company on account of the money furnished by it. All or practically all of the outstanding stock of the Improvement Company has been issued to and is now held by the said Belt Company, and the said Kansas City, Pittsburg & Gulf Railroad Company and their assigns; that this defendant has not now and never has had any interest in the property of the Improvement Company except that it holds a mortgage on a certain piece of the property owned by the said Improvement Company to secure certain promissory notes aggregating the sum of $5,000, which mortgage was a subsisting lien upon the property at the time the Improvement Company bought it, and which mortgage was subsequently purchased and is now held by this defendant. This defendant also holds certain stock of the Improvement Company, as collateral security for an indebtedness due this defendant from the said Belt Company. The defendant admits that Wash Adams, Esquire, was appointed receiver of the said Improvement Company; that he afterwards resigned and that T. T. Crittenden was appointed as receiver in his place and stead, and that said T. T. Crittenden now has pos-
390 session and control of its property as alleged in the said amended ancillary bill.

55. This defendant denies that it caused the Fairmount Amusement Company to be organized, or to be dominated or controlled by it, as alleged in the amended ancillary bill, or in any way; denies that the Belt Company ever advanced any money to this defendant for the purpose of purchasing or improving the property of the Amusement Company. This respondent admits that all of the capital stock of the Amusement Company belongs to the Belt Company, subject, however, to the lien of the Trust Company upon it as a pledge for the security of certain indebtedness of the Belt Company to this defendant, as hereinafter shown. This defendant states that it does not know what moneys, if any, the Amusement Company ever expended, if any, and does not know who furnished the money; but this defendant denies that the Belt Company ever supplied this defendant with any money to be used in furthering the ends or purposes of the Amusement Company; denies that this defendant ever took upon itself the duty of disposing of or disbursing any money for the Belt Company for any such purpose; denies that large sums of money or any sums of money were ever paid by the Belt Company to this defendant for that purpose; denies that the Belt Company or any one else has ever asked this defendant for an accounting on account of any such money alleged to have been furnished to this defendant for any such purpose.

56. It is true that the Amusement Company was organized for the purpose of operating what is commonly known as Fairmount Park; that said park was established by the said Air Line and the Belt Company for the purpose of creating passenger traffic for the said Air Line and the Belt Company to and from the said park; that the said park was operated as a place of recreation and amusement, in order to attract residents of Kansas City and vicinity to the same and to cause them to use the line of the said Air Line and the said Belt Company for transportation to and from said park, and that said park at the time it was established, and for more than six years thereafter, had no transportation facilities except those afforded by the said Air Line and the said Belt Company, and that the said Air Line and the said Belt Company derived large revenues and profits from passenger traffic in connection with said park. It is untrue that this defendant at any time caused said Belt Company to advance to it large sums of money for the purpose of fitting up Fairmount Park; it is true, however, that this defendant, itself did advance, at the special instance and request of the Air Line and
391 the Belt Company, from time to time, large sums of money in the fitting up of Fairmount park, and that it charged the same to the said Air Line, and afterwards to the Belt Company when the account of the Air Line was merged in that of and assumed by the Belt Company; but this defendant denies that the Belt Company ever supplied the Trust Company with any money for that purpose; denies that the Belt Company or anyone else ever requested this defendant to account for any money alleged to have been advanced to it by the Belt Company in fitting up said Fairmount Park, but states that no such money was furnished; all of the money which this defendant advanced towards fitting up Fairmount Park was charged, as aforesaid, to the Air Line or to the Belt Company, and due and proper accounts were rendered thereof from month to month as the work progressed, and were duly audited and approved; the originals of such bills and accounts so rendered have been ever since and are now in the possession of the Belt Company and its receivers. That all of the transactions of whatever nature between this defendant and the Air Line or the Belt Company in reference to Fairmount Park were fully accounted for, known to and ratified and approved by all of the office-s, directors and stockholders of the Air Line Company and the Belt Company, and the said complainants should be held estopped from now questioning the same.

57. This defendant denies that it caused to be organized what is known as the Northern Townsite Company; denies that it dominated and controlled the affairs of the said Townsite Company; denies that it caused the Belt Company to advance to it upwards of $5,000, or any other sum which was used by this defendant in the purchase of property which was taken in the name of the said Townsite Company; denies that all or substantially all of the money that was used for the purpose of acquiring the property of the Townsite Company was money advanced by the Belt Company; and denies that this defendant instead of issuing to the said Belt Company all of the capital stock of the said Townsite Company,

issued large portions thereof to itself, or to other persons for its use and benefit; or that it otherwise disposed of the same, except as hereinafter stated; denies that the Belt Company or any one else has ever requested it to account for any money alleged to have been received by this defendant from the Belt Company for the purposes of the Townsite Company. It is true that the Townsite Company was organized for the purpose of acquiring real estate along the line of the Northern Company; the facts are that this defendant and the Belt Company supplied all of the money that was used in purchasing lands by the Townsite Company. The Belt
392 Company paid into the treasury of the Townsite Company $6,286.57, and received therefor 439 shares of the capital stock of the said Townsite Company of the par value of $100 each, and this defendant paid into the treasury of the said Townsite Company $6,720.07, and received 489 shares of the capital stock of said Townsite Company, of the par value of $100 each; that said shares so issued to the Belt Company and to this defendant, were issued in proper proportion to the amount of money paid in by each, and that the amount of money paid into the treasury of the said Townsite Company by this defendant and the Belt Company was equivalent to about $14.32 on each share of stock so issued to them respectively. That 24 shares of said stock were issued to each of the following named parties: A. E. Stilwell, C. A. Braley and J. T. Nolthenius, in compensation for their services as directors and officers of the Townsite Company, and that no other stock of the said Townsite Company has been issued to anyone. That the defendant owes the Belt Company nothing on account of the Townsite Company's affairs, and there is nothing to call for any accounting by this defendant to the Belt Company in connection therewith.

58. This defendant denies that it caused the Kansas City, Pittsburg & Gulf Railroad Company to be formed, but admits, however, that the said Kansas City, Pittsburg & Gulf Railroad Company was formed for the purposes stated in the said ancillary bill, and that it issued the bonds to the amount therein stated; that the defanlt therein stated was made, and that the foreclosure proceedings stated therein were had. This defendant denies that either the Belt Company, the Union or Air Line Companies were largely dependent upon the Kansas City, Pittsburg & Gulf Railroad Company, for their earnings; it admits that an operating contract was in existence between the Belt Company and the said Kansas City, Pittsburg & Gulf Railroad Company, but it denies that it was well known to this defendant that if the Kansas City, Pittsburg & Gulf Railroad Company went into the hands of receivers, it would result in the insolvency of the Belt and other companies before named, or that it would necessitate their ultimately being thrown into the hands of receivers, and the mortgages upon their respective properties foreclosed.

59. This defendant denies that it at any time set about to contrive a scheme whereby it might appropriate to itself before the Belt Company should pass beyond its control, any of the property

or assets of the Belt Company; denies that it caused to be exhibited to its own officers and directors who were holding the position of officers or directors of the Belt Company, various claims and demands which it alleged were due and owing by the Belt Company to it; denies that it caused such of its own officers and em-
393 ployes who were holding the positions of officers and directors of the Belt Company to pass upon and approve such claims and demands; denies that this defendant caused its own officers and employes who were holding the positions of officers and directors of the Belt Company to execute to this defendant various pretended promissory notes and other negotiable instruments for the alleged purposes of securing to this defendant the payment of such pretended claims as alleged in the amended ancillary bill; denies that this defendant caused to be delivered and transferred to it various stocks, bonds and accounts and other personal property belonging to the Belt Company as collateral security for the said pretended indebtedness by the means or for the purposes alleged in the amended ancillary bill.

60. This defendant states, however, that the said Belt Company did for value received execute and deliver to this defendant from time to time in part payment of the indebtedness of said Belt Company, to this defendant, certain promissory notes, which notes are more particularly hereinafter set out and described and are now held and owned by this defendant, upon which notes there is now due and owing from the said Belt Company and its receivers an amount aggregating more than one-half million dollars.

61. And this defendant shows to the court that the Belt Company assigned and pledged to the respondent as collateral security for the payment of the said promissory notes and other indebtedness, held by this defendant against the Belt Company, the stock, bonds and property stated in the amended ancillary bill of complaint, except that the item of property stated in the amended ancillary bill as being 600 tons of steel rails was in fact about 344 tons of steel rails and about 17 tons of fastenings.

62. This defendant denies that the said notes were executed or that the said stock, bonds and property were given as collateral security by reason or through any domination or control of this defendant over the Belt Company. It is true that at the time the said notes were given and the said property assigned as collatera security that a majority of the officers and directors of the Belt Company were connected with this defendant, either as its officers, directors or employes, but this respondent denies that any of the officers or directors of the Belt Company were personally interested in securing to this defendant any of the assets of the Belt Company which in equity or good conscience ought not to have been secured and denies that the execution of said promissory
394 notes, or either of them or the delivery of the said collateral security or any part thereof, was fraudulent or void for any reason whatever.

63. On the contrary this defendant states and shows to the court

that the Belt Company was justly indebted to this defendant at and prior to the time of the execution and delivery of the said promissory notes respectively, for moneys from time to time loaned to the said Belt Company, or advanced by this defendant and paid out to and for the use and benefit of the Belt Company, all subsequent to the first day of January, 1898; that each and all of said notes were given for the purpose of evidencing a bona fide indebtedness to the amount specified in said notes. That said notes were executed and delivered, and the said collateral security assigned and pledged in good faith for the purpose of evidencing and securing the payment of debts justly and equitably due and not otherwise. That all of said notes were given for so much money loaned and advanced by this defendant to the Belt Company, subsequent to the first day of January, 1898, as aforesaid.

64. This defendant denies that it kept its officers and directors, or caused its officers and directors to be continued as the officers and directors of the Belt Company during the time stated in the amended ancillary bill, or at any time. It is true, that many of the officers and directors of the Belt Company were also officers and directors of this defendant, but that condition was occasioned by the fact that the stockholders of the Belt Company, who were persons other than this defendant elected certain officers, directors and employes of this defendant as officers and directors of the Belt Company, and it was not occasioned by any domination or control of this defendant, or by any influence whatever exerted by or on behalf of this defendant, and there never was, at any time, any officer, director or employe of this defendant, who was also an officer or employe of the Belt Company who desired or wished this defendant in any way to have or acquire any undue advantage whatever of the Belt Company, and there was at all times open and careful accounting had between the Belt Company and this defendant of all transactions in which they had any mutual connection.

65. This defendant denies that the only accounting which has ever been had between it and the Belt Company has been such an accounting as its officers and employes holding the positions of officers and directors of the Belt Company pretended to make and this defendant denies that the only accounting, which
395 has been had between it and the Belt Company, has been such as was made by the officers of said companies in looking over and going through the form of approving the accounts and statements rendered the Belt Company by this defendant, but on the contrary this defendant states that the mutual accountings between [*his*] defendant and the Belt Company were faithfully made and were the result of a thorough and systematic method of bookkeeping, and that from time to time the mutual accounts between the said companies were thoroughly examined and checked by the proper officers of said companies and said accounts duly approved, and if any inaccuracies existed therein same were corrected and adjusted at the time.

66. This defendant states that it kept full, true and correct accounts of all and singular its dealings with the Belt Company and all other companies herein mentioned; that this defendant employed, in conducting its business, what is known as the voucher system of bookkeeping, whereby a voucher is made for each and every transaction wherein any money is disbursed or paid out; that such voucher contains on its face the receipt of the person or corporation to whom any such money is paid; that for every disbursement made by this defendant it has on hand a voucher showing the person to whom the disbursement was made, the amount thereof and on what account, to which is appended the receipt of the person to whom such payment was made; that this defendant at all times herein mentioned had and still has on hand a voucher known as a journal voucher for each [a-d] every charge or credit made against or in favor of any account on its books, such voucher containing full details of the transaction; that all such vouchers are and were at all times carefully and systematically filed by this defendant in numerical order; that a full, true and correct transcript of all such vouchers is contained and set forth in the books of this defendant and that the said books of this defendant have at all times been carefully and correctly kept, and this defendant states that during all or most of the time, during which the transactions complained of in the said bill took place, the Belt Company used and employed the same system of accounting; that in each and every case that this defendant made any charge against the Belt Company or any of the other companies named herein or gave any credit to the Belt Company or any of the other of said companies, immediate notice thereof was given by this defendant to the Belt Company or such other company against whom or in favor of — such charge or credit was made or given; that if this defendant received any money or property for which the
396 said Belt Company or any other of said companies was entitled to credit, such fact with full details of the transaction, were then and there communicated to the said companies respectively, and if the Belt Company and the other companies hereinabove mentioned, found said credit correctly given it immediately entered the same upon their own books respectively, and the same is true of all other companies with which this defendant had any dealings, and if any charge was made by this defendant against the Belt Company or any other company herein named the same was immediately reported to the said Belt Company or to such other company against which the charge was made, and if such charge was found to be correct, such charge was entered upon the books of the Belt Company or on the books of the company against which such charge was made; that such charges and credits were made regularly and in the ordinary course of business and continued over a long period of time; that if this defendant charged anything to the Belt Company for commission or services in any particular transaction and such charge was found to be correct by the officers of the Belt Company, all such charges were entered and

extended upon the books of the Belt Company; that at regular stated intervals the respective auditors of the respective companies, including said Belt Company, checked and verified the balances between the said companies, and if any inaccuracies were found therein the same were immediately adjusted and corrected; that this system of accounting was employed during the whole period in which this defendant had any dealings with the Belt Company or any of the other companies herein mentioned; that it was at all times the aim and intention of this defendant its accounts should be full, true and correct and that any person or corporation with whom it had been dealing should have full and free access to the same, and should have full and free information as to the state of such accounts and that such aim and intention herein was at all times carried out. Respondent denies that such checking and verifying of such accounts was a mere pretense and sham, but on the contrary states that the proper officers and employes of the respondent, and of the Belt Company and of all the other companies in which the Belt Company was interested, at all times during the period in which the said alleged grievances took place, in so doing, acted with an eye single to the protection of their respective companies, to the end that the books and accounts of such respective companies should speak the truth and should at all times correctly show the state of such accounts. That from time to time the said Belt Company through its officers caused to be exhibited to each and all of its stockholders statements of the accounts between the Belt Company and defendant, based on the books of accounts
397 of said Belt Company and of defendant and that said stockholders were satisfied with said book showing and made no objection thereto and complainants should now be held estopped from questioning same.

67. Respondent further denies that at any time prior to the institution of this suit the complainants, in the original bill or the complanants in the said amended ancillary bill ever requested respondent for any accounting as to its dealings with the said Belt Company or that respondent ever refused to make any such accounting; on the contrary respondent states that it repeatedly, prior to the institution of this suit and during the month of June, 1900, at which time there was a complete change of management of the said Belt Company, demanded of the said Belt Company and its receivers and the persons representing them that they and the said Belt Company pay to this Trust Company the amount of its and their indebtedness to this defendant and that this defendant requested the Belt Company and its receivers to make an examination of the books of this defendant in order to again satisfy them that the said indebtedness was justly due to this defendant, and this defendant states that prior to the institution of this suit the Belt Company had its own experts make such examination and that such experts did make such examination, with the result that it found a difference of only one cent between the accounts as shown on the books of this defendant and as shown on the books of the Belt

Company; that the said Belt Company and its receivers have frequently, prior to the institution of this suit, recognized the said indebtedness of this defendant against the Belt Company as valid and just, and have frequently promised to pay the same; that in the month of June, 1900, the Belt Company, which was then managed by persons, none of whom were in any way connected with this defendant, paid on account of some of the said promissory notes, held by this defendant, and executed by the Belt Company, large sums of money, which were duly cerdited thereon, as hereinafter shown, and promised to pay the balance due on said notes and other indebtedness.

68. This defendant states that by reason of the premises complainants herein are not entitled to have any further accounting and this defendant states that it would be a manifest hardship and injustice upon it to be obliged to again account to the complainants or to the said Belt Company; that the dealings for which the complainants ask an accounting cover a period of more than ten years prior to the institution of this suit; that during said period this defendant, at the special instance and request of the said Belt Company and its constituent companies, at divers times received and paid out for the said Belt Company vast sums of money,
398 involving thousands of transactions, and that in such transactions this defendant received and disbursed several millions of dollars, and that in each and all of said transactions this defendant fully accounted at the time; that each and all of said transactions were fully known to and acquiesced in by the officers, directors and stockholders of the Belt Company and its constituent and allied companies, and that to now, after so many years, require this defendant to have all of its accounts opened and re-examined will result in manifest hardship and injustice; that this defendant has at all times denied that complainants were entitled to any further accounting in this suit; that it is not true that this defendant has prepared and submitted any statement of account to said complainant since the filing of the original and ancillary bills herein, and this defendant states having already accounted so fully to the said companies there is no occasion for any further accounting herein; this defendant states that it is true, however, that its auditor has been called by the complainants herein as a witness before the special master to whom the issues herein were referred by this honorable court and that at the request of said complainants this defendant's auditor did, as a part of his testimony before said special master, submit a statement of the ledger account between this defendant and the Belt Company, and this defendant states that said statement is a true and correct statement of said account; this defendant denies that said account is insufficient or untrue; denies that said statement does not properly or fully account for the stocks and bonds and other properties received by this defendant from, for or on account of the Belt Company; denies that any of the charges against the Belt Company in said account are untrue or illegal or unauthorized, and this defendant states that all of such

charges are just and correct both in law and in equity; this defendant denies that the said witness has omitted from said statement any credits to which the Belt Company is entitled; this defendant admits that in the year 1893, it had accounts on its books against the Union Company, the Consolidated Company, the Air Line and the Belt Company, and that in said year all of said accounts were merged by this defendant with its said account in the Belt Company, but this was because the Belt Company had consolidated with said Consolidated Company and had acquired all of the capital stock of the Union Company and the Air Line, and it is true that for this reason all charges made against or on account of said lines were afterwards made by this defendant against the Belt Company and were assumed by the Belt Company.

69. In answer to paragraph 1 of said amended ancillary bill this defendant admits that the Suburban Company was or-
399 ganized under the law of the State of Missouri or or about January 8, 1887, but denies that nothing was done by said company in the way of construction of its road until on or about May 31, 1889, but states that the preliminary surveys of said road had been made and that a franchise had been obtained by it from the city of Kansas City, Missouri, for the use of streets and highways in said city, and this defendant again denies that it caused the said company to issue any securities, stock or bonds, but states that any securities issued by said company were caused to be issued by its own stockholders and officers, and this defendant again denies that it caused the incorporation of the Kansas City Terminal Construction Company, hereinafter called the Construction Company, and this defendant again denies that it caused the said Suburban Company on or about May 31, 1889, or at any other time to enter into any contract with A. E. Stilwell for the construction of said line or any other contract, and again denies that it, this defendant, caused the said Construction Company to build the said railroad from Broadway street in Kansas City, Missouri, along Second street to Harrison street or along any other street or place, but on the contrary this defendant states that said Construction Company had its own stockholders, officers and directors and conducted its own business in its own way, and made its own contracts, as did also said Suburban Company; this defendant states that the said Suburban Company did make and enter into a contract with A. E. Stilwell on or about June 1, 1889, for the construction of said line in consideration of certain stock and bonds to be issued to the said Stilwell or his assigns by the said Belt Company, and afterwards the said Stilwell did transfer to this defendant as trustee for the said Construction Company the said contract, but this defendant denies that said Stilwell transferred said contract, as aforesaid, in consideration of the sum of $10,000 or any other sum, and this defendant states that it did not receive one cent or any valuable thing whatsoever from said Stilwell or any other person in connection with the transfer of said contract, and this defendant denies that upon the transfer of said contract this defendant undertook to comply with

the terms of said contract or any one of them but states that there was no reason why it should do so; and this defendant denies that it had any interest whatsoever in the said contract; this defendant denies that it caused its own stockholders, employes, officers and directors to be elected and appointed officers and directors of the Construction Company and denies that it at any time dominated or controlled the Construction Company, but on the contrary states that said Construction Company was dominated and con-
400 trolled by its own adult stockholders and directors, and that said Construction Company was organized at the instance and by the procurement of the Suburban Company and not otherwise; this defendant denies that the Construction Company was made up of the stockholders, employes, officers and directors of this defendant and such of their friends as they were willing to appoint to come in and enjoy the fruits and profits of said alleged plan as alleged. It is true that certain persons, who were officers of or connected with this defendant, owned some stock in the Construction Company, but this was not caused by this defendant, and this defendant states that in the main the stockholders of the Construction Company were persons who had invested in such stock and who lived in various parts of the United States, and it is true that the Construction Company proceeded with the construction of that portion of the road of the Suburban Company from Broadway to Cecil Junction, but this defendant is not advised as to the cost of such construction; this defendant denies that it had anything to do with the delivery of said road by the Construction Company to the Suburban Company; denies that it caused the Suburban Company to accept the said railroad from the Construction Company in an incomplete condition as a full compliance with the requirements of said construction contract, and this defendant denies that it caused the Suburban Company to direct this defendant to turn over to the Construction Company the stocks and bonds described in said construction contract, but states that all the acts and doings of the Suburban Company and the Construction Company were the free act and deed of said respective companies; this defendant admits that after the said road was turned over to the Belt Company by the Construction Company the Suburban Company did issue to the Construction Company its stock and bonds as hereinabove set forth and this defendant avers that afterward the said securities were distributed by the Construction Company among its own stockholders. This defendant denies that it caused the Suburban Company to accept a partial compliance by the said Construction Company with the terms of said contract with the Suburban Company as and for a full compliance, denies that it caused said securities to be issued and denies that it caused the Suburban Company to at any time enter into any contract, and denies that it at any time dominated and controlled the [*the*] Suburban Company for any purpose or at all.

70. This defendant further states that it has no information sufficient to found a belief upon as to the cost of the road and right-

of-way constructed and acquired by the Construction Company and turned over to the Suburban Company, but this defendant denies that the stocks and bonds turned over by the Suburban
401 Company to the Construction Company were worth reasonably the sum of $480,000.00, but on the contrary states that said securities were worth much less than that sum. Respondent denies that it received from the Suburban Company any of the stocks and bonds turned over to it by the Construction Company, and states that it received no stock or bonds from the Construction Company except those which it had paid for either in cash or in services. This defendant denies that it should, in equity and good conscience, account to the complainants for any of the profits, if any, made by the Construction Company in said transactions; that said transactions took place more than ten years prior to the institution of this suit; that the Suburban Company and its stockholders fully ratified the same, and this defendant pleads the statute of limitations of Missouri, hereinafter set out, as to said transactions.

71. This defendant further states that at the time *of* the Suburban Company accepted said road from the said Construction Company said Suburban Company had issued no stock whatsoever, and that at the time said road was turned over by the said Construction Company to the Suburban Company the only stockholders of the Suburban Company were the stockholders of the said Construction Company, and that if, as alleged, the said Construction contract was not in all respects carried out by the Construction Company, which this defendant denies, that no person was injured thereby except the stockholders of the said Construction Company, who were then the sole stockholders of the said Suburban Company; that at the time said road was turned over to the Suburban Company by the Construction Company, as aforesaid, the entire property of the Suburban Company consisted of a line of railroad extending from Second and Wyandotte streets in Kansas City, Missouri, in an easterly direction to Cecil Junction; that at said time the said road had neither freight nor passenger traffic of any consequence and could not reasonably expect to have such traffic unless it further extended its road or acquired other lines of railroad; that said line of railroad was not extended by the Suburban Company from said Cecil Junction to Brush Creek in Jackson County, Missouri, until a long time afterward; that at said time the Consolidated Terminal Railroad Company and the Union Terminal Railroad Company and the Air Line had not yet been organized nor their lines constructed and that was not done until long afterward, and that at the time said Construction Company delivered said road to the Belt Company as aforesaid the facilities and property so turned over were entirely adequate for the
then requirements of the said Suburban Company; that
402 long afterward through the extension of its line and through the acquisition of other lines of railroad the passenger and freight traffic of the said Suburban Company and the said Belt Company increased to such an extent that it became

necessary to acquire and construct switching yards, depots and round houses and other structures and facilities for the carrying on of said business; that among the increased facilities acquired, as aforesaid, were a large and expensive passenger depot at Second and Wyandotte streets in Kansas City, costing about $65,000.00; that said depot was not acquired or constructed until several years after the said Construction Company had turned over said road to the Suburban Company, as aforesaid, and that said round houses, depots and additional terminal grounds became necessary solely through the increased traffic, caused by the extension of said Suburban Company's line and the acquisition by said Suburban Company of other lines penetrating the industrial sections of Kansas City and connecting with other lines of railroad entering Kansas City; that such increased facilities were not necessary in the condition the road was in at the time said Construction contract was entered into nor at the time said road was turned over to the Suburban Company by the Construction Company, as aforesaid, and this defendant states that among the items with which the complainants seek to charge this defendant are the expense of the said Suburban Company and the Belt Company in purchasing said increased terminal yards, freight depots, round houses, etc., all of which would be contrary to equity and good conscience, even if this defendant were in any way bound by the contract between said Construction Company and the said Suburban Company, but this defendant again states that it was under no obligation whatsoever to the Suburban Company or any other company or person under said construction contract, nor on account of the manner in which said contract was carried out, said contract was solely between the said Construction — and the said Suburban Company, and this defendant was in no wise a party thereto, except to disburse the securities of the said Suburban Company at the direction of said Suburban Company to the persons entitled thereto.

72. This defendant further states that at the time said first division of the Suburban Company lines between Second and Wyandotte streets and Cecil Junction were turned over by the Construction Company to the Suburban Company each and all of the stockholders of the Suburban Company knew exactly the condition the said line was in, and knew exactly whether or not all of the right-of-way for said line had been paid for and if not paid for the amount of the deferred payments, and knew exactly the cost
403 of the construction of said line; that all of said matters were fully set forth on the books of the said Construction Company and that at the time said line was turned over by the Construction Company to the Suburban Company the books of the Construction Company were turned over to the Suburban Company and have ever since been in the possession of the Suburban Company and its successor, the Belt Company and the receivers of the Belt Company, and that by reason of the premises the complaints are estopped, after so many years have passed, from now asserting that said road was turned over to the Suburban Company in an incomplete condition, and are now estopped from even charg-

ing that the said Construction Company, much less this defendant, which had nothing to do with the transactions, with the cost and expense of the Suburban Company and the Belt Company and its receivers in and about the purchase of terminal grounds, depots, right-of-way and the other matters complained of in this connection in the said amended ancillary bill.

73. In answer to paragraph B on page 25 of said amended ancillary bill this defendant denies that there remained in the treasury of the Suburban Company, after it had paid the Construction Company, as aforesaid, bonds of the Suburban Company of the par value of $100,00.00 and denies that said bonds of the par value of $100,000.00 were in any manner taken or appropriated by this defendant for its own benefit or anybody's benefit; denies that said bonds were of the reasonable value of $90,000.00 in money; denies that after the delivery by the Suburban Company to the Construction Company of its stock of the par value of $600,000.00 that stock of the par value of $400,000.00 still remained in the treasury of the Suburban Company, and denies that such stock of the par value of $400,000.00 was in any way taken or appropriated by this defendant and denies that said stock was of the reasonable value of $80,000.00 in money, but on the contrary this defendant states that of the first issue of bonds made by the said Suburban Company, to-wit, bonds of the par value of $500,000.00, all of said bonds with the exception of bonds of the par value of $50,000.00 were delivered to the Construction Company, as aforesaid, and that the remaining bonds of the par value of $50,000.00 were distributed by the said Suburban Company, through its officers, directors and stockholders, to the original promoters of the said Suburban Company for services rendered, and that this defendant got none of said bonds, and that of the first issue of stock of the said Suburban Company of the par value of $1,000,000.00, stock of the par value of $600,000.00, but having at that
404 time no actual value was delivered by the Suburban Company to the said Construction Company as a bonus with said bonds and that of the remaining stock of the par value of $400,000.00, this defendant got none except that which it bought and paid for, as shown on the books of this defendant, and as shown on the books of the said Suburban Company and the said Belt Company.

74. In answer to paragraph C on page 26 of said amended bill, this defendant again states that it was under no obligation, legal or equitable, under the terms of said Construction contract, was not a party to the same, had nothing to do with the execution of the same, had nothing to do with the carrying out of the same, and that there is no reason in law or in equity why this defendant should be charged by reason of the said contract; that all of the monies alleged to have been expended as shown by the alleged bill of items on pages 26 and 27 of said amended bill were monies expended by the said Suburban Company later the Belt Company, for its own benefit in constructing and equipping and improving its

own lines and there is no reason in law or in equity why it should not pay its own bills.

75. In answer to paragraph D, on page 28, of said amended bill, this defendant denies that it undertook to procure any right of way for the said Suburban Company, except at the special instance and request of the said Suburban Company; that it is true that this defendant at the request of the Suburban Company, advanced large sums of money to it for various purposes and charged such monies to the said Suburban Company as it had a right to do; that all of such transactions were fully known to and acquiesced in by the said Suburban Company; this defendant denies that it in any instance or at any time caused the Suburban Company or the Belt Company to purchase any right-of-way or execute notes for deferred payments, but that all such transactions were conducted by the Suburban Company or the Belt Company at its own instance and for its own benefit, and that under no circumstances could this defendant by any possibility have benefited thereby; that it is true that this defendant from time to time at the request of the Belt Company paid interest, due from the Belt Company on the obligations of the latter company, and charged such disbursements to the Belt Company, as it had a right to do, and that the said Suburban Company, later the Belt Company, at all times recognized its obligations to reimburse this defendant on account thereof; that it is true that this defendant failed to furnish a depot for the Suburban Company, but there was no reason in law or equity why respondent should furnish a depot or anything else for the Suburban Company; this defendant denies that it was obligated to furnish any depot to the Suburban Company, or to the Belt
405 Company, and denies that the said Construction Company was the agent of the defendant; this defendant admits that for the benefit of the Suburban Company and the Belt Company, and at the request of said Company, it, this defendant advanced a large sum of money to the Belt Company for the construction of a passenger depot at Second and Wyandotte streets, and that it charged the cost thereof to the Suburban Company or to the Belt Company, as it had a right to do, and as the said companies requested it to do, and that each and every charge of each and every item of the expenses of constructing said depot appears not only on the books of this defendant but also *in* the books of the Belt Company, and the said Belt Company, its officers, directors and stockholders have at all times acquiesced in such charges, which charges were fair, reasonable and proper; that in the printed itemized statement attached to said amended bill and marked "Exhibit I," wherein complainants pretended to set forth the items of expense of the Belt Company for right-of-way, depots and other buildings, and attached to said amended bill marked "Exhibit 1," there are included many items aggregating many thousands of dollars of expense incurred by the said Belt Company in increasing its terminal facilities through the purchase of large tracts of real estate for terminal grounds and switching facilities, and not essential as right-of-way and not requisite to the said Belt Company or the Suburban Company in the en-

joyment of their franchise, and that said real estate includes lands purchased by the said Belt Company for its future requirements and in anticipation of future necessities and that such lands were not purchased on account of the then existing needs of the said railway companies, but on the contrary, on account of an expected increase of traffic which would arise from the acquisition of other lines, extensions, the growth of Kansas City and its tributary country, etc., and that said statement is not true and correct; this defendant admits that the said railway companies paid interest on deferred payments due on such real estate which were a lien on some of the lands so purchased by the said Suburban *or* Belt Companies, but there is no reason in law or in equity why the Suburban Company, later the Belt Company, should not pay interest on their own debts and this defendant is in no wise liable therefor.

76. This defendant in answer to the matters and things averred in paragraph- E to K, inclusive, on pages 29 to 35, inclusive, of said amended bill, again states that it was under no obligation to furnish the said Suburban or Belt Company with any right-of-way or to make any of the payments therein mentioned, and that for the reasons hereinabove set forth, and denies that the complainants
406 are entitled to have any credit upon their indebtedness to this defendant by reason of such payments, and this defendant admits that it did not pay all of the operating expense of the said railway companies, nor for the equipment, maintenance nor extension of their roads, and states that there was no reason in law or in equity why it should do so.

In answer to paragraph L of said amended bill on page 35 thereof this defendant states that it was under no obligation, legal or equitable, to furnish the Suburban or Belt Company with switching yards in Kansas City or elsewhere; denies that the Second Street Improvement Company was one of its auxiliary companies or that this defendant created it; states that the said Second Street Company had its own stockholders, officers and directors, and that while it is true that some of the officers of said Second Street Company were also connected with this defendant, yet this was because the stockholders of the said Second Street Company chose such persons as its officers and not through any act of this defendant; denies that it caused the Second Street Company to lease to the Consolidated Terminal Company the land described in said paragraph L or any land, but says that such lease was entered into between the Second Street Company and the Belt Company of their own free will and accord, and that there is no reason in law or in equity why the said Belt Company should not have paid the rent to the Second Street Company which it agreed to pay, and there is no reason in law or in equity why this defendant should pay the rent due from said Belt Company; but said tract of ground was not necessary to the operation of said Suburban Company, but was purchased by the Belt Company long after the Suburban Company had ceased to exist and long after the Belt Company had acquired the Air Line, the Union Company and the Consolidated Company, and that said tract of land was much larger than the said Belt Company needed

to have at the time it leased the same, and same was leased in view of the future requirements of the said Belt Company.

77. In answer to paragraph M on page 36 of said amended bill, this defendant admits that the said Second Street Company leased certain land to the Suburban Company for depot purposes, but denies that it caused the Second Street Company or the Suburban Company to enter into such lease and denies that it had anything to do with the same, and that there is no reason in law or in equity why this defendant should pay the rental on said land or any other rental which the Suburban Company or Belt Company obligated themselves to pay.

407 78. In answer to paragraph N on page 36 of said amended bill, this defendant admits that in March, 1890, the McClelland-Stumpf and Peltzer Brick Manufacturing Company conveyed to Alfred L. Howe the land therein described, and that said land was part of the depot grounds of the Suburban Company, but this defendant denies that said Howe was its agent or dummy, but on the contrary states that said Howe was the treasurer of said Suburban Company and that said land was purchased by said Howe for the use and benefit of said Suburban Company, and at its request. This defendant admits that said Howe made a cash payment to said Brick Company on account of said land and executed his notes as alleged, secured by deed of trust for the deferred payments; that afterward, to-wit: June 23, 1890, said Howe, for a nominal consideration, conveyed said real estate, subject to said incumbrance to the Suburban Company. This defendant admits that when the first of said notes became due it paid the same, at the request of the Suburban Company, and charged the amount of such payment to the Suburban Company, and that afterward and prior to the said consolidation between the Suburban Company and the Consolidated Terminal Company the said Suburban Company liquidated and paid the said charge. This defendant admits that the said Brick Company on March 14, 1890, conveyed certain land described in said paragraph N of said amended bill to one W. S. Taylor, but this defendant denies that said Taylor was its agent or dummy, but on the contrary states that said Taylor was an officer of the Suburban Company and bought said land at its request and for its use and benefit. Defendant admits that a cash payment was made by said Taylor on said real estate and that notes and deed of trust were executed by him to secure the unpaid purchase money, and that afterward said Taylor for a nominal consideration conveyed said real estate to the Suburban Company and this defendant admits that the notes so executed by Taylor and Howe, as aforesaid, aggregated the principal sum of $89,333.33, and that said notes were secured by deed of trust, which was a lien upon the land upon which afterward the said Suburban Company and the Belt Company erected a depot at Second and Wyandotte streets; defendant denies that in October, 1897, the Belt Company was financially embarrassed or insolvent; denies that stock of the Belt Company was depressed in value at said time; this defendant denies that it was desirous of manipulating the accounts of the Belt Company, or that it did at

said time or any other time manipulate the accounts of the Belt Company; this defendant denies that any arrangements was made between any of its officers and one J. De Goeijen, Jr., or
408 between it or any other person or corporation whereby it assumed or agreed to pay the real estate notes, which were a lien on the property of the Belt Company, including said notes aggregating $89,333.33, and this defendant denies that it at any time assumed and agreed to pay the said notes, except upon the condition and under the circumstances hereinafter set forth, but on the contrary states that said notes, including said notes aggregating $89,333.33 were assumed by said De Goeijen; this defendant denies that in April, 1899, or at any other time it had reason to believe or believed that it would lose control of the Belt Company and states that at no time did it have control of the Belt Company; denies that it set about to relieve itself of any obligation to pay the said notes aggregating $89,333.33, but states that it had at no time incurred any such obligation; denies that in April, 1899, that the said De Goeijen was indebted to it in an amount in excess of said notes or in any sum, and denies that said De Goeijen was unable to pay his obligations to this defendant or any other person; denies that it caused the Belt Company to take over any account due the defendant from said De Goeijen; denies that it knew that said De Goeijen was insolvent or that it could not collect its account against him, and states that it had no account against said De Goeijen at said time and states that said De Goeijen was at all times solvent; denies that it caused the Belt Company to make any entries on its books and denies that the Belt Company or complainants are entitled to any credit upon their indebtedness due this defendant on account of said notes for $89,333.33, which sum was charged by this defendant to the Belt Company on October 15, 1897.

79. Defendant states that the facts in regard to said item of $89,333.33, charged by it to the Belt Company on October 15, 1897, are as follows, to-wit: Said De Goeijen, Jr., was a resident of Amsterdam in Holland, and he and his associates also residents of Holland were on or about October 15, 1897, the owners of a large majority of the stock of t' said Belt Company and of bonds of the Belt Company; that said De Goeijen was the agent and representative of said Dutch investors was chairman of a permanent executive committee appointed by the stockholders of the Belt Company, which committee had full discretionary powers in the management of the Belt Company affairs, and was largely interested in the Belt and its constituent companies that said Dutch investors, including said De Goeijen, were interested in improving the financial condition of the Belt and its constituent companies.

80. That with this end in view the said De Goeijen, during the year 1897, came to Kansas City, Missouri, from Holland; that at that time the said Belt Company was indebted to various
409 persons to an amount aggregating upwards of $100,000.00 on account of purchase money notes executed by the Belt Company in payment for real estate used for terminal and depot purposes and secured by deed of trust, which was a first lien upon said

real estate; that at said time the Belt Company was also indebted to various other persons on account of money borrowed for its current requirements, in the nature of floating debt.

81. That during the year 1897, and prior to October 15, 1897, the Belt Company owned 483 second mortgage bonds of the Kansas City and Northern Connecting Railroad of the par value of $483,000.00 and owned 82 bonds of the Union Terminal Railway Company of the par value of $82,000.00.

82. That by written contract, dated July 1, 1897, the Belt Company sold to said De Goeijen the said 483 Northern bonds at 45 cents on the dollar or $450.00 for each bond or a total amount of $217,350.00, and sold to the said De Goeijen the said 82 Union Terminal bonds at par; that is to say, for $82,000.00, and by said contract the said De Goeijen agreed to pay the said Belt Company for said bonds on or before December 1, 1897.

83. And the said Belt Company on its part agreed that out of the proceeds of said sale it would pay or caused to be paid its said outstanding indebtedness or floating debt, including said real estate mortgage notes.

84. That afterward respondent, at the request of the Belt Company and said De Goeijen, agreed that it would act as the fiscal agent of the Belt Company in the collection from said De Goeijen of the purchase price of said bonds and would see to it that said purchase price was disbursed in accordance with the said arrangement made between the Belt Company and the said De Goeijen, that is to say, that this defendant would, as fast as the money was received from said De Goeijen and not otherwise, pay off and discharge the said floating debt of the Belt Company, including said real estate mortgage notes; that at the time said arrangement between the Belt Company and De Goeijen was entered into the said 82 Union Terminal bonds and the said 483 second mortgage Northern bonds were not in the possession of the Belt Company, but had been pledged by the Belt Company with various financial institutions as collateral security for the payment of its notes and obligations, and that before said bonds could be obtained by the Belt Company and delivered to said De Goeijen, it was known by all parties to the transaction that it would be necessary for such obligations to be paid, and this defendant was delegated
410 by the said De Goeijen and the said Belt Company to pay off and discharge said obligations out of the proceeds of said securities bought by said De Goeijen.

85. That in accordance with said arrangement between the defendant De Goeijen and the Belt Company, this defendant passed to the credit of the Belt Company on its books on October 15, 1897, the full sum of $217,350.00 on account of said Northern second mortgage bonds, purchased by said De Goeijen, as aforesaid, and also passed to the credit of the said Belt Company the full sum of $82,000.00, being the full purchase price of the 82 Union Terminal bonds, purchased by said De Goeijen at par, as afore-said.

86. That in pursuance of said arrangement this defendant as soon as it could get the said bonds released by the persons who were

holding the same as collateral security, sent the said bonds to the said De Goeijen, and the said De Goeijen from time to time made payments on account of his said purchase of said bonds, and that this defendant in pursuance to said arrangement applied the said payments so made by De Goeijen to the payment of the said floating indebtedness of the Belt Company.

87. That the said De Goeijen paid the entire purchase price of the said bonds to this defendant with the exception of the sum of $89,333.33, which amount was still unpaid at the time said Knott and the said Swinney were appointed receivers for the said Belt Company.

88. That with the proceeds of said bonds so sold by the Belt Company to said De Goeijen this defendant was able to and did pay off and discharge all of the floating debt of the Belt Company outstanding October 15, 1897, with the exception of said sum of $89,333.33, which sum represented the aggregate amount of said real estate mortgage notes secured on the depot property of the Belt Company, and which notes were then held by the Provident Life and Trust Company of Philadelphia, and which company continued to hold the said notes until the same were paid as hereinafter stated.

89. That from time to time this defendant for and on behalf of the Belt Company requested the said De Goeijen to pay it the said sum of $89,333.33, being the balance due the Belt Company on account of his purchase of the said Northern second mortgage bonds and the said 82 Union Terminal bonds, so that this defendant might pay off and discharge said real estate mortgage notes held by the said Provident Company, but the said De Goeijen failed to pay same to this defendant at any time; that it was at all times
411 distinctly understood and agreed between the Belt Company and the said De Goeijen and this defendant that this defendant should not be required to pay the said real estate mortgage notes held by said Provident Company and aggregating $89,333.33, until and unless the said De Goeijen should pay defendant in full for the said Belt Company for the said bonds purchased by him from it, as aforesaid, and defendant states that said De Goeijen at no time paid to it the full amount of the said purchase price of said bonds, his payments on said bonds lacking exactly the sum of $89,333.33 of being the full purchase price as agreed on as aforesaid, and respondent states that it denies it had any interest in said transactions except to collect the said purchase price from said De Goeijen and to apply the proceeds thereof, in accordance with the said directions of the said Belt Company and said De Goeijen, which respondent did, and that in said transaction respondent acted solely as the agent for the said Belt Company and the said De Goeijen; that it would be unjust and inequitable to charge respondent with the said principal sum of $89,333.33 or any part thereof, for the reason that against the said charge of said amount made by this defendant against the Belt Company on October 15, 1897, this defendant, on the same day gave credit to the Belt Company for the full amount of the purchase price of the said bonds and this defendant at

no time received the said purchase price in full, the deficiency being the exact amount of said real estate mortgage notes, aggregating the principal sum of $89,333.33.

89*a*. And this defendant states that said Belt Company at all times treated the said De Goeijen as its debtor by reason of his failure to either pay the said depot mortgages or to pay the balance due on the purchase price of the said bonds, and from time to time, and at regular intervals, the said Belt Company rendered bills against the said De Goeijen for the said sum of $89,333.33 and for the interest which it the said Belt Company from time to time paid to the said Provident Company on account of said depot mortgages, and that the said Belt Company regularly collected from the said De Goeijen the said interest accruing on the said depot mortgages to the said Provident Company and paid as aforesaid by the Belt Company, and that it was at all times fully understood by the Belt Company, its stockholders, officers and directors that this defendant was in no wise liable to pay the said depot mortgages aggregating said sum of $89,333.33.

412 90. And further answering said charge of said amended ancillary bill in relation to said real estate mortgage notes, this defendant states that even though the said De Goeijen did not pay the full amount of said purchase price of said bonds to the Belt Company through the medium of this defendant, yet the said De Goeijen did in fact pay the same to the receivers of the Belt Company, complainants herein, in the manner hereinafter stated, that is to say: Shortly after the said Kansas City, Pittsburgh and Gulf Railroad Company went into the hands of receivers in the month of April, 1899, certain persons organized themselves into a committee of re-organization, said committee assuming to act for and on behalf of all of the holders of securities of the said Gulf Railroad, who should join and participate with the said committee in the re-organization of said company; that said committee promulgated a plan of re-organization and succeeded in securing the co-operation of practically all of the stockholders and bondholders of said Gulf Railroad Company; that as part and parcel of the said plan of re-organization said committee acquired all of the stocks and bonds of the said Belt Railroad Company and its constituent companies, and that as part and parcel of said plan of re-organization, and pursuant to authority conferred on it by said stockholders and bondholders, the said committee proceeded to adjust certain of the floating indebtedness of the said Gulf Company and of the said Belt Company; that at the time the said Gulf Company went into the hands of receivers it was indebted to the said De Goeijen in the sum of about $300,000.00 borrowed money; that said De Goeijen made claim against the receivers of said Gulf Company for the amount of said indebtedness and also made claim against said committee for the amount thereof; that in the meantime Knott and Swinney, complainants herein, were appointed receivers for the Belt Company, pursuant to the same plan of re-organization and the said receivers of the said Belt Company referred to the said Committee for adjustment the claim of said Belt Company against the said

De Goeijen for the principal sum of $89,333.33, growing out of the failure of said De Goeijen to either pay the balance due on the purchase price of said Union Terminal bonds and Northern bonds or to pay the said real estate mortgage notes, and that thereupon said De Goeijen and the said committee entered into negotiations for a settlement of the mutual controversies pending between the said De Goeijen and the said committee, which was acting on behalf of the said Belt Company and the said Gulf Company and their receivers; that the said committee brought forward as an offset against De Goeijen's claim for $300,000.00 against the Gulf Company, the claim of the Gulf Company and its receivers against
413 De Goeijen for the said principal sum of $89,333.33, and the said claim of said De Goeijen was compromised and settled on that basis, the said committee paying the said De Goeijen the sum of $150,000.00 in full settlement of the mutual demands existing between the said De Goeijen and the said committee, which committee was acting at the time for and in behalf of the Belt Company, the Gulf Company and their receivers, and that the amount so paid to the said De Goeijen was practically the full amount of the said De Goeijen's claim against the Gulf Company less the amount which the said De Goeijen owed the said Belt Company on account of his purchase of the said Union Terminal bonds and the said Northern bonds, and his assumption of said depot mortgages and this defendant states that the said Belt Company and its receivers, having thereby received full payment for the said depot mortgages aggregating $89,333.33, are estopped to say that either the said DeGoeijen or this defendant is indebted to them on account of the said real estate mortgage notes, and this defendant states that it was with the amount of money thus deducted by the said committee from the said De Goeijen's claim that the said receivers of the Belt Company afterward paid the said Provident Life and Trust Company said real estate mortgage notes and not otherwise.

91. In answer to the averments made in paragraph 1 on page 41 of said amended ancillary bill, this defendant denies that it caused the Suburban Company to take up and pay the alleged overdraft of the said Construction Company, to the amount of $313.76 or any other overdraft, and states that at the time said Construction Company delivered said road to the Suburban Company, the Suburban Company, through its stockholders, officers and directors, assumed said overdraft and afterward paid the same as they were bound to do.

92. In answer to paragraph 2 on page 42 of said amended ancillary bill and subdivisions *a* to *n*, inclusive, of said paragraph, this defendant states that it has already hereinabove fully answered the charges and averments made in said paragraph; this defendant again states that due and proper credit was given to the said Suburban Company, Belt Company, Air Line, Consolidated Terminal and Union Terminal Companies for all moneys and property of said companies, coming into its hands; that no sums of money were charged against said companies by this defendant for commissions or other services except such as were agreed upon between this defendant and the said companies, respectively, and that said charges for com-

missions or other services were all and singular just, fair and reasonable, and that for all securities, either stocks or bonds, issued by said companies and coming into the hands of this defendant, it
414 fully, promptly and faithfully accounted to the said companies, respectively, as will appear from the books of account of said companies, in the possession of complainants; and this defendant states that the pretended statements contained in said paragraph 2 of page 42 of said amended bill and in said subdivisions of said paragraph 2 are not a true and correct statement of the monies and securities received by this defendant, and that said statements are grossly misleading and unfair; this defendant denies that it ever received any donations from any of the said companies; denies that it ever appropriated to its own use any money or property of the said companies or either of them coming into its hands and denies that complainants are entitled to have any credit upon their indebtedness to this defendant, by reason of the pretended omissions of any items from the accounts exchanged between this defendant and the said companies, respectively, and this defendant states that the accounts between it and the said companies, respectively, are and were at all times full, true, just and correct, and this defendant makes the same answer in respect to averments made in paragraph 3 of said amended bill on page 46 thereof and in subdivisions *a* to *d*, inclusive, of said paragraph; this defendant denies that none of the charges made by it were ever submitted to, or approved by the parties in interest in said companies, but on the contrary, states that each and all of said charges were submitted to and approved by the parties in interest in said companies; denies that there was anything in the relationship between this defendant and the said companies which deprived this defendant of the right to be paid for its services to said companies, and states that it would be grossly inequitable and unjust to deprive this defendant of its just compensation in and about the premises; this defendant admits that it was not an eleemosynary institution; admits that it was in business for pecuniary profit and gain; admits that it was not organized or conducted for the purpose of gratuitously serving in a multitude of transactions said companies or any of them for the sole convenience and profit of the said companies, but this defendant states that all services rendered by it to said companies were rendered in the ordinary course of business, as similar services were rendered by it to other persons and companies, and that there is no reason in law or in equity why the said Belt Company or its constituent companies should not pay their honest debts; this defendant denies that the said companies were its dummies for the benefit and profit of this defendant, but on the contrary states that said companies were at all times seeking their own legitimate business and profit and that they made only such contracts with this defendant as their
415 officers and agents and stockholders believed would profit said companies, and that all of said officers, agents and stockholders were of full legal age and competent to manage their own affairs, and this defendant makes the same answer in respect to the

averments made in paragraph 4 on page 48 of said amended bill and of subdivisions *a* to *e*, inclusive of said paragraph.

93. In answer to paragraph 5 on page 50 of said amended bill, this defendant admits that it, from time to time, loaned money to the companies therein mentioned, taking the notes of said companies evidencing such loan, and that it charged interest on the said notes in the same manner that it charged interest to other companies or individuals, customers [this of] defendant, who borrowed money from it, and this defendant states that there is no reason in law or in equity why the said companies should have the right to borrow money from this defendant without paying interest, and there is no reason in law or in equity why the said companies should not pay interest on the monies received and borrowed by them; this defendant admits that whenever any of said companies had a balance in their favor in its hands in open account that this defendant allowed such company interest on such daily balances and such daily balances were correct and were properly computed and were verified and checked by the respective auditors of the said companies each and every month, and that this defendant allowed interest to said companies on such daily balances at the rate of 2 per cent per annum, which was as much if not more than was paid by other banking institutions to their customers, under like conditions and this defendant admits that frequently that said companies overdrew their accounts with this defendant and that this defendant charged interest to said companies on such overdrafts just as it did to other customers under like circumstances; this defendant states that it usually charged interest on such overdrafts at the rate of 7 per cent per annum, which was a fair and reasonable charge and was less than was charged by other banking institutions to their customers under like circumstances; this defendant denies that it made any improper or unlawful charges of interest or discount against the said companies or any of them, but on the contrary states that all of such charges for interest or discount were correct, proper and lawful and were only such as were distinctly agreed upon by the parties in interest at the time such charges were made, all of which fully appears on the books of account, not only of this defendant but on the books and records of said companies themselves; this defendant states that no such charges for interest or discount were made except in the ordinary course of business and in accordance with business
416 usages universally in force, and this defendant denies the correctness of the alleged computation of interest or discounts made in the said amended ancillary bill and in the exhibits thereto attached, but states that said alleged computations are incorrect and untrue, and this defendant states that if any compound interest was charged by it against any of the said companies, which this defendant denies, such charges were fully agreed upon at the time same were made, and this defendant denies that complainants are entitled to have any credit upon their indebtedness by reason of the matters and things set up in said paragraph 5 on page 50 of said amended ancillary bill or in any of the subdivisions of said paragraph.

94. In answer to paragraph 6 on page 54 of said amended ancillary bill, this defendant admits that one of the features of its business was to supervise and conduct building operations, and that for this purpose it maintained what is called a building department; this defendant denies that the purpose of said building department was to conduct construction operations for its auxiliary companies and states that it had no auxiliary companies; this defendant admits that at the special instance and request of the said Suburban Company, Belt Company, Consolidated Company, Union Company, Air Line, Elevator Company and Amusement Company it did a large amount of construction work for the said companies, but denies that it made any exorbitant or unreasonable charges for such work; this defendant states that all such work was faithfully and efficiently done; that this defendant maintained a large and expensive staff of employes for the purpose of properly conducting such operations; that by reason of the fact that this defendant, through its said building department, could more efficiently do the work and was better equipped to perform the same, the said companies from time to time employed this defendant to conduct such operations; that this defendant made no charge for the services of its building department except such as were fair and reasonable, and such charges were not more, and in fact were less, than the said companies would have had to pay others for the said services; that there is no reason in law or in equity why the defendant should not receive fair and just compensation for the services rendered by its said building department or a fair profit for the work of said building department; that no charges were made by said building department against the said companies or either of them except such as were fully, fairly and openly agreed upon between this defendant and the said companies; this defendant states that there is no reason in law or in equity why its said building department should have done any work for any of said companies gratuitously, and this
417 defendant denies that complainants are entitled to any credit on their indebtedness to this defendant by reason of any charges made against any of said companies on account of the services of said building department.

95. In answer to paragraph 7 on page 55 of said amended ancillary bill, this defendant denies that it caused the incorporation of the Amusement Company, but again states that said Amusement Company was caused to be organized by the said Belt Company, and the said Air Line, for the purpose of creating passenger traffic for the said companies; this defendant denies that it caused the said companies to spend large sums of money or any sum of money in the acquisition and improvement of Fairmount Park, but states that any money invested for that purpose was invested by the said companies for their own proper benefit and in the ordinary course of business; this defendant states that the establishment and maintenance of said park did result in creating an extraordinary passenger traffic for said Belt Company, Air Line and the said lines received the benefit of such traffic; this defendant states that there is and was no possible way by which it could benefit or profit through the said park;

this defendant states that the books and papers of said Amusement Company and of the said Belt Company and Air Line are now and ever have been in the possession of complainants and the said Belt Company; that therefore this defendant is not advised as to the result of the operation of said park, but this defendant is informed and believes and so charges [*to*] fact to be that the operation of said park, after taking into account the earnings of the said Belt Company and Air Line, by reason of said passenger traffic, resulted in little if any loss to the said Belt Company or Air Line; this defendant states that if it should turn out that the operation of such park did result in a loss that there is no reason in law or in equity why the Belt Company or the said Air Line, for whose sole benefit the said park was established and maintained, should not pay the same, and this defendant states that said companies having received the benefits and advantages of said park are and should be held estopped from complaining of any losses on account thereof.

96. And this defendant in answer to paragraph 8 on page 56 of said amended ancillary bill and subdivisions *a* to *e*, inclusive, of said paragraph, states that it has already fully answered the averments therein made and this defendant again avers that the said Missouri Elevator and Terminal Company was an auxiliary company of the said Belt Company; that said Elevator Company was organized at
the instance of said Belt Company for the purpose of owning
418 and operating elevators upon the line of said Belt Company
and for the purpose of promoting and increasing the freight traffic of said Belt Company through the handling and shipment of grain and for the purpose of increasing the revenue of the said Belt Company; that the mortgage notes held by this defendant, secured upon the property of said Elevator Company, represent exactly so much money expended by this defendant for said Elevator Company in the acquisition and construction of said elevator property; that the said Belt Company is the owner of all and singular the shares of stock outstanding and issued by said Elevator Company and the said Belt Company, in order to acquire said stock of its own act and volition, assumed the debts of the said Elevator Company; that the said Belt Company assumed no debts of the said Elevator Company except such as were for money actually spent upon the property of said Elevator Company; that while it is true that this defendant advanced monies for the purpose of maintaining and equipping the said elevators and charged the same to the said Belt Company, it was done at the request of the said Belt Company and for its use and benefit; this defendant denies that any of the said stock of the Elevator Company was issued to it or that it caused any stock of the Elevator Company to be issued to anybody, and denies that it caused any such stock to be issued to the officers and employes of this defendant or to their wives, but again states that all of the outstanding and issued stock of the said Elevator Company was issued to said Belt Company and it or complainants are still the owner of the same, and this defendant further states that it never had any interest in the said Elevator Company or in its property except to be reimbursed for the moneys it had expended on account thereof;

this defendant further states that the said Belt Company derived large revenue from the handling and switching of grain to and from said elevators and the rentals thereof, and having received all the benefit of said elevators should now be held estopped from seeking to unload its loss, if any, upon this defendant; this defendant further states that ever since June, 1893, when the Belt Company became interested in the said Elevator Company, the books of account of the said Elevator Company showing exactly what had been expended on said elevators and the result of their operation have been in the possession of the said Belt Company or the said complainants, who at all times knew the condition of said Elevator Company and its property; that any and all contracts made by the said Belt Company in relation to said Elevator Company or its property or its stock were made by the proper officers, stockholders and directors of the said Belt Company and the said Elevator Company, who at all
419 times knew the exact facts in relation to all of the transactions made in that behalf, were fully known to and ratified by the stockholders, directors and officers of the said Elevator Company and the said Belt Company, and complainants should be held estopped from now seeking to charge this defendant with the result of such transactions.

97. Defendant, answering the averments made in paragraph 9 on page 59 of said amended ancillary [bill], again denies that it caused the incorporation of said Northern Company, but states that the facts in that behalf are as hereinabove set forth, and this defendant states that all of the transactions had by said Belt Company in connection with said Northern Company were voluntarily entered into by the said Belt Company at the instance of its stockholders, officers and directors; that said transactions were entered into by the Belt Company for its own sole benefit and profit, and this defendant should not be charged either in law or in equity with any loss, if any, resulting from such transactions; that if any profit resulted from such transactions the Belt Company received and retained the same and was entitled to the same; and there is no reason in law or in equity why this defendant should pay any of the losses, if any there were; this defendant admits that it paid certain interest coupons due on the bonds of the Northern Company and charged the same to the Belt Company but states that this was done at the special instance and request and for the benefit of the Belt Company; that at the time this was done the Belt Company had in [i-s] treasury large blocks of the securities, both stocks and bonds, of the said Northern Company, which it had received from said Northern Company in part payment for constructing the said Northern Company's road and that the said Belt Company was at said time endeavoring to dispose of through this defendant the said securities; that it was the desire of the Belt Company and to its interest to obtain as large a price as possible for the said securities of the Northern Company, received by it as aforesaid, and that it would have been disastrous to said Belt Company for it to have allowed a default to occur in the payment of the interest due on the bonds of the said Northern Company, and that for the purpose of preventing such default and pre-

venting a depreciation of the value of the securities of the Northern Company so received and held by it the said Belt Company, for a short period, advanced through this defendant certain moneys for the benefit of the Northern and of itself for the payment of interest accruing on the said bonds of the Northern Company; this defendant denies that it caused the Belt Company to pay any such interest on Northern bonds, but states that this was done by the Belt Company for its own purposes as hereinabove set forth; this de-
420 fendant states that it made no payments of any interest on Northern bonds except at the request of the Belt Company and that all charges made against the Belt Company by this defendant in this connection, were made with its full knowledge, approval and consent.

98. In answer to paragraph D on page 63 of said amended ancillary bill, this defendant states that the said Northern Company began operating on or about July 1, 1898; that on July 31, 1898, certain interest became due on the first mortgage bonds which had been issued by the said Northern Company and delivered to the Belt Company in payment of the Belt Company's services in and about the construction of the Northern Company's road; that at the time said interest became due the said Northern Company had just begun to operate its road and was not as yet in financial condition to pay its fixed charges; that the Belt Company, which was the holder and owner of a large amount of the bonds of the Northern Company and which expected to still receive a larger number of bonds by virtue of its construction contract with the Northern Company, and with a view to lightening the burdens of the said Northern Company, and for the purpose of enhancing the value of its securities, requested this defendant, to whom said bonds had been delivered by the Belt Company for disposition, to cancel the interest coupons attached to said Northern bonds, becoming due on July 31, 1898; that pursuant to said request of the Belt Company and not otherwise this defendant did cancel the said 314 coupons mentioned in said amended bill; and that this was done at the solicitation and with the full knowledge of the said Belt Company, which having received all the benefit of said transaction, should be held estopped from now complaining thereof.

99. In answer to paragraph 11 on page 64 of said amended ancillary bill, this defendant states that the facts in that behalf are as follows: On September 25, 1893, the Belt Company was the owner of 200 second mortgage bonds of the par value of $1000.00 each, issued by the said Air Line and secured by second mortgage upon the property of that company; said bonds had been issued by the Air Line to the Belt Company in consideration of the Belt Company guaranteeing the payment, principal and interest, of the said bonds and each of said bonds bore the written guaranty endorsed thereon by the Belt Company of said principal and interest; that said 200 second mortgage bonds constituted the entire issue of second mortgage bonds made by the said Air Line. On said 25th day of September, 1893, a written contract was entered into between the Belt

Company and this defendant, whereby this defendant pur-
421 chased said 200 second mortgage bonds from the Belt Company at and for the price of 75 cents on the dollar or $750.00 for each bond, and thereby this defendant agreed to take and pay for an aggregate of 170 of said bonds within eighteen months from the date of said contract, and to take and pay for such of the remaining 30 of said bonds as should remain unsold under the terms of the mortgage securing same, on or before September 1, 1898, and said contract further provided that in consideration of this defendant taking said bonds at said price the said Belt Company agreed to transfer to this defendant 2500 shares of stock of the Union Terminal Company, then in the treasury of the Belt Company; this defendant further states that as to said 30 bonds numbered from 171 to 200, inclusive, it was provided in the mortgage securing same that same should be reserved in the hands of this defendant as trustee, so that same might be sold if necessary and the proceeds used for the purpose of paying interest on bonds theretofore sold.

100. Defendant states that in pursuance to said contract it received from the said Belt Company 130 of said bonds and gave credit to the Belt Company for said bonds at the price agreed upon, to-wit: $750.00 for each bond, and the said Belt Company did also, pursuant to said contract, deliver to this defendant the said 2500 shares of Union Terminal stock.

101. That at all of said times the Belt Company was the owner of all of the capital stock of the Air Line and was guarantor of the said second mortgage bonds, and afterward the said Belt Company, finding that the earnings, present and prospectiv , of the said Air Line were not sufficient to justify the Belt Company in negotiating said second mortgage bonds and thereby increasing the fixed charges of the said Belt Company, which had guaranteed said bonds, the Belt Company cast about for some means whereby it could avoid carrying out its contract to deliver said second mortgage bonds to this defendant, and whereby it, the Belt Company, could retire the said second mortgage bonds; that thereupon the Belt Company failed to make any further deliveries to this defendant of said second mortgage bonds and entered into negotiations with this defendant for a return by this defendant of such second mortgage bonds, as had already been sold and delivered to this defendant by the Belt Company; that thereupon [*ils*] was agreed between this defendant and the said Belt Company that this defendant would return to the Belt Company all of the said 130 bonds purchased by this defendant as aforesaid, at the same price at which this defendant had bought the same, to-wit:

75 cents on the dollar, and all of the said bonds were then
422 and there returned to this defendant by the Belt Company, and thereupon the Belt Company returned the said bonds to the treasury of the Air Line in consideration of being released by the Air Line of its said guaranty of the said bonds, and said bonds were accepted on said terms by the Air Line, and thereupon the said entire issue of said second mortgage bonds of the Air Line to the number of 200 were cancelled and released of record; this defendant states that it was distinctly agreed when it returned said bonds to the

Belt Company, as aforesaid; that in consideration of releasing said Belt Company from its said contract to sell said entire issue of the Air Line bonds to this defendant, this defendant should retain the said 2500 shares of Union Terminal stock and this was done; defendant denies that it failed, neglected or refused to purchase and pay for the remaining 70 of said bonds as specified in the said contract, but on the contrary states that the said Belt Company declined to carry out said contract; this defendant denies that said second mortgage bonds could not be sold upon the market, and denies that said bonds were worthless, but on the contrary states that each of said bonds bore the written guaranty of the said Belt Company, making said Belt Company primarily liable thereon, and that at all said times the obligations of the Belt Company were worth 100 cents on the dollar; this defendant denies that it devised any plan or scheme to unload said bonds upon the Belt Company, but on the contrary states that said bonds were resold and returned to the Belt Company at its own solicitation and request, and solely for the reason that the said Belt Company desired to be relieved of its said guaranty of the said bonds, and this defendant states that by reason of the premises and by reason of the agreement entered into between this defendant and the Belt Company at the time, it had a right to retain the said 2500 shares of the Union Terminal stock, and this defendant denies that complainants are entitled to have any credit upon their indebtedness to this defendant by reason of the premises.

102. In answer to paragraph 12 on page 68 of the said amended ancillary bill, this defendant denies that it caused the railroad of the Air Line to be constructed and denies that it used the said Kansas City Terminal Construction Company for that purpose, but on the contrary states that the Belt Company caused said Air Line to be constructed and that said line was constructed by contract between the said Air Line and the said Construction Company, and this defendant denies that it caused the Air Line to enter into said contract, but admits that under the terms of said contract the Construction Company was to receive the stock and bonds of the Air Line
423 in certain amounts fixed in said contract for its services; this defendant denies that it brought the contract between the said Construction Company and the Air Line, whereby the said Construction Company turned over and delivered said railroad to the said Air Line, but on the contrary states that this defendant had nothing to do with said transactions; this defendant denies that said railroad was in an uncompleted condition at the time same was turned over to the Air Line by the Construction Company, but admits that at the time said railroad was so turned over to the Air Line the Air Line assumed all the liabilities and took over all of the assets of the said Construction Company; this defendant states that the facts in this behalf are as follows: This defendant states that for and on behalf of said Air Line and the said Construction Company, and at their request, it rendered valuable services to the said Construction Company in selling for the account of the said Construction Company all of the stocks and bonds received by said Construction Company in payment for its work under said Construction Contract; and

the said Construction Company recognizing its obligation to compensate this defendant for its expenses and services in that behalf, at a meeting of the Board of Directors of said Construction Company duly convened, adopted a resolution that there should be issued by the said Construction Company to this defendant two hundred (200) shares of the full paid capital stock of the said Construction Company in compensation for its services aforesaid and said two hundred (200) shares of capital stock were issued to this defendant in accordance with said resolution; and this defendant denies that it subscribed for the capital stock of the said Construction Company or any part thereof except as above stated; and this defendant denies that it ever became liable to the said Construction Company on account of such subscription; and this defendant denies that any subscription by it to the capital stock of the said Construction Company was taken over by the said Air Line as one of the assets of the said Construction Company at the time the said Air Line assumed the liabilities and took over the assets of the said Construction Company or at any other time. Defendant is not advised as to whether or not the said two hundred (200) shares of stock of the said Construction Company received by this defendant were the same shares as were subscribed for by A. E. Stilwell, trustee, as alleged in the amended ancillary bill, but states that if they were the same shares the said subscription was fully paid as hereinbefore set forth, by the services rendered by this defendant and in accordance with the said resolution. This defendant further states that it rendered valuable services to the said
424 Air Line in and about obtaining the franchises of said Air Line, procuring right-of-way, and other services, and that the only compensation received by this defendant from the said Air Line for said services was thirteen (13) first mortgage bonds of the said Air Line and five hundred (500) shares of its stock; that the said stock at that time had no value whatsoever and that this defendant afterward sold the said bonds at eighty cents (80c.) on the dollar, realizing therefor the sum of Ten Thousand Four Hundred Dollars ($10,400.00), being the highest obtainable price of said bonds at said time and that said sum of ten thousand four hundred dollars ($10,400) and said five hundred (500) shares of worthless stock constitute the only compensation received by this defendant from the Air Line for its services rendered as aforesaid and that said compensation was less than this defendant's said services were worth. This defendant denies that it caused any fictitious entries to be made upon the books of the Air Line cancelling said alleged stock subscription for two hundred (200) shares of Construction Company stock, and denies that it caused any fictitious entries of any kind to be made on the books of the Air Line at any time; and this defendant states that if the said alleged charge against this defendant on account of said alleged stock subscriptions was cancelled, it was a proper thing for the Air Line to do for the reason that this defendant had long before paid for said stock as hereinbefore set forth.

103. This defendant in answer to paragraph B on page 70 of said amended bill, denies that it caused the Air Line to pay any overdraft of the Construction Company and this defendant denies that

the Air Line paid any debts of the Construction Company except such as it had expressly assumed and agreed to pay and this was done by the Air Line through its authorized officers and agents and with the consent and approval of the stockholders of said Air Line.

104. This defendant in answer to paragraph 13 on page 70 of said amended ancillary bill, denies the same but states that the facts were as follows: That in November, 1892, the Belt Company gave its note to the West Kansas City Land Company for $5600 upon certain terms and conditions expressed in said note and this defendant guaranteed the payment of said note and interest to the West Kansas City Land Company, thereby making this defendant liable on account of the said note of the Belt Company, and that thereupon and on or about the same time this defendant charged the Belt Company with the sum of $5600, being the amount of the liability assumed by this defendant; that said charge was made by this defend-
425 ant with the full knowledge and consent and approval of the Belt Company; that afterward demand was made upon this defendant for the payment of said note by the Land Company, the payee therein, and this defendant, at the request of the Belt Company, refused to pay the same for the reason that the Belt Company was claiming that the Land Company had not complied with the terms and conditions of the contract on account of which said note was given, and thereupon the said Land Company brought suit against the said Belt Company, and such proceedings were had in said suit that judgment was rendered against the Belt Company for the amount due on said note, and afterward the complainants, as receivers of the said Belt Company, paid the same, but this defendant states that said judgment was not rendered nor was it paid until long after the institution of this suit; that by reason of the premises the complainants are entitled to have credit upon their indebtedness to this defendant for the said sum of $5600, and this defendant is willing that complainants should have such credit; this defendant denies, however, that the said Belt Company ever paid to this defendant the sum of $5600 in cash on account of said note or any other sum on said account, but states that said item of $5600, charged by this defendant against the Belt Company was a mere charge and was made for the reason that this defendant had guaranteed said note and had become liable thereon, and it transpiring subsequent to the bringing of this suit that the said Belt Company has discharged its own liability on said note said charge so made by this defendant, though properly made at the time, should now be credited upon the indebtedness owing by the said Belt Company to this defendant.

105. In answer to paragraph 14 on page 71 of said amended ancillary bill, this defendant states that it is true that on or about November, 1899, a judgment was rendered against the Belt Company for the sum of $5000 in favor of one Zumwault in a suit brought by him to recover for personal injury sustained by him; that it is true that the Belt Company appealed said cause to the Supreme Court of Missouri, and gave an appeal bond, as required by law, and that this defendant at the request of the Belt Company, became surety on said appeal bond and that to indemnify this defendant for its liability

on said bond the Belt Company deposited with this defendant the sum of $5000; that afterward such proceedings were had that the said judgment and said suit was on the 19th day of May, 1903, and long after the institution of this suit, reversed without being remanded, and that thereupon the liability of this defendant on said bond ceased; this defendant denies that it has refused since the re-
426 versal of said cause to account for or pay over to said Belt Company or its receivers the said sum of $5000, but on the contrary states that this defendant has at all times been willing, since the reversal of said cause, that the said receivers of said Belt Company should have credit on their indebtedness to this defendant for the said sum of $5000, and this defendant denies that said receivers are entitled to any interest on the said sum of $5000, no agreement having been made by the parties to the transaction that any interest should be paid by defendant thereon, and neither of said parties intending that any such interest should be paid.

106. In answer to paragraph 15 on page 71 of said amended ancillary bill this defendant denies it was its habit in the disposition of securities of the Belt Company or any of its constituent companies to make sale of said securities at such prices as this defendant should decide upon, or that when such sale was made to credit the said companies with a less amount than was received by this defendant, or that it was the habit of practice of this defendant to report to said companies that such sales had been made for a less amount than was actually received, but on the contrary this defendant states that no sales were made by it for the account of said companies of any of said securities except at prices previously agreed upon with the said companies, and this defendant denies that it in any instance negotiated for the sale of any such securities, and after finding the price at which it could dispose of the same purchased such securities itself from the said companies, and denies that any such transactions ever took place, and denies that this defendant ever made any profit through such transactions; on the contrary, this defendant states that no securities were purchased by it from the said companies or either of them, except at prices openly and fairly agreed upon between it and the said companies, and that said prices were usually much higher than the prices at which said companies were selling said securities to other persons.

107. This defendant in answer to paragraphs 16, 17 and 18 on pages 72 to 74, inclusive, of said amended ancillary bill, denies that at any of the times therein mentioned the Belt Company was insolvent, and denies that this defendant at any time caused the said Belt Company to declare any Dividend, but on the contrary states that the said Belt Company at all of said times was managed and controlled solely by its own adult stockholders, officers and directors, and that defendant had nothing to do with the declaration of said dividend; this defendant further denies that at the time said dividends were declared it owned a large amount of stock of the said
427 Belt Company, but on the contrary states that the amount of stock at such times owned by this defendant was comparatively insignificant, and that there is no reason in law or in equity

why the Belt Company should not have paid its own dividends out of its own funds; this defendant states that there is no reason in law or in equity why the dividends of the said Belt Company should have been paid out of the funds of this defendant.

108. This defendant in answer to paragraph 19 on page 74 to said amended ancillary bill, denies that it caused the Union Terminal Company to execute its bonds in the sum of $2,000,000 or in any other sum; denies that it caused the said Union Company to secure the said bonds by mortgage; denies that it caused the Union Company to sell bonds or any of them to the Belt Company; denies that it caused the said Belt Company to sell any of said bonds to this defendant; denies that it wrongfully sold any of said bonds to anybody; denies that this defendant caused the Belt Company to guarantee the payment of said bonds of the Union Company; denies that it caused the Belt Company to pay any interest on the bonds of the Union Company; this defendant admits, however, that it purchased more than 500 of said Union Company bonds from the Belt Company and states that it paid the said Belt Company for said bonds the par value thereof or 100 cents on the dollar, which was far in excess of what the said bonds were worth, and this defendant admits that it purchased other bonds of the said Union Company from the said Belt Company at prices ranging from $800 to $950 per bond, the par value of which was $1000 per bond, and that the prices paid by this defendant to the said Belt Company were far more than the said bonds were worth.

109. In answer to paragraph 21 on page 75 of said amended bill, this defendant states that the charge therein referred to, as having been made against the Belt Company, was on account of money advanced for the said Belt Company and was made with the full knowledge, consent and approval of the Belt Company at the time and that said charge was a proper charge.

110. In answer to paragraph 22 on page 76 of said amended ancillary bill, this defendant denies that it caused the incorporation of the Fruit Auction and Cold Storage Company; states that said Company was organized at the instance and request of said Belt Company and for its benefit; states that said company was organized for
the purpose of increasing the freight traffic on the line of the
428 said Belt Railroad Company; that for this purpose said company established a warehouse and trading room on the line of said Belt Company and that at said trading room commission merchants, dealers in produce and fruit, conducted an exchange, and that at said warehouse shipments of fruit and produce were received by means of the line of the said Belt Company, and that by reason thereof the said Belt Company derived a large revenue through the diversion of shipments of fruit and produce from other lines to its line, and that said company and its operations were conducted solely for the benefit of the said Belt Company; that at the request of the said Belt Company this defendant advanced moneys to the said Fruit Auction Company and that to reimburse this defendant for the advancements so made, at the request and for the benefit of the Belt Company and not otherwise, the Belt Company transferred

to this defendant 286 shares of stock of the Belt Company, but this defendant denies that said shares of stock were of the value of $6290, but on the contrary states that said stock had little, if any, value at that time.

111. In answer to paragraph 23 on page 76 of said amended ancillary bill, this defendant states that it is true that it made charges against the Belt Company aggregating the sum of $6500 on the dates stated in said bill, but states that said charges were made because this defendant on said dates, at the instance and request of the Belt Company, paid drafts aggregating said sum of $6500, which drafts had been drawn on the said Belt Company and that said drafts were for the obligations of the said Belt Company, and this defendant, having paid the same, was entitled both in law and in equity to charge the amount thereof to the Belt Company, and this defendant states that if the said Belt Company lost any money in speculation there is no reason in law or in equity why this defendant should pay such losses; that all of such charges were fully known to, ratified and acquiesced in by the said Belt Company, its officers and directors, and complainants are now estopped from questioning the same.

112. In answer to paragraphs 24 and 25 on page 77 of said amended ancillary bill, this defendant again denies that it at any time appropriated or converted to its own use any stock of the Belt Company or the Union Company or of any other company.

113. In answer to paragraph 26 on page 78 of said amended ancillary bill, this defendant states that it has already hereinabove fully answered the same, and again denies that it constructed the said Air Line but states that same was constructed by the said Construction Company; that when the said Construction Company delivered said road to the said Air Line, to wit, in the year 1892, the
429 Construction Company turned over to the Air Line all of its books of account showing in detail the cost of the said Air Line, and the said books of account have ever since been in the possession of the said Air Line, and the said Belt Company and their receivers, and that all the facts and circumstances surrounding the transactions of the said Air Line and the cost thereof were fully known to the stockholders and directors of the Air Line and the Belt Company at the time the said line was accepted from the Construction Company, and complainants are now estopped from complaining of the result of such contract, and this defendant again denies that it made any profit on the said construction contract, and avers that it had nothing to do with the said Construction Company except as a banking institution, selling the stocks and bonds received by the Construction Company in payment of its work for which stocks and bonds this defendant has fully accounted many years ago.

114. In answer to paragraph 27 on page 78 of said amended ancillary bill, defendant states that the Northern Townsite Company was a corporation organized for the purpose of buying and selling and otherwise disposing of land, particularly lots in certain townsites located on the line of the said Northern Railroad and that the said Belt Company and defendant and others were stockholders of said Townsite Company; that the only lands in which the said

Townsite Company had or claimed to have any interest were the lands upon which were situated two townsites, one called Trimble and one called Braley—and that these lands were bought and paid for wholly by the said Townsite Company; that there were other lands standing in the name of the Townsite Company which had been paid for wholly by the said Belt Company, but the said Townsite Company at no time claimed to have any interest in the said lands paid for by the Belt Company as aforesaid. The way it came about that the said Townsite Company had lands standing in its name which were owned entirely by the Belt Company, was as follows and not otherwise: The Belt Company under and by virtue of its Construction contract with the said Northern Company, was under a contract duty to furnish right-of-way for the Northern Company, and the right-of-way agent of the Belt Company, in acquiring such right-of-way, frequently found it expedient or necessary to buy a whole tract of land upon which said right-of-way was to be located and which tract of land was much larger than was needed for right-of-way or depot purposes and the title of all of said land over and above the amount necessary for right-of-way and depot purposes, was, by the Belt Company for its own convenience and for its own purposes, put, temporarily, in the name of the said Townsite Company, and the portion of
430 said land which was needed by the said Northern Company for right-of-way, was by the said Townsite Company, upon request of the Belt Company, deeded to the said Northern Company, but the Townsite Company at no time claimed to have any interest in any lands which had been bought and wholly paid for by the said Belt Company; its business was confined solely to the selling of lots in the said townsites which had been bought and paid for wholly by the said Townsite Company, and that as to the lands which had been so bought and paid for wholly by the Belt Company, the Belt Company treated the same as its own and collected the rents and profits thereof, none of said rents and profits being collected by the said Townsite Company; that none of said lands exclusive of said right-of-way, the title to which was put by the Belt Company in the name of the Townsite Company, was needed for right-of-way or railroad purposes, but was held and owned by the said Belt Company in the manner aforesaid, for the purpose of dealing in real estate and for the purpose of making a profit thereby; that the Townsite Company held the title of said lands exclusive of said townsites, wholly for the convenience and accommodation of said Belt Company, and at all times stood ready to convey the same to the Belt Company or to such other person or corporation as the said Belt Company might direct. Defendant denies that the said Belt Company was the only stockholder of the said Townsite Company, but on the contrary states that other persons and corporations were also stockholders of the said Townsite Company and contributed largely to the purchase price of said townsite lands; and defendant denies that the said Townsite lands are in equity the lands of the Belt Company, but said lands are the property of the said Townsite Company and complainants are

not entitled to any credit upon their indebtedness to defendant by reason of the transactions of the said Townsite Company or by reason of the other matters and things set forth in said amended bill. It is true that defendant at the request of the said Townsite Company, from time to time, sold through its land department certain lots and parcels of land in the said townsites of the said company and that it charged a commission therefor, as it had a right to do, and said commission was fully agreed upon between the members to the transaction and was fair and reasonable (150).

115. Defendant denies that it at all times, or at any time dominated or controlled the said townsite company, but states that said townsite company was dominated and controlled by its own officers, stockholders and directors; and defendant denies that it caused the Belt Company to have the title to any of its lands taken in the name of the said Townsite Company, but on the contrary states
431 that anything that was done in that behalf was done as the free act and deed of the said Belt Company.

116. In answer to paragraph 28 on page 80 of said amended ancillary bill, this defendant denies that it caused the Belt Company to purchase locomotives No. 51 and 52, therein mentioned, or any other locomotives, or that it ever caused the Belt Company to purchase anything, but on the contrary states that whatever the Belt Company did in that behalf it did of its own free will and accord, and this defendant denies that it made any charge against the said Belt Company for rental or otherwise except such as was justly due from the said Belt Company, and this defendant states that said charge has been fully settled by the Belt Company many years ago, and complainants are now estopped from questioning the same.

117. This defendant in answer to paragraph 29 on page 81 of said amended ancillary bill, denies that on or about July 1, 1898, or at any other time it caused the Belt Company to lease from the Second Street Company the lots in said bill described or any other lots, but on the contrary states that if any such lease was made it was made by the proper officers, directors and stockholders of the Belt Company, who were all of sound mind and able to manage their own affairs, and this defendant denies that it caused the Belt Company to execute a lease to all or any of said land to the Wells, Fargo Express Company, and this defendant denies that the said Second Street Company was one of the auxiliary companies of this defendant, and this defendant denies that it at all times or at any other time dominated or controlled the said Second Street Company, and this defendant states that whatever leases or contracts were made between the said Belt Company, Second Street Company and the said Express Company, were made in the ordinary course of business between said companies, and this defendant had no connection whatsoever therewith.

118. As to so much of the said amended ancillary bill as seeks an account of the money, property or effects of the said Belt, Union, Air Line, Consolidated, Suburban, Kansas City Terminal Construction, Elevator, Improvement, Townsite or Northern Companies, coming into the hands of this defendant prior to the 6th day of

September, 1895, or that seeks a satisfaction for or in respect of any money or property received by this defendant for or on account of any of the above named companies or with respect to any of the matters and things set forth in the said amended ancillary bill as having taken place or transpired prior to the said date,
432 this defendant says that all of the said matters and things pretended to have transpired, and all of the said money, property and effects pretended to have been received by this defendant, if any such were received, transpired and were received by this defendant more than five years before the commencement of this action or any action whatsoever, and that if the said complainants in the said amended ancillary bill had any cause of action or suit against this defendant for or concerning any of the said matters, which this defendant does not admit, that such cause of action or suit did not accrue or arise within five (5) years before the said amended ancillary bill or the said original bill herein was filed or this defendant was served with process, nor did this defendant at any time within five (5) years before the said bills were exhibited or process sued out against this defendant, promise or agree to come to any account or make satisfaction or agree to pay any sum or sums of money for or by reason of any of the said matters, nor was there any occasion for it so to do; and that by a certain Act of the General Assembly of the State of Missouri, for the limitation of actions and suits at law, it was enacted as is shown by Sections 6773, 6774 and 6775, of the Revised Statutes of the State of Missouri, for the year 1889, as follows, to-wit:

SEC. 6673. "Civil actions, other than those for the recovery of real property can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued."

SEC. 6774. "Within ten years: First, an action upon any writing, whether sealed or unsealed, for the payment of money or property; second, actions brought on any covenant of warranty contained in any deed of conveyance of land shall be brought within ten years next after there shall have been a final decision against the title of the covenantor in such deed, and actions on any covenant of seizin contained in any such deed shall be brought within ten years after the cause of such action shall accrue; third, actions for relief, not herein otherwise provided for."

SEC. 6775. "Within five years: First, all actions upon contracts, obligations or liabilities, express or implied, except those mentioned in section 6774, and except upon judgments or decrees of a court of record, and except where a different time is herein limited; second, an action upon a liability created by a statute other than a penalty or forfeiture; third, an action for trespass on real estate; fourth, an action for taking, detaining or injuring any goods or chattels, including actions for recovery of specific personal prop-
erty, or for any other injury to the person or rights of an-
433 other, not arising on contract and not herein otherwise enumerated; fifth, an action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued

until the discovery by the aggrieved party at any time within ten years, of the facts constituting the fraud."

The defendant states that the statutes have been in force during the whole time in which the said matters set forth in said amended ancillary bill are pretended to have transpired and ever since the said pretended causes of action are alleged to have accrued; and this defendant pleads the several matters aforesaid in bar to so much of the said complainant's said demands as aforesaid and prays the judgment of this Honorable Court thereon.

119. For further plea this defendant says ever since defendant had any dealings of any kind with the said Kansas City Terminal Construction, Fruit Auction, Belt, Union, Suburban, Air Line, Consolidated, Northern Elevator, Townsite *or* Improvement Companies, the said Belt Company and all of said companies have had full knowledge of all the facts and circumstances in connection with the said dealings and in connection with the disposition made of the stocks and bonds of the said companies or any of them and of the organization and management of the said companies and of the condition of their property and assets and of all the pretended acts and doings of this defendant in connection therewith, if any such acts were done; and that the said companies, including the said Belt Company, have had full knowledge of all such facts and circumstances in connection with said transactions ever since the same were had and done, if any such transactions took place; and that the said Belt Company and the other companies above named have taken no steps to enforce any rights which it had or has or claims to have, arising out of such transactions and that the said Belt Company and the other companies above named and the complainants in the said amended ancillary bill have been guilty of laches in the premises and should not now be permitted to come into a court of equity and assert any claim arising out of said transactions or to question the same, and defendant craves the same benefit from this defense as if it had formally pleaded the same in bar of said amended ancillary bill or had demurred thereto.

120. As to so much and such part of the said amended ancillary bill as seeks an account of and concerning the dealings and transactions therein alleged to have taken place between this defendant and any of the other companies therein named, this defendant says

434 that long prior to the filing of the said bills of complaint herein, from time to time and at least once in each and every month during the whole time that this defendant had any dealings with the said Suburban, Belt, Union, Air Line, Consolidated, or any of the other companies therein mentioned, this defendant caused to be exhibited to the said companies with which said dealings were had, a full, complete and correct statement in writing, of the accounts between it and the said companies or any of them, counterparts of each item of which were delivered to the said companies respectively, of all sums of money, and all property which this defendant had before that time, by the order and direction and for the use of the said companies received and of all manner of things thereunto relating or at any time prior thereto

depending between this defendant and the said companies, and in respect whereof the said bills of complaint have since been filed; and the said companies, through their proper officers, after a strict examination of the said accounts and every item and particular thereof, which accounts this defendant avers to have been true and just did approve and allow the same and did pay to this defendant in whole or in part the balances shown to be due this defendant, either in cash or by their promissory notes duly executed and delivered, or did agree to pay the said balances to this defendant, as the case might have been; and that from time to time, prior to the filing of said bills of complaint, each and every matter and thing complained of in the said amended ancillary bill was settled by the said Belt Company, either in cash or by the execution by it to defendant of notes evidencing the indebtedness shown to have been due defendant from said Belt Company by the said statements, and that in the said indebtedness were included, all and singular, the said matters complained of in the said amended ancillary bill, and the said notes were executed by the said Belt Company with full knowledge on the part of its officers and directors of the facts and circumstances from which said indebtedness arose, and that each and all of the matters aforesaid complained of in the said amended ancillary bill were many years ago and long prior to the commencement of this suit, fully settled and adjusted between defendant and the said Belt Company through the execution by the said Belt Company from time to time of it- notes given in part payment of the accounts so exhibited by the defendant to the Belt Company as aforesaid and that said notes have long since been paid and settled and that at the time said notes were executed to defendant the stockholders and officers and directors of the Belt Company and of all the other companies with whom any such dealings were had, were fully informed as to all the matters and things on account of which said notes were given and that the notes executed by the said Belt Company and which are now held by defendant, are
435 notes evidencing the indebtedness of the Belt Company arising long after the notes first hereinbefore referred to were paid and settled; and the action of the officers and directors of the Belt Company and the other companies hereinabove named in executing said notes, was afterward fully ratified and confirmed by the stock-holders of the said companies; and this defendant pleads the several matters aforesaid in bar of so much of the said amended ancillary — as prays an account herein and defendant prays the judgment of this Honorable Court thereon.

121. This defendant further states that long prior to the commencement of this action there was a complete accord and satisfaction between this defendant and all of the companies hereinabove named with respect to all of the matters and things set forth in the said amended ancillary bill, excepting only the matters set forth in paragraphs 104 and 105 hereof, which matters and things relate solely to facts and circumstances arising since the institution of this suit, and for which the complainants were not entitled to have credit on their

indebtedness to respondent until long after the said bills of complainants were exhibited.

122. Further answering, defendant states that from and after the first day of January, 1898, continuously up until the 1st day of April, 1900, defendant at sundry and frequent times loaned and advanced to the said Belt Company at its instance and request large sums of money, aggregating more than a half million dollars, for the purpose of making necessary improvements in the said Belt Company's road, and that the said Belt Company used the said money for its own purposes; that the said Belt Company from time to time repaid to this defendant some of the money so loaned and advanced by it as aforesaid, but left unpaid a very large portion thereof, for a part of which balance promissory notes, hereinafter described, were duly executed and delivered by the Belt Company to this defendant and to secure which certain stocks, bonds and property owned by the Belt Company, and hereinafter described, were pledged as collateral security; that the said Belt Company, long after any officer of this defendant had ceased to have any connection with the said Belt Company, subsequently recognized said indebtedness, evidenced by said notes, as just and valid and subsequently promised to pay the same; that during the month of June, 1900, the Belt Company at a time when no officer of this defendant had any connection therewith paid, on account of some of the said promissory notes, large sums of money which were duly credited thereon, as is hereinafter shown, and promised to pay the remainder due on said notes and the other indebtedness hereinafter described and owing to this defendant.

436 123. That this defendant now owns and holds the following promissory notes, duly executed and delivered as aforesaid to this defendant by the said Belt Company, all of which notes are long past due and unpaid, to-wit:

One note dated March 31, 1899, due July 2, 1899, for $50,000.00, with interest from date at the rate of six per cent per annum, on which there has been paid and credited on June 14, 1900, $12,500.00.

One note dated July 26, 1899, due on demand for $203,900.00, with interest at 6 per cent per annum from date, upon which there was paid and credited on June 11, 1900, $9,993.65.

One note dated October 23, 1899, due on demand, for $7,162.40 with interest at 6 per cent per annum from date.

One note dated November 7, 1899, due January 8, 1900, for $50,000.00 with interest after maturity at 8 per cent per annum, upon which there was paid and credited June 14, 1900, $12,500.00.

One note dated January 25, 1900, due May 25, 1900, for $25,000.00, with interest after maturity at 6 per cent per annum; interest paid to September 1, 1901.

One note dated February 8, 1900, due May 12, 1900, for $109,500.00 with interest from maturity at 8 per cent per annum, on which there was paid and credited October 23, 1900, as proceeds of sale of collateral made by the National Bank of Commerce, $110,250.00 leaving a balance due on October 23, 1900, of $3,240.66.

One note dated September 21, 1899, for $23,056.48, with interest after date at 8 per cent per annum.

One note dated February 9, 1900, due June 11, 1900, for $10,400.00, with interest from maturity at 6 per cent per annum.

124. In addition to above described promissory notes the Belt Company is justly indebted to this defendant on an open book account, arising subsequent to the execution by the said Belt Company of the said notes, and arising on account of money advanced at various times and in sundry sums by this defendant to, and paid out for the use and benefit of the said Belt Company, at its special instance and request, parts of which said money the said Belt Company, from time to time, repaid and was duly credited therewith, all of which sums of money, so advanced and paid out for the use and benefit of the said Belt Company, together with the payments and credits thereon, are truly set out and appear from the
437 bill of items hereto annexed and marked "Exhibit A," which bill of items shows the balance due to this defendant on said account on June 4th, 1900, as being $43,713.32.

125. And this defendant states that the stocks, bonds and property, which were assigned to it by the said Belt Company as collateral security for the said indebtedness, are as follows, towit:

10,000 shares of the capital stock of the Union Company.

4,997 shares of capital stock of the Union Company.

4,994 shares of capital stock of the Air Line.

1,120 shares of the capital stock of the Central Improvement Company.

439 shares of stock of the Northern Townsite Company.

425 shares of stock of the Missouri Elevator and Terminal Company.

25 shares of stock of the Fairmount Amusement Company.

13,920 shares of stock of the Kansas City Northern and Connecting Railroad Company.

67 9-10 second mortgage bonds of the said Northern Connecting Company.

23 first mortgage bonds of the Kansas City and Northern Connecting Railroad Company.

26 first mortgage bonds of the Kansas City Northern and Connecting Railroad Company.

315 first mortgage bonds of the Kansas City Northern and Connecting Railroad Company, also,

A certain account and claim of the Belt Company against the Kansas City, Pittsburg & Gulf Railroad Company, consisting of charges for material furnished and labor performed, switching charges and terminal rentals, due from the said Gulf Railroad Company to the said Belt Company, which account on its face amounts to $132,805.44, also,

343 1940-2240 tons of steel rails, also,

16 1712-2000 tons of fastenings.

126. And defendant states that the above enumerated promissory notes executed by the said Belt Company and now held by this defendant, were executed by the proper officers of the said Belt Com-

pany by authority expressly conferred upon said officers at
438 meetings of the Board of Directors of the said Belt Company duly convened and held, and that afterward, on February first, 1900, at a meeting of the Board of Directors of the said Belt Company duly convened and held, a majority of the directors being present, a resolution was regularly adopted ratifying the action of said officers in executing said notes and in delivering the said property to defendant as collateral security therefor.

127. This defendant states that it has heretofore sold certain of said collateral security with the knowledge and consent of the said Belt Company and has applied the same to the payment of the said promissory notes, and that as to the remaining collateral security this defendant has been temporarily enjoined, at the suit of the Cambria Steel Company in the above entitled original cause, from selling or otherwise subjecting certain of the above named stocks and bonds, so held by this defendant as collateral security, toward the payment of the indebtedness of the Belt Company to this defendant, but that certain of said collateral security has, under the order of this court, been sold by this defendant and the proceeds of certain sales are now held by this defendant in accordance with the order of this court to await the final determination of this cause. As to the said claim and account of the Belt Company against the said Gulf Company, assigned to and held by this defendant as collateral security for the said indebtedness, this defendant states that said claim and account has been made by this defendant the subject of an intervening petition in the suit of the State Trust Company, complainant, against said Gulf Company and others, defendants, filed in this court, and that the said intervention is still pending and undetermined.

128. As to the steel rails and fastenings, hereinabove mentioned, this defendant states, that notwithstanding the said Belt Company transferred and assigned the same to this defendant as collateral security as aforesaid, it afterward refused to actually deliver the same to this defendant and this defendant was therefore obliged to bring suit in replevin therefor, which suit was brought in the State Court of Jackson County, Missouri, and resulted in a judgment in favor of this defendant and that this defendant has sold the said steel rails and fastenings, and has applied the same toward the payment of the said open account thereby reducing the balance due on said open account to the sum of $31,809.49.

129. And this defendant again shows to the court that it has no interest in the property of the Central Improvement Company or of the said Amusement Company or of the said Missouri Elevator and Terminal Company, except that it holds certain stock of the
439 said companies as collateral security, as aforesaid, for the indebtedness due this defendant by the said Belt Company, and that it holds certain mortgage liens upon the property of the said Elevator Company.

130. And this defendant further states and shows that it has frequently heretofore made demand upon the said Belt Company and upon the complainants in the said amended ancillary bill, for the

payment of each and all of said promissory notes and said book account, and that this defendant on the 1st day of April, 1900, made special demand upon the said Belt Company for the payment of all of said promissory notes which are payable on demand, and also on that date made demand on the said Belt Company for the payment of the said open book account; that the said Belt Company has failed and refused to pay the said notes or account or any part thereof.

131. The defendant submits to the judgment of this Honorable Court and humbly insists that this suit is altogether unnecessary and vexatious and that even if complainants had been entitled to any such relief as is prayed by the said bill, the same might have been obtained by proceedings at law, but defendant says that a large sum of money has been due for a long time on account of said promissory notes and said open book account and now is justly due and owing to it from the said Belt Company and complainants and that during the whole of the transactions in the said bill mentioned, the said Belt Company has repeatedly acknowledged the accuracy of the accounts rendered by defendant to it and has treated the same as being, as in fact they were, and are settled accounts, and has treated the said notes and open book accounts as justly owing and due to defendant and defendant claims the same benefit from this defense, as if it had pleaded the same to the said bill.

132. All of which matters and things hereinbefore stated this defendant is ready to aver, maintain and prove as this honorable court may direct, and hereby prays that judgment may be rendered by this Honorable Court against the Kansas City Suburban Belt Railroad Company and the said complainants as its said receivers, in favor of this defendant, for the amount of each and all of the said promissory notes, together with interest thereon, and for the amount of the said open book account with interest thereon from the 1st day of April, 1900, and that this defendant may have judgment against the said Belt Company for any and all further sums of amounts that may be found due this defendant; that the court may by proper order protect and enforce the interest of this defendant in and to the stocks, bonds, accounts and property, so deposited with and held by defendant as collateral security as aforesaid, and that the said Belt Company and its said receivers
440 may be ordered and directed to pay to this defendant whatsoever sums of money this defendant may be found entitled to herein, and that this defendant also have judgment for its reasonable costs, charges and expenses in this behalf most wrongfully expended and sustained and for such other and further relief as to the court shall seem meet and just in the premises.

GUARDIAN TRUST COMPANY,
By HARRY S. MECARTNEY AND
J. C. ROSENBERGER,
Its Solicitors.

EXHIBIT A.

Kansas City Suburban Belt Railroad Company, Debtor, to Guardian Trust Company.

1899.				
Sept. 25.	To payment of draft of W. S. Taylor, dated Sept. 23, 1899, for payment of 20 coupons Union Terml. Ry., due Aug. 1, 1899.....	$500.00		
Sept. 26.	To payment draft of W. S. Taylor, dated Sept. 26, 1899, for payment of 40 coupons Union Terml. Ry., due Aug. 1, '99.....	1,000.00		
	To expressage on 65 coupons Union Terml. Ry. from New York to Philadelphia.....	.50		
	To proportion of Philadelphia office expense for month of August, 1899.....	4.50		
Sept. 27.	To interest on note for $25,000, dated Sept. 25, 1899, from that date to Jan. 25, 1900, 122 days at 6 per cent.....	508.33		
	To revenue stamps on note of $23,056.48 given by them to Trust Co., dated Sept. 21, 1899.....	4.62		
	To telegrams	2.38		
	To telegrams	.59		
Sept. 29.	To revenue stamps on note of $25,000 given to Trust Co., dated 9-25-99.....	5.00		
	To revenue stamps on note for $25,000 given First Nat. Bank, K. C.....	5.00		
	To payment of semi-annual interest, due Oct. 4, 1899, to Provident Life & Trust Co., on two notes of $5,000 each at 6 per cent, held by them, dated April 4, 1890.....	300.00		
Sept. 30.	To payment to Nat. Bank of Commerce for draft on New York remitted for coupon interest	40,000.00		
	By proceeds of sale of draft by K. C. Suburban Belt R. R. Co. at 30 days on J. de Goeijen, jr., for florins 100,000 draft endorsed by Trust Co., amount to apply as credit to above charge of $40,000.....	.....	$39.437.50	
Oct. 3.	To revenue stamps on draft on J. de Goeijen, jr., and telegrams regarding draft.....	19.58		
Oct. 3.	By collection from J. de Goeijen, jr., acct. interest on $89,333.33 for the month of September	.....	521.10	
441				
Oct. 4.	To payment of 20 coupons Union Terml. Railway, due Aug. 1, 1899.....	500.00		
Oct. 10.	To revenue stamps on 13,920 shares stock K. C. & N. C. R. R. Co. transferred.....	279.40		
Oct. 11.	To clerical services, Oct., 1899.....	17.00		
	To funds deposited with Drexel & Co. for payment of coupons of Union Terml. Railway and Consolidated Terml. Ry. Co....	1,000.00		
Oct. 14.	To telegrams.....	5.76		
Oct. 19.	To expressage N. Y. to Philadelphia, on 20 coupons Union Terml. Ry.....	.13		
Nov. 7.	To interest on note of $50,000, dated March 31, 1899, renewed by note maturing Jan. 9, 1900. Interest March 31, 1899, to Jan. 9, 1900, and 6 per cent.....	2,366.67		
Nov. 8.	By collection from J. de Goeijen, jr., of interest on $89,333.33, month of Oct., 1899..	.....	538.48	

Nov. 29.	To interest on daily balances, September, 1899			
	To interest on daily balances, October, 1899.		37.22	
Dec. 1.	To interest on daily balances, November, 1899		22.74	
Dec. 6.	By collection from J. de Goeijen, jr., of interest on $89,333.33 for month of November, 1899.....		33.35	
1900.			.....	521.10
Jan. 2.	By proceeds of sale of draft by K. C. Suburban Belt R. R. on J. de Goeijen, jr., bearing endorsement of Trust Co., draft for florins 37,735.84, sold at 39¾		.....	15,000.00
Jan. 2.	To drafts of Kuhn & Co. of London, dated Dec. 20, 1899, on Trust Co., as endorser, to take up drafts on J. de Goeijen, jr., Sept. 30, 1899, for $39,437.50 not paid by him, $41,000.00; less allowances by Kuhn & Co., acct. excess in exchange, $667.40...	40,332.60		
Jan. 4.	By collection of interest from J. de Goeijen, jr., on $89,333.33, month of December, 1899		.....	538.48
Jan. 25.	To draft of Kuhn & Co., London, dated Jan. 12, 1900, on Trust Co., as endorser to take up draft on J. de Goeijen, jr., Jan. 2, 1900, not paid by him.....	15,000.00		
Feb. 2.	By cash on account.....		.....	3,245.13
May 17.	To clerical services, months of November and December, 1899, January, February and March, 1900, five months, at $17.00...	85.00		
June 4.	To interest on daily balances:			
	Month of Dec., 1899..... $34.95			
	Month of Jan., 1900..... 200.65			
	Month of Feb., 1900..... 224.36			
	Month of Mar., 1900..... 254.01			
		713.97		
Sept. 26.	By net proceeds of sale of rails and fastenings turned over to Trust Co. under bill of sale: 343 1940/2240 tons rails at $33.00, $11,347.58; 16 1712/2000 tons fastenings at $33.00, $556.25, Total, $11,903.83.			
	Less expenses: Premium paid on bond given in replevin suit, $300.00.			
	Commission paid A. G. Hay: 343 1940/2240 tons rails at 25c., $85.96.			
	16 1712/2000 tons fastenings at 25c., $4.21.			
	Loading cars, $17.85.			
	Demurrage on cars, $194.00.			
	Switching $81.25.			
	Expenses of A. J. Singer from Chicago to St. Louis, acct. sale, $87.50—$770.77.....		.....	11,133.06
		$102,744.34		$70,934.85
	Balance due Trust Co.....			$31,809.49

442 Afterwards, to-wit, on the 7th day of August, 1905, the Answer of T. T. Crittenden, as Receiver of the Central Improvement Company, to the amended intervening petition of The Kansas City Southern Railway Company was filed. Said Answer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

No. 2468.

CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERMINAL Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants; The Kansas City Southern Railway Company, Intervener.

Bill.

Answer of T. T. Crittenden, as Receiver of the Central Improvement Company, and Central Improvement Company to the Amended intervening Petition of the Kansas City Southern Railway Company.

The Central Improvement Company, one of the defendants in the above entitled cause, and T. T. Crittenden, as Receiver of the Central Improvement Company, defendants in the amended intervening petition of The Kansas City Southern Railway Company, for their separate answer to said amended intervening petition, answering, say:

These defendants admit that the intervenor is a corporation, duly organized and existing under the laws of the State of Missouri, as a railway corporation, and that it was incorporated according to law in March, 1900.

These defendants neither admit nor deny that the mortgages or deeds of trust executed and delivered by The Kansas City Suburban Belt Railroad Company, Consolidated Terminal Railway Company, Kansas City & Independence Air Line, Union Terminal Railroad Company, and the Kansas City, Pittsburg & Gulf Railroad Company, described in the said amended intervening petition of The Kansas City Southern Railway Company, recited that the same should be a first mortgage and paramount lien upon the railroad of said companies, and upon all the properties and property rights of the said Companies, of every name, nature and description, then

held or that might thereafter be acquired including all the
443 privileges and franchises thereto appertaining, but ask that proof of the same be made.

These defendants, further answering, neither admit nor deny that by virtue of the foreclosure sales and the purchase thereat, by The Kansas City Southern Railway Company, described in said amended intervening petition, the said The Kansas City Southern Railway Company acquired title to any of the property of said railroad companies acquired after the execution and delivery of said mortgages or deeds of trust described in said amended intervening petition, but ask that proof of the same be made.

These defendants further answering state that they are not sufficiently informed to answer even upon information and belief as to whether the claims of the Cambria Steel Company and Stuart R. Knott and Edward F. Swinney, as Receivers of the Kansas City Suburban Belt Railroad Company, and the Kansas City Suburban Belt Railroad company are subordinate and inferior to the claims of The Kansas City Southern Railway Company, described in the said amended intervening petition; and further answering, these defendants, upon information and belief aver that the matters and things stated and set out in the said amended intervening petition, except as to those matters hereinbefore specifically answered, are true.

All of which matters and things hereinbefore stated these defendants are ready to aver, maintain and prove, as this Honorable Court may direct.

Wherefore, defendants pray that the amended intervening petition of The Kansas City Southern Railway Company may be dismissed, as to these defendants, and for their costs in this behalf most wrongfully expended.

T. B. BUCKNER,
Solicitor for Defendants.

Afterwards, to-wit, on the 9th day of June, 1904, the Answer of The Central Improvement Company and T. T. Crittenden, its Receiver to the Amended and Supplemental Ancillary Bill of Complaint of Stuart R. Knott, and Edward F. Swinney, as Receivers of the Kansas City Suburban Belt Railroad Company, and The Kansas City Suburban Belt Railroad Company was filed. Said Answer is in words and figures as follows:

444 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company and Northern Townsite Company, Defendants.

Bill.

STUART R. KNOTT and EDWARD F. SWINNEY, as Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver; Northern Townsite Company and Fairmount Amusement Company, Defendants.

Ancillary Bill.

Answer of the Central Improvement Company and T. T. Crittenden, Its Receiver, to the Amended and Supplemental Ancillary Bill of Complaint of Stuart R. Knott and Edward F. Swinney, as Receivers of the Kansas City Suburban Belt Railroad Company, and the Kansas City Suburban Belt Railroad Company.

These defendants now and at all times hereafter saving to themselves all and all manner of benefit of exceptions or otherwise than can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, answering say:

1. These defendants, the Central Improvement Company and T. T. Crittenden, its Receiver, do not know and cannot set forth as their belief or otherwise whether or not the allegations in said Amended and Supplemental Ancillary Bill of Complaint are true (except as to those parts which they hereinafter specifically admit) but of the truth thereof require strict proof to be made.

445 2. The defendants admit that the Kansas City Suburban Belt Railroad Company, the Union Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Northern Townsite Company, Fairmount Amusement Company, Central Improvement

Company, Cambria Steel Company are corporations organized and existing under and by virtue of the laws of the State of Missouri and citizens and residents of said state and each of them having their principal office or place of business in Kansas City, Missouri, and each of them being an inhabitant of the Western Division of the Western District of Missouri, except the Cambria Steel Company which is a corporation duly created and existing under the laws of the State of Pennsylvania and a non-resident of the State of Missouri, and the Union Terminal Railroad Company which is a corporation duly created and existing under the laws of the State of Kansas and a non-resident of the State of Missouri.

3. These defendants further admit all the facts and matters alleged and set forth on pages 1, 2, 3, 4, and 5 of the Amended and Supplemental Ancillary Bill of Complaint; that the Kansas City Pittsburg and Gulf Railroad Company was a railroad corporation organized under the laws of the State of Missouri and that for the purpose of acquiring the funds with which to construct the said railroad the said Railroad Company issued its first mortgage to secure the issue of its first mortgage bonds; that on April 1, 1899, there were issued and outstanding said bonds to the amount of twenty-three million dollars ($23,000,000.00) and that at that time default was made in the payment of the installment of interest due on the said bonds and a bill for the foreclosure thereof was forthwith filed and receivers for said Railroad Company were appointed and thereafter such proceedings were had that said Railroad Company was sold under foreclosure decree.

4. These defendants admit that the Central Improvement Company was incorporated with a capital stock of two hundred thousand dollars ($200,000.00) of which one hundred forty-one thousand five hundred dollars ($141,500.00) par value has been issued; that said company was organized for the purpose of holding the title to various pieces of real estate in Kansas City, Missouri, and elsewhere purchased for the use and benefit of the Kansas City Suburban Belt Railroad Company, hereinafter for convenience referred to as the Belt Company, and the Kansas City Pittsburg & Gulf Railroad Company and other companies; that certain pieces of such real
446 estate are used by and are vitally necessary in the operation of the railroad of the Belt Company and are held in the name of the Central Improvement Company; that the total consideration for all of the property acquired by this defendant company was furnished or advanced by the Belt Company or the Kansas City, Pittsburg & Gulf Railroad Company; the title to all of such property being taken in the name of the Central Improvement Company; that certain tracts of land so acquired have since been sold by this defendant company or by its receivers, and that $8,315.72 *dollars*, resulting from such sales, are now in the hands of T. T. Crittenden, as Receiver of this defendant company; that the title to the following described land acquired by this defendant Company as above described, all of which is of vital importance and necessary to and for the operation of the railroad of the Belt Company and the Kansas City, Pittsburg & Gulf Railroad Company, is held in the name of

this defendant company, and is, together with the said $8,315.72 *dollars*, now in the possession of T. T. Crittenden as Receiver of this defendant Company:

Real Estate Purchase No. 1:

First Street and Cheyenne Avenue, Kansas City, Kansas.

Commencing at a point in the South line of Cheyenne Avenue, in Kansas City, Kansas, 30 feet West of the North and South ½ Section line through the center of Section 22, Township 11, Range 25; thence West along said South line of Cheyenne Avenue 37.8 feet; thence in a Southwest direction on a straight line forming an angle of 56′ 9″ with said South line of Cheyenne Avenue, 680 feet more or less, to the Northerly boundary line of a tract of land owned by the Chicago, Milwaukee & St. Paul Railway Co.; thence in a northeasterly direction along said Northerly boundary line (the same being a curved line to the left 575 feet, more or less, to a point in the West line of a 60 foot street (the center line of which street is the North and South ½ Section line through the center of Section 22, Township 11, Range 25); thence along the West line of said street 197 feet to the place of beginning and containing an area of 1.65 acres.

Real Estate Purchase No. 2:

20th Street and the Kansas River, in Kansas City, Kansas.

A certain strip or piece of land situated partly in the Southeast quarter of Section 21, and partly in the Southwest quarter
447 of Section 22, Township 11, Range 25, in Wyandotte County, Kansas, and bounded and described as follows: Beginning at a point in the South line of the right of way of the Union Terminal Railroad, as said right of way is described in the deed to the Union Terminal Railroad Company, recorded in book 204 at page 418, and following, of the Real Estate Records of Wyandotte County, Kansas, where said South line would be intersected by the prolongation or extension Southward of the East line of Tenth Street (formerly 20th Street), in Kansas City, Kansas; thence in an Easterly direction along said line of right of way 2,178 feet; thence South 208.3 feet; thence in a Westerly direction on a line parallel to the South line of said right of way of the Union Terminal Railroad, and at the uniform distance of 200 feet from same, 2,178 feet to a point in the East line, extended Southward, of the aforesaid 10th Street, in Kansas City, Kansas; thence North along said line 200 feet to place of beginning, containing 10 acres. All in Wyandotte County, Kansas.

Real Estate Purchase No. 3:

Near Railroad Street, Kansas City, Kansas.

A certain lot or piece of land situated in the Northeast quarter of Section 22, Township 11, Range 25, in Wyandotte County,

Kansas, bounded and described as follows: Beginning at a point in the East line of Railroad Street, in Kansas City, Kansas, 1336.85 feet in a Southwesterly direction (measured on the line of said street) from the South line of Osage avenue; thence East along the South line of a tract of land formerly owned by the Western Dressed Beef Company, 270 feet, more or less, to a point in the West line of right of way of the Union Terminal Railroad; thence in a Southwesterly direction along said line of right of way, to a point where same intersects or coincides with the East line of Railroad street; thence in a Northeasterly direction along the line of said street 390 feet, more or less, to place of beginning, and containing an area of 0.48 acres. All in Wyandotte County, Kansas.

Real Estate Purchase No. 4:

Railroad Street and Mulvane Avenue, Argentine, Kansas.

Beginning at a point in the West line of the Northeast quarter of the Southwest quarter Section 20, Township 11, Range 25, Wyandotte County, Kansas, 854 feet South of the Northwest corner of same, said point being also the southwest corner of
448 land of John O'Connor; thence North 414 feet to a point in the South line of right of way of the Union Terminal Railroad Company; thence South 71 degrees 40 minutes East along said line 603.5 feet to a point in the West line of land of Morris O'Connor; thence South along same 161.4 feet; thence South 63 degree 37′ West 139.5 feet to a point in the South line of land of said John O'Connor; thence West along said South line 447.58 to place of beginning, and containing 4.1 acres. All in Wyandotte County, Kansas.

Real Estate Purchase No. 6:

West 8th & Santa Fe Streets, Kansas City, Mo.

All of Lots 1, 2, 3, 4, 5, 6, 7, Block 14 West Kansas Addition No. 1, to City of Kansas (now Kansas City, Missouri); also commencing at the northwest corner of said lot, thence running due North to the Missouri River; thence East following the meanderings of said River to a point due North of the N. E. corner of said lot 5; thence due South to the N. E. corner of said Lot 5; thence West to place of beginning; also commencing at the Southwest corner of Lot 11, in said Block 14, thence north along the East line of Santa Fe street 85.67 feet to N. W. corner of Lot 8, in said block 14; thence East along the North line of said lot 8, 98.2 feet; thence Southwest making an interior angle with the last described line of 50 degrees 35′ and running 112.2 feet to the South line of Lot 11, being the North line of Eighth street at a point on said line 26.2 feet East of the East line of Santa Fe street; thence West along the South line of Lot 11 and the North line of Eighth street 26.2 feet to place of beginning, subject to right of way of the Kansas City Suburban Belt Railroad. All in Jackson County, Missouri.

Real Estate Purchase No. 9:

Otis Street and Owen Avenue, Kansas City, Mo.

All of Lots numbered 1-45-46, in Block 2, in Modern Mutual Place, an addition to Kansas City, Missouri, as the same appears of record upon the recorded plat thereof, and so much of lots numbered 2 and 44 in Block 2, and so much of lots numbered 6, 7 and 8 in Block 1, in said Addition as lie N. & N. W. of a line parallel to and 20 feet South and S. E. of the center line of the most Southerly tract of the K. C. S. B. R. R. Co. or K. C. & Independence Air Line, as the same is now located across said lots, which said center line is described as follows:

449 Beginning at a point in the West line of Lot 8, in Block 1, of said Addition, 65/100 feet S. of the N. W. corner of said lot; thence in a Northeasterly direction on a line of a curve to the right of 550.8 feet radius, 210 feet more or less to a point in the W. line of lot 44, in Block 2, of said Addition 3.3 feet S. of the N. W. corner of said lot; thence continuing on said curve to the right having a radius of 550.8 feet 198.8 feet to a point in the E. line of Lot 1, in Block 2 of said Addition 2 1/10 feet south of the N. E. corner of said lot. All in Jackson County, Missouri.

Real Estate Purchase No. 10:

Highland Avenue and Front Street, Kansas City, Mo.

All of Lots 31, 47 and 48 Hurck's Sub-Division of Guinotte Farm, as the same are marked and designated on the recorded plat thereof on file in the office of the Recorder of Deeds in and for the County of Jackson, State of Missouri, except such parts of said lots as lie in the Missouri River. All in Jackson County, Missouri.

Real Estate Purchase No. 11:

Commercial Street, Kansas City, Kansas.
13th and Myrtle Avenue, Kansas City, Kansas.

Lots 14, 15, 16, 17 and 18, Loomis' Riverside Addition, except such portion of said lots as lies South and West of The Kansas City Southern Railway Company (formerly the Union Terminal Railroad Company) right of way; Lots 25, 27 and 28, Clifton Place Addition, to Kansas City, Kansas; Lots 2, 3, 5, 31 & 32, Block "D," F. J. Baird's Addition to Armourdale, now a part of Kansas City, Kansas. All in Wyandotte County, Kansas.

Real Estate Purchase No. 12:

3rd and Washington Streets, Kansas City, Mo.

Lot 4, Block 5, Lykins Addition, Kansas City, Mo. All in Jackson County, Missouri.

Real Estate Purchase No. 13:

3rd and Washington Streets, Kansas City, Mo.

450 Lot 7, Block 4, Lykins' Addition, Kansas City, Mo. All in Jackson County, Missouri.

Real Estate Purchase No. 20:

9th & Fremont Streets, Centropolis, Mo.

Lot 21, Block 9 of Centropolis, Jackson County, Missouri.

Real Estate Purchase No. 21:

2nd & Wyandotte Streets, Kansas City, Missouri.

Lot 124, Block 12, Old Town, now Kansas City, Missouri.

Real Estate Purchase Nos. 22 and 23:

7th and Mulberry Streets, Kansas City, Mo.

A tract of land described by metes and bounds as follows: Beginning at the N. E. Corner of Lot 16 Block 16 in that part of Kansas City, Missouri, known as "Extension of West Kansas Addition No. 1"; thence west along the north line of said Block 16 72 feet, to the northwest corner of Lot 14 in said block; thence in a northerly direction on the prolongation or extension of the west line of said Lot 14 62.1 feet to a point 22 feet (measured at right angles) North of the center line of the main track of the Kansas City Suburban Belt R. R. Co., (now the Kansas City Southern R. R. Co.) as located and constructed upon the ground; thence in an easterly direction on a line parallel to the center line of said main track and at the uniform distance of 22 feet from said center line to a point in the northerly extension or prolongation of a line parallel to the east line of Lot 8 Block 15 in West Kansas Addition No. 1, thence South on said line to the northeast corner of Lot 8 of said Block 15; thence west to the point of beginning.

Also a certain lot or piece of land comprising parts of lots 1-2-3-4 and 5 in Block 15 in that part of Kansas City, Missouri, known as Extension of West Kansas Addition No. 1 and bounded and described as follows: Beginning at the Northwest corner of said Block thence East along the north line of same 99 feet more or less, to a point 6 feet (measured at right angles) north of the center line of the northerly switch track of the Kansas City Fort Scott and Memphis Railroad; thence in a Southwesterly di-
451 rection on a line parallel to said center line and at the uniform distance of six feet from same one hundred feet more or less, to a point in the east line of Mulberry street; thence North along said line 13 feet, more or less, to *to* the place of beginning, in Jackson County, Missouri.

Rear Estate Purchase No. 24.

8th and Hickory Streets, Kansas City, Mo.

A certain lot or piece of land situated North and West of that part of Kansas City, Missouri, known as "Extension of West Kansas Addition No. One" and bounded and described as follows: Beginning at a point in the Northward extension of the East Line of Hickory Street Eight feet South of the center line of the Consolidated Terminal Railroad (now The Kansas City Southern Railway) as said road is located and constructed upon the ground, and six hundred and thirteen and six-tenths (613.6) feet North of the North line of Ninth Street; thence in a Southwesterly direction on a line parallel to the center line of said Kansas City Southern Railway Company's Railroad, and at the uniform distance of Eight (8) feet (at right angles) South of said line One Hundred and Ninety-two and eight-tenths (192.8) feet to a point in the Northern extension of the East line of Lot number Eight (8) in Block No. sixteen (16) of said Extension of West Kansas Addition No. 1; thence South along said line Fifty-five and nine tenths (55.9) feet to a point six feet North of the center line of the Kansas City, Fort Scott & Memphis Railroad Company's most Northerly main switch track; thence in a Southwesterly direction, on a line parallel to the center line of said Kansas City, Fort Scott & Memphis switch track, and at the uniform distance of six (6) feet North of said center line, One Hundred and Ninety-two and eight-tenths (192.8) feet to a point in the Northward extension of the East line of Hickory Street, five hundred and twenty-six (526) feet North of the North line of Ninth Street; thence North along said line Eighty-seven and six-tenths (87.6) feet to place of beginning, and containing 0.308 acres, more or less. All in Jackson County, Missouri.

Real Estate Purchase No. 27:

Ninth & Jefferson Streets, Kansas City, Mo.

First parcel—A triangular piece of ground in the Northwest corner of Block Three (3), Coates & Hopkins' Addition to the
452 City of Kansas (now Kansas City) bounded as follows; Beginning at a point on the West side of said Block Three (3) which is Sixteen (16) feet from the Northwest corner thereof, and running thence Northerly along said West side Sixteen (16) feet to said corner; thence Easterly along the North Side of Block Three (3) [*seventh*] (70) feet; thence Southwesterly to the place of beginning; containing about 550 square feet of 13/1000 of an acre.

Second parcel—A part of Block seven (7) in said Coates & Hopkins' Addition which is bounded as follows: Beginning at a point on the East side of said Block Seven (7), which is two hundred and Fifty-two and four-tenths (252-4/10) feet from the Northwest corner of Eighth & Henning Streets; thence Northerly Forty-six (46) feet along said East side to the Northeast corner of said Block seven

(7); thence Northwesterly along the Northerly side of Block seven (7) One Hundred Forty-four and Seven-tenths (144-7/10) feet to the Northwest corner thereof; thence South along the west side of said Block seven (7) 84 degrees and four minutes included angle Two Hundred Forty-four and Three-tenths (244-3/10) feet; thence Northeasterly 35 degrees 20 minutes included angle One Hundred Eighteen and one-tenth (118/10) feet; thence Northeasterly 187 degrees 15 minutes, included angle Sixty-seven and Five-tenths (67-5/10) feet; thence North-easterly 188 degrees 26 minutes, included angle, Sixty-eight and seven-tenths (68-7/10) feet to the point of beginning. Containing 21,215 square feet, or 487/1000 of an acre. All in Jackson County, Missouri.

Real Estate Purchase *Purchase* No. 29:

All that part of Lot 32, Hurck's Subdivision of Guinotte Farm between right of way of the K. C. S. B. R. R. and the Missouri River, including all accretions, if any, to said lot, or any part thereof. All in Jackson County, Missouri.

5. These defendants admit that on the eighth day of November, 1900, one Wash Adams was appointed Receiver of the Central Improvement Company; thereafter said Wash Adams resigned and T. T. Crittenden was duly appointed receiver as successor of Wash Adams, and said Crittenden since his appointment has held possession of the property of the Central Improvement Company, including the tracts of land above described; that neither the Belt Company nor the Kansas City, Pittsburg & Gulf Railroad Company has ever been reimbursed for the money and consideration so furnished defendants by them for the purchase of said property; that all of the above described property, including the tracts of land sold
453 or the proceeds derived from the sale thereof is the property of the Belt Company or the Kansas City, Pittsburg & Gulf Railroad Company, unless it be the title has passed from said railroad companies by virtue of certain foreclosure sales had under certain railroad mortgages described in the Amended and Supplemental Ancillary Bill of Complaint.

And these defendants deny all and all manner of unlawful combination and confederacy wherewith it is by the said bill charged, without this, there is any other matter, cause or thing in said Complainant's Amended and Supplemental Ancillary Bill of Complaint material or necessary for these defendants to make answer to not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true, to the knowledge and belief of this defendant, all of which matters and things these defendants are ready and willing to aver, maintain and prove as this Honorable Court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

T. B. BUCKNER,
Sol'r for Defendants.

Afterwards, to-wit, on the 26th day of June, 1905, the following Replication was filed:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2468.

CAMBRIA STEEL COMPANY, Complainant,
vs.
THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Fairmount Amusement Company and Northern Townsite Company, Defendants.

STUART R. KNOTT and EDWARD F. SWINNEY, as Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainant,
vs.
CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Replication to the Answer of the Guardian Trust Company.

454 These replicants, Stuart R. Knott and Edward F. Swinney, as Receivers of the Kansas City Suburban Belt Railroad Company, and the Kansas City Suburban Belt Railroad Company, saving and reserving to themselves all and all manner of advantages of exceptions, which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant, Guardian Trust Company, for replication thereunto saith that they do and will aver, maintain and prove their said bill to be true, certain and sufficient in the law to be answered unto by said defendants, and that the answer of the said defendants is very uncertain, evasive and insufficient in law to be replied unto by these said replicants; without that that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied is true; all of which matters and things these replicants are ready to aver, maintain and prove as this Honorable Court shall direct, and humbly prays as in and by their said bill they hath already prayed.

S. W. MOORE,
T. R. MARKS,
Solicitors for Complainants.

Afterwards, to-wit, on the 2nd day of July, 1906, the following Order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, at Kansas City.

CAMBRIA STEEL COMPANY, Complainant,
v.
GUARDIAN TRUST COMPANY et al., Defendants.

Bill.

455

No. 2469.

EDWARD F. SWINNEY, Receiver of the Kansas City Suburban Belt Railroad Company et al., Complainants,
v.
GUARDIAN TRUST COMPANY et al., Defendants.

Ancillary Bill.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Intervenor, Complainant,
v.
GUARDIAN TRUST COMPANY et al., Defendants.

Intervening Petition.

Order.

Leave is hereby given to Edward F. Swinney, Receiver of the Kansas City Suburban Belt Railroad Company, and the Kansas City Suburban Belt Railroad Company to file their Second Amended and Supplemental Ancillary Bill of Complaint herein; to the Guardian Trust Company to file its answer thereto instanter; and to said Edward F. Swinney as Receiver and Kansas City Suburban Belt Railroad to file their replication thereto instanter.

(Signed) SMITH McPHERSON, *Judge.*

Afterwards, to-wit, on the 2nd day of July, 1906, a Second Amended and Supplemental Ancillary Bill of Complaint was filed by Edward F. Swinney, Receiver of the Kansas City Suburban Belt Railroad Company and Kansas City Suburban Belt Railroad Company.

Said Second Amended and Supplemental Ancillary Bill of Complaint is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver, Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

456 *Second Amended and Supplemental Ancillary Bill of Complaint.*

To the Judges of the United States Circuit Court for the Western Division of the Western District of Missouri, in the Eighth Circuit, Sitting in Equity:

Your orators, Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company and the Kansas City Suburban Belt Railroad Company, with leave of court, bring this their second amended and supplemental ancillary bill of complaint against the Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company and Thomas T. Crittenden, its Receiver, Cambria Steel Company, Fairmount Amusement Company, and Northern Townsite Company, each and all of which said corporations both complainant and defendants, are corporations organized and existing under and by virtue of the laws of the State of Missouri and citizens and residents of said state and each of them having their principal office and place of business at Kansas City in said state and each of them being an inhabitant of the Western Division of the Western District thereof, except the Cambria Steel Company, which is a corporation duly created and existing under the laws of the State of Pennsylvania and a non-resident of the State of Missouri.

Your orators state that on November 30, 1900, in the suit of W. W. Bierce, et al., complainants, against the Guardian Trust Company, defendant, then pending in the United States Circuit Court for the Western District of Missouri, Francis M. Black was appointed receiver of the defendant, Guardian Trust Company, and was at the time of filing the original ancillary bill herein the duly qualified and acting receiver of said company, but that since the filing of said bill the receiver for the Guardian Trust Company has been discharged and the said Trust Company is now in the possession of its corporate property, operating and conducting its own business in connection therewith; that in this suit Wash Adams was heretofore appointed receiver for the Missouri Elevator & Terminal Company, but the property and assets of the said Missouri Elevator & Terminal Company had since the filing of the original ancillary bill herein been turned over to the Guardian Trust Company, the mortgagee in certain mortgages covering the property of said Missouri Elevator & Terminal Company; that at the time of filing said original ancillary bill Wash Adams was the duly qualified and acting receiver for the Central Improvement Company, since which time the said Adams has resigned and Thomas T. Crittenden has been appointed as his successor and is now the duly qualified and acting receiver of said company; that said Thomas T. Crittenden is a citizen
457 and resident of the Western Division of the Western District of the State of Missouri.

And, thereupon, your orators complain and say that the above-named complainant, the Cambria Steel Company, heretofore exhibited to this Honorable Court its bill of complaint against the Kansas City Suburban Belt Railroad Company, a defendant, and the other corporation defendants above named, in and by which said bill of complaint said Cambria Steel Company, as such complainant, set up the recovery of a judgment by it against the Kansas City Suburban Belt Railroad Company for the sum of One Hundred Thousand Nine Hundred Sixty-Two and 91-100 Dollars ($100,962.91), and the issuance and delivery, and return unsatisfied of an execution thereon, and in and by said bill of complaint sought to subject to the payment and satisfaction of said judgment certain rights, properties and assets belonging to the Kansas City Suburban Belt Railroad Company and the other defendants above named.

Your orators further show that prior to the filing of said bill of complaint by said Cambria Steel Company four certain bills of complaint were duly filed in this court by the Provident Life & Trust Company of Philadelphia, two of said bills being filed against the Kansas City Suburban Belt Railroad Company as the sole defendant; another of said bills was filed against the Union Terminal Railroad Company, a Kansas corporation, and the said The Kansas City Suburban Belt Railroad Company as defendants; and the other of said bills was filed against the Kansas City & Independence Air Line, a Missouri corporation, and the said Kansas City Suburban Belt Railroad Company. Each of said bills sought the foreclosure of a first mortgage, upon certain railroad property described in the said bills of complaint respectively, and which said several described

pieces of railroad property together for a long time have been operated by the Kansas City Suburban Belt Railroad Company as a continuous and allied system, said Kansas City Suburban Belt Railroad Company being also the beneficial owner of said properties by reason of owning the capital stock of said several companies. Upon the same day upon which the said bills of complaint were filed an application was made for the appointment of a receiver of all the property of said Kansas City Suburban Belt Railroad Company and on the same day, to-wit, on the sixth day of September, 1900, an order was duly entered of record in each of said causes, as well as in the above entitled cause, appointing your orator Edward F. Swinney and Stuart R. Knott as receivers of the said Kansas City Suburban Belt Railroad Company, and vesting them, as such receivers, with
458 all the rights, title, estate, property and interest of the said the Kansas City Suburban Belt Railroad Company, and authorizing and directing them as such receivers, to proceed to take such steps and institute such proceedings, legal or otherwise, as might be necessary and requisite to compel a restoration to said Kansas City Suburban Belt Railroad Company, and said Stuart R. Knott and Edward F. Swinney, as its receivers, of any property rights belonging to it and to compel an accounting from any and all persons, firms or corporations from whom the said Kansas City Suburban Belt Railroad Company might be entitled to such accounting; that said Stuart R. Knott and Edward F. Swinney, as such receivers, were also authorized to appear in any and all suits theretofore or thereafter instituted against the said Kansas City Suburban Belt Railroad Company, in its name or in the names of Stuart R. Knott and Edward F. Swinney, as the receivers, to defend any and all such suits. Your orators further show unto the court that under and by virtue of the powers and authorities so vested in them, as aforesaid, your orators for and on behalf of the Kansas City Suburban Belt Railroad Company, which is made a defendant to the bill of complaint in the above entitled cause, have appeared and filed their answer to said bills of complaint, as will appear of record herein, and having so filed said answer, your orators bring this, their ancillary bill of complaint herein against the defendants above named, and now file this, their second amended supplemental ancillary bill of complaint against said defendants; that since the filing of the original ancillary bill herein, Stuart R. Knott has resigned as receiver and said resignation has been accepted; and that Edward F. Swinney has been continued as sole receiver herein.

Your orators further show unto the court that immediately upon the appointment of your orators, Stuart R. Knott and Edward F. Swinney, as such receivers, they took possession of each and all the property of the said Kansas City Suburban Belt Railroad Company, and under and pursuant to the orders of the court so appointing them, and thereafter and until the foreclosure sale hereinafter referred to, did operate the railroad property of the said Kansas City Suburban Belt Railroad Company. That such proceedings were had in the causes above referred to that on the 6th day of November, 1901, decrees of foreclosure and sale were duly rendered directing the sale

of the railroad and properties of the Kansas City Suburban Belt Railroad Company, Kansas City & Independence Air Line, Consolidated Terminal Railroad Company and the Union Terminal Railroad Company, covered by the mortgages upon said railroads and property respectively, and on December 31, 1901, the said
459 properties so covered by said mortgages, as aforesaid, were in pursuance of said decrees of foreclosure and sale duly sold and conveyed to the purchaser, The Kansas City Southern Railway Company.

And your orators further charge and aver that the matters and things mentioned and set forth in this, your orators' second amended and supplemental bill of complaint are ancillary to the said suits so pending in this court wherein your orators, Stuart R. Knott and Edward F. Swinney, were appointed as such receivers and are properly cognizable in this court, which has possession of each and all property of the said Kansas City Suburban Belt Railroad Company, except such as was covered by its mortgage and has been heretofore conveyed as aforesaid. For convenience, the Kansas City Suburban Belt Railroad Company will be hereinafter referred to as the Belt Company; the Guardian Trust Company will hereinafter be referred to, for convenience, as the Trust Company; the Missouri Elevator and Terminal Company will be hereinafter referred to, for convenience, as the Elevator Company; the Central Improvement Company will herinafter, for convenience, be referred to as the Central Company; the Fairmount Amusement Company will hereinafter, for convenience, be referred to as the Amusement Company.

Your orators show unto the court that the Trust Company was incorporated according to law in and about the year 1883, and that on or about the month of June, 1899, and until on or about the month of June, 1899, the name of the Trust Company was the Missouri, Kansas & Texas Trust Company, but that at said latter date such proceedings were taken as are provided by the statutes of the State of Missouri in such case made and provided, so that its name was changed to the Guardian Trust Company.

Your orators upon information and belief further show unto the court [thaz] on or about the first day of January, 1887, a corporation was formed under the laws of the State of Missouri known as The Kansas City Suburban Belt Railroad Company, hereinafter, for convenience, called the Suburban Company, for the purpose of building a belt line of railroad to encircle the cities of Kansas City, Missouri, and Kansas City, Kansas. That as your orators are informed and believe and so charge the facts to be the said Suburban Company was either organized by the said Trust Company, or the control of the Suburban Company passed to the Trust Company shortly after its incorporation, so that the servants and employes of the Trust Company were elected as its officers and directors and the said Trust Company at all times hereinafter mentioned dominated and controlled the said Suburban Company. That as your
460 orators are informed and believe and so charge the fact to be the Trust Company so dominating and controlling the Suburban Company by virtue of holding possession of the offices

of its board of directors and officers caused the Suburban Company to issue and deliver to it, the Trust Company, each and all of the capital stock of the Suburban Company, and also caused the Suburban Company to execute its bonds secured by a first mortgage upon all of its corporate property then held and to be thereafter acquired amounting in the aggregate to the sum of One Million Dollars ($1,000,000.00), and that said bonds in like manner, by virtue of the domination and control of the Trust Company were delivered to the Trust Company, and the Trust Company thereupon proceeded to sell and otherwise dispose of said bonds and stocks and to apply the proceeds thereof as claimed by it for the corporate purposes of the Suburban Company in the construction and operation of its road; but the Trust Company, although often requested to do so, did not at any time and never has truly accounted to the Suburban Company for the proceeds realized by it from said bonds and stock, and never has accounted in any way for said proceeds or the manner in which it has so expended the same, except as hereinafter stated.

Thereafter, as your orators are informed and believe, and so charge the fact to be, the Trust Company caused to be formed under the laws of the State of Missouri, a corporation known as the Consolidated Terminal Railway Company for the purpose of building a line of road to connect with the line of road constructed or proposed to be constructed by the Suburban Company, although the Suburban Company had full power under its charter to have constructed the said road itself. The Consolidated Terminal Railway Company is hereinafter, for convenience, referred to as the Consolidated Company. That, as your orators are informed and believe and so charge the fact to be, the Consolidated Company was formed and controlled by the Trust Company, electing as its officers and directors the servants and employes of the Trust Company so that at all times it dominated the Consolidated Company, and the Trust Company thereupon caused the Consolidated Company to issue and deliver to it its entire capital stock and also bonds secured by a first mortgage upon its corporate property then and to be thereafter acquired aggregating the sum of Seven Hundred and Fifty Thousand Dollars ($750,000.00), and caused all said bonds to be delivered to the Trust Company, and the Trust Company thereupon proceeded to sell and dispose of said bonds and stock of the Consolidated Company so delivered to it as aforesaid and to apply the proceeds thereof as alleged by it for the corporate purposes of the Con-
461 solidated Company in the construction and operation of its road; but the Trust Company, although often requested so to do, did not and never has truly accounted to the Consolidated Company for the disposition made by it of said bonds and stock so delivered as aforesaid and the proceeds derived therefrom and the purpposes to which said proceeds were applied, and never has accounted in any way therefor, except as hereinafter stated.

Your orators further show unto the court that they are informed and believe, and so charge the fact to be, that thereafter and on or about the 25th day of July, 1892, the Consolidated Company and the

Suburban Company, as authorized by the Statutes of the State of Missouri, entered into articles of consolidation whereby the said two companies became one consolidated corporation, thereafter known as the Kansas City Suburban Belt Railroad Company, of which your orators, Stuart R. Knott and Edward F. Swinney, were appointed Receivers, as aforesaid, and under and by virtue of said articles of consolidation, as well as the statutes of the State of Missouri in such case made and provided, the said Kansas City Suburban Belt Railroad Company and your orators, Stuart R. Knott and Edward F. Swinney, as its receivers, have succeeded to each and all of the rights of both the Consolidated Company and the Suburban Company.

Your orators further show unto the court that they are informed and believe, and so charge the fact to be, that at the time of the consolidation of said two companies, as aforesaid, the Trust Company caused its officers and employes to be elected to the positions of officers and directors of the Belt Company, the company so formed by said consolidation, and continued such persons in such positions respectively, continuously until about the month of April, 1900, whereby the Trust Company at all times, up to said last mentioned date, completely dominated and controlled the actions of the Belt Company.

Your orators further show unto the court that they are informed and believe, and so charge the facts to be, that some time prior to said consolidation and on or about the 30th day of December, 1891, it was found advisable in the course of the construction of the line of road of the Suburban Company to have a corporation formed under the laws of the State of Kansas for the purpose of building and holding the title to that portion of the line of road of the Suburban Company lying within the State of Kansas and for that purpose the Union Terminal Railroad Company, hereinafter referred to as the Union Company for the sake of convenience, was by the Trust Company caused to be incorporated under the laws of the State of Kansas and the Trust Company, as in the other
462 instances, caused its officers and employes to be elected the officers and directors of the Union Company and the Union Company was a corporation organized for the sole purpose of holding the title to said property of the Suburban or Belt Company in the State of Kansas; that the Trust Company thereupon caused all of the stock of the Union Company to be issued to the Suburban or Belt Company and also caused the Union Company to execute its first mortgage bonds in the amount of Two Million Dollars ($2,000,000.00); and said bonds were secured by a first mortgage upon all the property of the Union Company then and to be thereafter acquired; that said bonds were thereupon issued and delivered to the Trust Company for the use and benefit of the Suburban or Belt Company; that the Trust Company immediately proceeded to sell, or otherwise dispose of, the said bonds and stock of the Union Company, which had been theretofore delivered to it by the Belt Company, and to apply the proceeds derived from such sale in part, as alleged by it, to the construction and operation of the road so

built for the Belt Company and held and operated in the name of the Union Company; that the Trust Company thereupon became liable to account to the Belt Company for the proceeds and disposition of the same derived from the sale of the said bonds and stock, but although often requested to do it always has failed and refused to account truly to the Belt Company for the disposition made by it of said bonds and stock, the proceeds derived from such disposition and the manner in which said proceeds were disposed of, and has never accounted therefor in any way except as hereinafter stated.

Your orators further show unto the court that they are informed and believe and so charge the facts to be that thereafter and on or about the 23rd day of January, 1891, the Trust Company caused to be incorporated under the laws of the State of Missouri, a corporation known as the Kansas City & Independence Air Line; hereinafter, for convenience referred to as the Air Line; said company being incorporated for the purpose of building a line of road connecting the line of the Suburban Belt Company and the City of Independence, Missouri; that the capital stock of said company was placed at the sum of Five Hundred Thousand Dollars ($500,00.00). The Trust Company immediately caused its officers and employes to be elected directors and officers of the Air Line and thereupon caused the Air Line to issue its first mortgage bonds to the amount of Three Hundred Thousand Dollars ($300,000.00), secured by a first mortgage upon all of its corporate property then and to be thereafter acquired; that by virtue of the fact that the officers and directors of the Air Line were officers and employes of the Trust Company it at all times dominated and controlled the Air Line up to
463 and until the month of April, 1900; that thereafter the Trust Company acquired each and all of the bonds and stock of the Air Line, the Trust Company in fact constructing the railroad of the Air Line and acquiring said bonds and stock in consideration therefor; afterwards it proceeded to dispose of the same and to apply the proceeds, as it alleged, for the corporate purposes of the Belt Company; but the Trust Company, although often requested so to do, has never at any time truly accounted to the Belt Company for the disposition made by it of the said bonds and stock, and the proceeds realized by it therefrom and has never accounted to the Belt Company in any manner except as hereinafter stated.

Your orators further show that they are informed and believe and so charge the facts to be that the Trust Company at all times up to and about the month of April, 1900, absolutely and completely dominated and controlled the affairs of the Belt Company by reason of the fact that the officers and employes of the Trust Company were elected officers and directors of the Belt Company at the behest of the Trust Company and were simply dummies acting as the agents of the Trust Company; that the Trust Company itself attended to the disbursement of all the moneys which were realized from the sale of the bonds and stock of the several companies hereinbefore named and itself attended to the disbursement of the moneys which were used in the construction and building of the lines of road of said defferent companies. That

your orators are informed and believe, and on such information and belief state that the total cost of the lines of all of the said companies did not exceed the sum of about Two Million Dollars ($2,000,000.00), but that there was actualy delivered to and disposed — by the Trust Company secured bonds and stock aggregating more than Five Million Dollars ($5,000,000.00) and that the Trust Company has never at any time truly accounted to the Belt Company or to your orators for the proceeds derived by it from the sale of said bonds and the disposition made by it of such proceeds and has never accounted to the Belt Company in any way, except as hereinafter stated.

Your orators upon information and belief further charge and aver that on or about the 30th day of June, 1896, the Trust Company, either in its own name or in the name of some of its officers, or some corporation controlled by it, had entered into a contract whereby it was obligated to construct a line of railroad from Kansas City, Missouri, to Pattonsburg, Missouri, for the purpose of connecting at that point with the Omaha & St. Louis Railroad Company and the Omaha, Kansas City & Eastern Railroad
464 Company; that the Trust Company thereupon caused to be incorporated under the laws of the State of Missouri a corporation known as the Kansas City & Northern Connecting Railroad Company, hereinafter for convenience called the Connecting Company, and caused certain of its officers and employes to be elected officers and directors of the Connecting Company and by virtue thereof at all times dominated and controlled the affairs of the Connecting Company; that the Trust Company, being under obligation to construct said road as aforesaid set about to discover a way in which it could cause said railroad to be constructed without incurring any liability itself and without making itself liable for the possibility of loss in such construction; that it thereupon conceived the idea of having the Belt Company undertake the construction of said railroad on consideration of the issuance of bonds and stock of the Connecting Company; that, therefore, by virtue of the domination and control which the Trust Company exercised over the affairs of both the Belt Company and the Connecting Company, the Trust Company caused a contract to be entered into between the Belt Company and the Connecting Company whereby the Belt Company agreed to construct and did construct said line of railroad for the Connecting Company in consideration, among others, of the issuance to the Belt Company of certain first and second mortgage bonds and stock of the Connecting Company, more fully specified in said contract; that said contract so entered into as aforesaid is set up in Exhibit A to the answer of the Trust Company filed in this cause, to which reference is hereby made. The said line of railroad so built as aforesaid was constructed for the sole use and benefit of the Trust Company and for the purpose of enabling it to comply with its obligations to so furnish the said railroad; that the said railroad so furnished, as aforesaid, was not and never has been of any

value whatsoever to the Belt Company; that the construction of said road, as aforesaid, by the Belt Company was the result of the Trust Company's domination and control of the Belt Company, utilizing the Belt Company to further and consummate its own purposes and ends and for its own benefit; and the said contract for the construction of said railroad of the Connecting Co-pany was so entered into *it by* as aforesaid solely by the domination and control exercised over the Belt Company by the Trust Company, and the Trust Company in so constructing said railroad as aforesaid, simply used the Belt Company as an unwilling agency in the building of the same and occupied towards the Belt Company the relation of principal; that each and all of the moneys paid out by the Belt Company for the construction of said connecting road passed through the hands of the Trust Company and all the bonds and stock which were to have been delivered to the
465 Belt Company under the terms of said pretended contract in like manner passed through the hands of the Trust Company and the Trust Company proceeded to sell or otherwise dispose of the same; that the Trust Company never at any time truly accounted to the Belt Company for the amount realized by it from said bonds and stock, and has never accounted in any manner to the Belt Company therefor, except as hereinafter stated. Your orators particularly charge and aver that the Trust Company in so using the Belt Company in the construction of said line is charged in law and in equity with the amount of the said loss claimed by the Trust Company to have resulted to the Belt Company and should be held accountable therefor.

Your orators further show unto the court that they are informed and believe and so charge the fact to be, that, during the time the Trust Company, so dominated and controlled the affairs of the Belt Company, Consolidated Company, Union Company and Air Line, it at various times had the Belt Company, Consolidated Company, Union Company and Air Line advance to it or take out of the earnings and assets of the Belt Company, Consolidated Company, Union Company and Air Line, large sums of money which it pretended to expend for and on account of the Belt Company, Consolidated Company, Union Company and Air Line; that by reason of the fact that the Trust Company at all times dominated and controlled the affairs of the Belt Company, Consolidated Company, Union Company and Air Line, and had its employes and servants elected as officers and directors of the Belt Company, Consolidated Company, Union Company and Air Line, your orators are unable to state the amount of money so appropriated by the Trust Company and belonging to the Belt Company, Consolidated Company, Union Company and Air Line, and which the Trust Company alleges was expended for the corporate purposes of the Belt Company, Consolidated Company, Union Company and Air Line, but upon information and belief your orators charge and aver that said amount aggregates upwards of Five Hundred Thousand Dollars ($500,000.00); and that the Trust Company has never at any time truly accounted

for the said money so received by it, nor the manner in which it was expended, and has never accounted in any manner therefor except as hereinafter stated.

Your orators further show unto the court that they are informed and believe, and so charge the fact to be, that during the times hereinbefore mentioned the Trust Company took upon itself the business of paying out practically all the moneys which were paid out for the benefit of the Belt Company and of buying for the Belt
466 Company practically all the property which the Belt Company needed to acquire in its business of operating said road and used the moneys of the Belt Company for that purpose, but, instead of taking the title of the property so purchased, in the name of the Belt Company, the Trust Company caused other corporations to be formed for the purpose of holding the naked legal title to said respective properties, and caused the capital stock of said corporations so organized as aforesaid to be issued to the Belt Company and then turned over to the Trust Company or to be issued to the Trust Company direct in trust, for the use and benefit of the Belt Company; and the Trust Company caused its own servants and agents and employes to be elected and continued as the officers and directors of such companies respectively and at all times, down to the month of April, 1900, so that the Trust Company, in the same manner that it controlled the affairs of the Belt Company, dominated and controlled the actions and affairs of the said subsidiary companies; that among the companies so organized by the Trust Company, in the manner aforesaid, is the Missouri Elevator & Terminal Company, with a capital stock of One Hundred Thousand Dollars ($100,000.00), of which Forty-Two Thousand Five Hundred Dollars ($42,500.00) has been issued; that the said company owns two certain elevators in Kansas City, Missouri, along the line of the Belt Company; and that the Trust Company caused the construction of said elevators, and one other elevator, which has since been destroyed by fire, and in the construction of the same used the money of the Belt Company; said money being paid out to the Trust Company upon its request; that no true accounting has ever been had between the Trust Company and the Belt Company as to the amount of money which it actually expended for the construction of said elevators or of the manner in which it disposed of the funds received by it from the Belt Company for the alleged purpose of undertaking such construction, although requests for such accounting have frequently been made upon the officers of the Trust Company, and no accounting has ever been made therefor, except as hereinafter stated. That the Trust Company caused the Belt Company to assume all the outstanding debts and liabilities of the Missouri Elevator & Terminal Company, and upon said outstanding debts and liabilities the Belt Company paid large sums of money, for which said Belt Company has never been reimbursed. That upon the 8th day of November, 1900, one Wash Adams was appointed Receiver of the Missouri Elevator & Terminal Company; that since that date the court in this cause has made an order turning over to the Trust Company the said properties of the Elevator Company for the collection of the rents therefrom

and the application of said rents upon underlying mortgages or encumbrances held by the Trust Company; that the Trust Com-
467 pany also caused to be organized the Central Improvement Company, a corporation organized under the laws of the State of Missouri, with a capital stock of Two Hundred Thousand Dollars ($200,000.00), of which One Hundred Forty-One Thousand Five Hundred Dollars ($141,500.00) par value has been issued; that said company was organized for the purpose of holding the title to various pieces of real estate in Kansas City, Missouri, and elsewhere purchased for the use and benefit of the Belt Company, and the Kansas City, Pittsburg & Gulf Railroad Company, another Missouri railroad, and other of the companies above mentioned so organized, dominated and controlled by the Trust Company; that the officers and employes of the Central Company, all of whom were the officers, servants or employes of the Trust Company, continued nominally in office and to control and manage such company until about the month of April, 1900; that certain pieces of real estate which are of vital importance to the Belt Company are held in the name of the Central Company; that the Trust Company took upon itself the duty of purchasing the said pieces of property and using for that purpose funds of the Belt Company; that various sums of money were, during the period above mentioned, paid out by the Belt Company to the Trust Company for the purpose of purchasing such pieces of real estate; that the Trust Company has never truly accounted to the Belt Company, although often requested so to do for the sums of money so received by it and the disposition made by it of such sums of money, and has never accounted at all therefor, except as hereinafter stated. That certain shares of stock of the said Central Improvement Company were also, although belonging to the Belt Company, issued to the Trust Company and it has disposed of the same, and although frequently requested so to do it has never truly accounted to the Belt Company therefor and has never accounted at all therefor, except as hereinafter stated. That a large amount of property was purchased with money advanced by the Belt Company, the title to which property, however, was taken in the name of the Central Improvement Company; that all of said property in truth and in fact has belonged to the Kansas City Suburban Belt Company; that the Belt Company has never been reimbursed for the money so advanced as aforesaid; that upon the 8th day of November, 1900, one Wash Adams, Esq., was appointed Receiver of the Central Improvement Company; that thereafter said Wash Adams resigned and T. T. Crittenden, Esq., was duly appointed receiver, as the successor of Wash Adams, and the said Crittenden since his appointment has held possession of the property of the Central Improvement Company, all of which in truth and in fact belonged to the Kansas City Suburban
Belt Railroad Company, and now belongs to it, unless the title
468 thereto has passed from it by virtue of the foreclosure sale of the property covered by its mortgage, as hereinbefore stated; that another subsidiary company organized by the Trust Company was the Fairmount Amusement Company, with a total Capital stock of Twenty-five Hundred Dollars ($2,500.00), all of

which belongs to the Belt Company; that said company was organized, dominated and controlled in the same manner by the Trust Company as the other corporations hereinabove set forth; that all of the moneys expended by the Fairmount Amusement Company were moneys supplied by the Belt Company or supplied by the Trust Company and charged to the Belt Company; and the Trust Company took upon itself the duty of disbursing all of the said funds, and that large sums of money were paid by the Belt Company to the Trust Company for that purpose, but the Trust Company has never at any time truly accounted to the Belt Company for said money so received by it or the manner in which it expended the same, although often requested so to do, and has never accounted in any way therefor, except as hereinafter stated. That said Fairmount Amusement Company was organized for the purpose of operating what is commonly known as Fairmount Park, along the line of the Kansas City & Independence Air Line road; that during the time that the Trust Company so dominated and controlled the Belt Company it caused the Belt Company to advance to it large sums of money for the purpose of fitting up said Fairmount Park; that the Trust Company took upon itself the duty of expending said sums of money for the purpose of fitting up Fairmount Park; that as your orators are informed and believe, upward of Three Hundred and Fifty Thousand Dollars ($350,000.00) was thus supplied to the Trust Company for the purpose of fitting up Fairmount Park; that the Trust Company has never at any time truly accounted to the Belt Company for the manner in which it expended such sums of money, although frequently requested so to do, and has never accounted at all therefor except as hereinafter stated; that another company organized by the Trust Company was the Northern Townsite Company, a Missouri corporation, with an authorized capital of One Hundred Thousand Dollars ($100,000.00), of which Ninety-Two Thousand Eight Hundred Dollars ($92,800.00) has been issued; that said company was organized by the Trust Company in connection with the construction of the Kansas City & Northern Connecting Railroad for the purpose of acquiring property at or near townsites along the line of said road; that the Trust Company in the same manner as it dominated the other corporations above named caused its own servants and employes to be elected and maintained as officers and directors of said Townsite Company
469 and at all times dominated and controlled the affairs of said Townsite Company; and the Trust Company caused the Belt Company to advance to it upwards of Forty-Seven Thousand Dollars ($47,000.00), which it used in the purchase of property which kas [take-] in the name of the Townsite Company; and your orators are informed and believe and on such information and belief state that substantially all the money with which the property of the said Townsite Company was acquired was money advanced by the Belt Company, and that the Trust Company instead of issuing the Belt Company all of the capital stock of the Townsite Company issued large portions of it to itself or to other persons for its use and benefit, or otherwise disposed of the same; that the Trust Company

has never truly accounted to the Belt Company at any time for the money so received by it for the purpose of said Townsite Company, from the Belt Company, or the manner in which it expended the same, although frequently requested so to do, and has never accounted in any manner therefor, except as hereinafter stated.

Your orators further show unto the court that they are informed and believe and so charge the fact to be that the Trust Company also caused to be organized under the laws of the State of Missouri, a corporation known as the Kansas City, Pittsburg & Gulf Railroad Company, for the purpose of constructing a line of railroad from Kansas City, Missouri, to the Gulf of Mexico; and that the said railroad was so constructed under the direction of the Trust Company acting through the said railroad corporation; and for the purpose of acquiring funds with which to construct the said railroad, the said Railroad Company issued its first mortgage to secure the issue of bonds herein specified, and on or about the first day of April, 1899 there were issued and outstanding bonds to the amount of Twenty-Three Million Dollars ($23,000,000.00); that at that time a default was made in the payment of an installment of interest due on the said bonds, and a bill was forthwith filed for the foreclosure thereof and receivers of the said railroad were appointed, and thereafter such proceedings were had that the said railroad was sold under the foreclosure decree.

Your orators further show unto the court that they are informed and believe and so charge the fact to be that the Belt Company, the Union Company, and Air Line above named were very largely dependent upon the said Kansas City, Pittsburg & Gulf Company for their earnings, and an operating contract was in existence between
— the Belt Company; so that it was well known to the Trust
470 Company that if the said Kansas City, Pittsburg & Gulf Railroad Company went into the hands of receivers it would necessarily and inevitably result in insolvency of the Belt Company and other companies hereinbefore named, and would necessitate their ultimately being thrown into the hands of receivers and the mortgages upon the property being foreclosed; that the Trust Company by reason of the domination and control which it exercised over the affairs of the said Kansas City, Pittsburg & Gulf Railroad Company well knew that at and for some time prior to the first day of April, 1899, said company would make default in the payment of the installment of interest due on that date and that such default would inevitably result in the filing of a bill to foreclose the mortgage and for the appointment of receivers for the said road and that the Trust Company thereupon set about to contrive a scheme whereby it might appropriate to itself, before the Belt Company passed beyond its control, all of the remaining property and assets of the Belt Company which were in such shape that they could by any possibility be transferred to the Trust Company. That the Trust Company thereupon caused to be exhibited to its own officers and employes who were holding the positions of officers and directors of the Belt Company various claims and demands which it alleged were due and owed by the Belt Company to it and caused such of its own officers and

employes as were holding the positions of officers and directors of the Belt Company to pass upon and approve said claims and demands, and thereupon caused its own officers and employes so holding the positions of officers and directors in the Belt Company between the 31st day of March, 1899, and the 9th day of February, 1900, to execute to the Trust Company various pretended promissory notes and other negotiable instruments for the alleged purpose of securing to the Trust Company the payment of the said pretended claims which it held against the Belt Company, and caused its own officers and employes, so holding the positions of officers and directors of the Belt Company, to cause to be delivered or transferred to it various stocks, bonds and accounts and other personal property belonging to the Belt Company as collateral security for the said pretended indebtedness of the Belt Company to the Trust Company.

Your orators further charge and aver, upon information and belief, that the notes so fraudulently caused to be made by the Belt Company to the Trust Company are as follows:

Note dated March 31st, 1899, payable on July 2d, 1899, for $50,000, with interest at the rate of 6 per cent per annum.

Note dated July 26th, 1899, payable on demand with 6 per cent interest for $203,900.

471 Note dated Sept. 21st 1899, payable on demand, with 8 per cent interest for $23,056.48.

Note dated Oct. 23d, 1899, payable on demand, with 8 per cent interest, for $7,162.40.

Note dated November 7th, 1899, due January 9th, 1900, with 8 per cent interest, for $50,000.00.

Note dated January 25th, 1900, due May 25th, 1900, with 6 per cent interest, for $25,000.

Note dated February 8th, 1900, due May 12th, 1900, with 6 per cent interest, for $109,500.00.

Note dated February 9th, 1900, due June 11th, 1900, with 8 per cent interest, for $10,400.

The stocks and bonds and other property which the Trust Company fraudulently caused its own officers and employees as officers and directors of the Belt Company to turn over to it for the purpose or securing the payment of the said pretended notes as aforesaid, are as follows:

338 first mortgage, 30 year 5 per cent gold bonds of the Kansas City & Northern Connecting Railroad Company of the denomination of $1000, dated January 1, 1897, being bonds numbered 1467, 1769 to 1773, both inclusive; 1799 to 1818, both inclusive; 1324 to 1331, both inclusive; 1756 to 1768, both inclusive; 1184 to 1216, both inclusive; 1466, 1369 to 1400, both inclusive; 1431 to 1440, both inclusive; 1609 to 1658, both inclusive; 1659 to 1708, both inclusive; 1819 to 1851, both inclusive; 1774 to 1798, both inclusive; 1301 to 1323, both inclusive, and 76 of said bonds the numbers of which are not known to your orators; also 50 of said bonds numbered 1129 to 1178, both inclusive.

67 and 9-10 second mortgage, 30 year 5 per cent income bonds of the Kansas City & Northern Connecting Railroad Company of the

denomination of $1000 each, dated January 1st, 1897, being bonds numbered 1064 to 1098, both inclusive; 1149 to 1157, both inclusive; 1162 to 1173, both inclusive; 1192 to 1202, both inclusive.

Certificate No. 227, entitling the holder to 250-1000 of said mortgage income bonds.

Certificate No. 229, entitling the holder to 250-1000 of said second mortgage income bonds.

Certificate No. 220, entitling the holder to 150-1000 of said second mortgage income bonds.

472 25 shares of the capital stock of the Fairmount Amusement Company of the par value of $100 each, as evidenced by certificates Nos. 9, 6, 5 and 4.

1120 shares of the capital stock of the Central Improvement Company of the par value of $100 each, as evidenced by certificate- Nos. 148, 149 and 147.

439 shares of the capital stock of the Northern Townsite Company of the par value of $100 each, as evidenced by certificate No. 11.

425 shares of the capital stock of the Missouri Elevator and Terminal Company of the par value of $100 each, as evidenced by certain certificates Nos. 36, 34, 37, 40 and 38.

19,997 shares of the 20,000 shares constituting the capital stock of the Union Terminal Railroad Company.

4994 shares of the capital stock of the Kansas City and Independence Air Line.

15 Kansas City and Northern Connecting Railroad Company's second mortgage income bonds.

About 600 tons of new steel rails, theretofore purchased by, and then belonging to said Belt Company, and being stored in its yards.

Your orators further charge that the Trust Company also caused the Belt Company to assign to it an open account against the Kansas City, Pittsburg & Gulf Railroad Company in an amount of One Hundred Thirty-Three Thousand Fifty-Eight and 4-100 Dollars ($133,058.04), to secure said alleged indebtedness.

Your orators further charge and aver upon information and belief that the said notes were executed and the said account assigned and the said property above described given as collateral security solely under and by virtue of the domination and control of the Trust Company over the Belt Company and at the time the said action was pretended to have been taken by the Belt Company the officers and directors of the Belt Company so causing the Belt Company to take such action were either officers and directors or servants of the Trust Company, and as such officers and directors or servants and employes of the Trust Company were personally interested in securing to the Trust Company all the available assets of the Belt Company, and that the execution of said promissory notes and delivery of said collateral security under such circumstances was fraudulent and void as against the Belt Company, and in law and in equity ought to be set aside.

473 Your orators further charge and aver upon information and belief that the Trust Company continued to keep its own

officers, servants and employes filling the positions of officers and directors of the Belt Company down to about the month of April, 1900, when the said Kansas City, Pittsburg & Gulf Railroad Company having been sold under foreclosure decree and a re-organization of said property joined with the Belt Company having been undertaken, the control of the said Belt Company passed into other hands, and that during all the time until said month of April, 1900, the said Trust Company continuously kept its own officers and employes in the positions of officers and directors of the Belt Company, so that at no time were there any persons holding the positions of officers and directors of said Belt Company, who were not personally interested in said Trust Company, and desirous of assisting the said Trust Company in every possible way; and at no time was there ever any true accounting had between the Trust Company and the Belt Company, for or by reason of the matters and things hereinabove set forth, except such an accounting as the officers and employes of the Trust Company, so holding the positions of officers and directors of the said Belt Company pretended to make in looking over and going through the form of approving the accounts and statements rendered to the Belt Company by the Trust Company.

Your orators further show unto the court that ever since the control of the Belt Company passed out of the hands of the Trust Company the Belt Company prior to the appointment of your orators as receivers, endeavored to procure from the Trust Company a true accounting for and by reason of the matters and things hereinabove set forth, for the purpose of determining the true state of accounts between the Belt Company and the Trust Company; but all such demands of the Belt Company have been refused by the Trust Company.

Your orators further show that, since the filing of the original and ancillary bill herein the Trust Company has prepared and submitted a statement of account which it pretends and claims to be a full and complete statement of account of all the matters and transactions had between it and the Belt Company, and the other companies aforesaid, covering the matters hereinbefore set forth; but your orators charge the fact to be that the said account is insufficient, untrue and that it does not properly or truly account for the stocks and bonds and other properties received by the Trust Company from, for or on account of the Belt Company and the other companies aforesaid; that many of the charges against the Belt Company and the other companies aforesaid contained in said
474 account are untrue, illegal, unauthorized and ought not in law or equity to be permitted to stand as charges against the Belt Company and the other companies aforesaid; that the Trust Company in making said account has omitted therefrom a large number of credits to which the Belt Company and the other companies aforesaid is properly and lawfully entitled; and your orators hereby set forth their objections to said account by reference to specific items and instances, without, however, in any degree waiving their right to object to said account as a whole or to insist that no such account has been rendered by the Trust Company as is con-

templated and required by law or equity or the equity rules governing such matters.

In the said pretended statement the accounts of the Trust Company against the Union Company, Consolidated Company and Air Line were consolidated with the account of the Belt Company in 1893, so that all charges made against or on account of said lines now appear in the statement of the account of the Belt Company.

1. Your orators further show that the Suburban Company was organized under the laws of the State of Missouri on or about January 8th, 1887; that nothing was done by the Suburban Company in the way of construction of its road or the issue or sale of its securities until on or about May 31, 1889. Prior to said date Mr. A. E. Stillwell, Vice President of the Trust Company, and his associates among the officers and directors of the Trust Company came into control of the Suburban Company; and the Trust Company through them, undertook to promote and finance the Suburban Company and to construct, or cause the construction, of its line of railroad. The plan adopted by the Trust Company for this purpose was to cause the Suburban Company to issue a large amount of securities, consisting of bonds and stocks, to be used in securing money with which to construct the railroad, and for this purpose to organize as its agency a construction company which, directly or through some contractor, should construct the line of the Suburban Company and nominally take the securities of the Suburban Company in payment therefor. It was the further intention and purpose of the Trust Company, as a part of the same plan, to cause securities of the Suburban Company to be issued very largely in excess, in value, of the cost of constructing the line of the Suburban Company, and to cause [*said securities to pass through the Trust Company, and to*] said securities to pass through the Trust Company, which would exact large and exorbitant amounts (under the guise of commissions and services for promotion and of a similar nature), and to cause such securities finally to be distributed among the stockholders and directors of the Con-
475 struction Company which was to be organized very largely from the officers and directors of the Trust Company; so that the large profits arising from the enterprise might inure to the Trust Company and its officers, directors and their friends and associates; and in accordance with the aforesaid plan the Trust Company caused the Suburban Company on or about May 31, 1889, to enter into a contract with A. E. Stilwell (said contract being hereinafter referred to as the Stilwell contract) dated June 1, 1889, by the terms of which said Stilwell, or assigns, agreed to organize a construction company within sixty days from the date of said contract, to be called the Kansas City Terminal Construction Company, for convenience hereinafter called the Construction Company, and to cause said Construction Company to build the line of railroad of the Suburban Company from Broadway Street in Kansas City, Missouri, and along Second Street to Harrison Street; thence in a northeasterly direction along the recorded survey of said line, as near as may be, to Cecil Station near the Blue River; said road to be double track the entire distance, with not less than sixty pound steel rails and to be built in

all particulars in a first class manner. It was further provided in said contract that the work should begin not later than the first day of September, 1889, and to be completed within twelve months from that date; that the Construction Company should buy such grounds as it might deem necessary for the use of said railroad company for depot purposes and to pay for all rights of way remaining unsecured by the railroad company; that the Construction Company should build a depot of such dimensions and cost and locate same at such a point and equip the road in such manner as it might deem for the best interests of the railroad company, and to pay all and every nature of expense incurred by the building of said road. In consideration for the building of the road, as above stipulated the Suburban Company agreed in said contract to issue its first mortgage bonds upon that portion of its line above described in the sum of Five Hundred Thousand Dollars ($500,000.00), bearing six per cent interest, the bonds to be in such form and of such denomination and to run such length [*in such form and of such denomination and to run such length*] of time as the said Stilwell or his assigns might designate; that of this issue of bonds the Suburban Company should place in escrow with the Trust Company, Four Hundred and Fifty Thousand Dollars ($450,000.00) of the same, face value, along with Nine Hundred Thousand Dollars ($900,000.00), face value of the stock of the Suburban Company, to be delivered by said Trust Company as trustee to the said Stilwell, or his assigns, upon the faithful completion of said road as in said contract provided.

476 On the day of the execution of said contract, to-wit, June 1, 1889, said A. E. Stilwell duly transferred and assigned the said contract to the Trust Company in consideration of the sum of Ten Thousand Dollars ($10,000.00), and the Trust Company, as the assignee of said Stilwell, thereupon undertook to comply with and perform all the conditions and terms of said contract imposed upon said Stilwell.

Your orators further show that, in pursuance of the duty and obligation cast upon the Trust Company by said contract, it proceeded to and did organize a corporation called the Kansas City Terminal Construction Compan r; and the Trust Company caused its own stockholders, employes, officers and directors to be elected and appointed officers and directors of the Construction Company, so that the Trust Company by reason thereof at all times absolutely dominated and controlled the Construction Company. The stockholders of the Construction Company were also made up of the stockholders, employes, officers and directors of the Trust Company and such of their friends as they were willing to permit to come in and enjoy the fruits and profits of the plan. The Construction Company thereupon began the construction of the railroad of the Suburban Company between the points above designated as Broadway Street and Cecil Station; and had only partially completed the construction of said road, the acquirement of the right of way and the performance of their duties and obligations required by said contract, when, on or about May 9, 1890, the officers of the Construction Company and of the Suburban Company and of the Trust Company (who were substantially the

same persons and having the same purposes and ends in view), with the intent to secure to themselves large and exorbitant profits through their interest in the Construction Company and the Trust Company, and contracting with themselves as the representatives of the said corporations, caused the Construction Company and the Suburban Company to go through the form of agreement, by the terms of which the Suburban Company agreed to receive and accept the uncompleted railroad so partially constructed by the Construction Company as aforesaid as a full compliance with the requirements of said Stilwell contract and to authorize and direct the Trust Company to turn over to the Construction Company the stocks and bonds described in said Stilwell contract; and accordingly by virtue of such control and domination so exercised by the Trust Company over the Suburban Company, the latter went through the form of accepting the said uncompleted railroad and directing the Trust Company to release the said securities, and the Trust Company did re-
477 lease and turn over to the Construction Company bonds of the Suburban Company in the amount of Four Hundred Thousand Dollars ($400,000.00), face value, and stock of the Suburban Company in the amount of Six Hundred Thousand Dollars ($600,000.00), face value, retaining for itself and its officers Fifty Thousand Dollars ($50,000.00), par value of the bonds, and Three Hundred Thousand Dollars ($300,000.00), par value of the stock, as hereinafter set forth; and said stock and bonds in the amount of Six Hundred Thousand Dollars ($600,000.00) and Four Hundred Thousand Dollars ($400,000.00), respectively, were thereupon distributed by the Trust Company and by the Construction Company to the stockholders, employes, officers and directors of said two companies and their friends who had been permitted to participate in the scheme as aforesaid.

Your orators further show that the action of the Trust Company in causing the Suburban Company to accept a partial compliance with its terms as and for a full compliance, and in causing said securities to be issued, was contrary to the best interests of the Suburban Company, oppressive, inequitable and was solely by virtue of the said domination and control and to the end that the persons so in control and domination might realize unlawful gains and profits; and the said transaction ought not in equity to be permitted to stand as against parties in interest in the Suburban Company.

(*a*) Your orators further show that the cost of the road and right of way so constructed and acquired by the Construction Company did not exceed the sum of Two Hundred and Ninety-Two Thousand Dollars ($292,000.00), and that the bonds and stock as aforesaid so turned over to the trust Company and the Construction Company as the pretended consideration were of the reasonable value of Four Hundred and Eighty Thousand Dollars ($480,000.00), and that the unlawful profits of said transaction amounting to the sum of One Hundred and Eighty-Eight Thousand Dollars ($188,000.00), with interest thereon from May 9th, 1890, at six per cent per annum, ought in equity and good conscience to be accounted for by the Trust Company and paid to your orators, and that the pretended

account rendered by the Trust Company omits said item, to which the complainants are properly entitled.

(*b*) Your orators further show that at the time of issuing the bonds aforesaid there were issued the sum of Five Hundred Thousand Dollars ($500,000.00) par value, and that those remaining after delivery by the Trust Company to the Construction Company of bonds of par value of Four Hundred Thousand Dollars ($400,000.00), to-wit, bonds in the sum of One Hundred Thou-
478 sand Dollars ($100,000.00), par value, were fraudulently wrongfully and unlawfully taken and appropriated by the Trust Company for its own benefit; and that said bonds so wrongfully taken and appropriated were of the reasonable value of Ninety Thousand Dollars (90,000.00); that at the same time the capital stock issued by the Suburban Company was of the par value of One Million Dollars ($1,000,000.00), and that remaining after the delivery by the Trust Company to the Construction Company of Six Hundred Thousand Dollars ($600,000.00), par value, as aforesaid, to-wit, the sum of Four Hundred Thousand Dollars ($400,000.00), par value, of said capital stock was fraudulently, wrongfully and unlawfully taken and appropriated by the Trust Company to its own use, and the said stock so wrongfully taken and appropriated was at that time of the reasonable value of Eighty Thousand Dollars ($80,000.00); that your orators are entitled in equity and good conscience to have the Trust Company account for and pay over to *to* your orators the value of said stocks and bonds, to-wit, the sum of One Hundred and Seventy Thousand Dollars ($170,000.00), with interest thereon from May 9, 1890, at six per cent per annum, all of which the Trust Company refuses to do and all of which said items are omitted as credits from said pretended statement of the Trust Company.

(*c*) Your orators further show that by reason of the failure of the Trust Company and its agents to fully complete said contract as provided for under the terms of the said Stilwell contract, the Suburban Company, its successor the Belt Company, one of your orators, as well as the receivers of the Belt Company, who are also your orators, were compelled to and did expend large sums of money to complete the construction of said railroad, and for the purchase of certain right of way which should have been procured and furnished by the Trust Company or by its agent, the Construction Company under said Stilwell contract, and which would have been so furnished but for the unlawful action of the Trust Company in causing the Suburban Company to accept a partial compliance with said contract as and for a full performance thereof: that a partial list of the amounts so expended by the Suburban Company during the year 1890-1891, are as follows:

For Right of Way and Expenses in Connection Therewith.

Date.	Name.	Amount
May .., 1890	M. Uhrig, Curator	$101.10
" 10, 1890	Emma Ackerman and others	50.56
" .., 1890	Dobson & Trimble	1,767.00
" 22, 1890	H. H. Noland, Clk. 1st Div	650.50
June .., 1890	Winford Dougherty	550.00
" 14, 1890	Winford Dougherty	10.00
" 25, 1890	Chi. & Alton, damages	4,202.00
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July 17, 1890	Dobson & Trimble	1,198.73
" 29, 1890	C. R. Barnhart	441.50
" " 1890	G. Friday	75.00
Aug. 8, 1890	T. D. Windrate	54.00
" 8, 1890	Sedden & Edwards Brick Co	400.00
...., 1890	J. P. Knoche	252.50
Oct. 28, 1890	Land Title & Guar. Co	42.50
" 23, 1890	T. S. Case	20.40
Jan. 21, 1891	Jennie Barber	25.00
May 10, 1890	Nat'l W. Wks. Co	$11.25
" 14, "	Smith & Bradbury	251.25
" 14, "	Smith & Bradbury	403.57
" 20, "	Mrs. S. J. Crute	300.00
" 31, "	K. C. Switch & Frog Co	333.00
" 31, "	K. C. Switch & Frog Co	666.00
" 31, "	K. C. Switch & Frog Co	128.00
June 6, "	K. C. Bolt & Nut Co	252.00
June 6, "	Am. Supply Co	108.48
" 19, "	Richards & Conover H. Co	4.17
" "	Western S. & D. Co	37.50
" 19, "	American Supply Co	128.97
" 3, "	Pay Roll, Cons. Train	208.75
" 19, "	Am. Supply Co	120.42
.... .., "	Smith & Bradbury	3,682.10
June .., 1890	Am. Supply Co	225.70
July 7, "	Am. Supply Co	60.87
" .., "	Smith & Bradbury	695.66
" 17, "	K. C. Switch & Frog Co	1,161.00
" .., "	C. R. Barnhart	314.00
" 26, "	J. Smith	10.00
" ... "	Holton, Warren Lbr. Co	128.01
" .., "	Holton, Warren Lbr. Co	104.55
July .., 1896	Holton, Warren Lbr. Co	183.60
" " "	Holton, Warren Lbr. Co	124.95
" " "	Holton, Warren Lbr. Co	199.92
" " "	Holton, Warren Lbr. Co	74.06
Aug. 8, 1890	Kansas City Switch & Frog Co	1,440.00
" 9, "	Kit Colyer	95.00
Aug. 8, "	Smith & Bradbury	842.30
" .., "	Smith & Bradbury	643.50

Date.	Name.	Amount.
Aug. 5, "	J. H. Knoche	
" .., "	J. Whitaker	100.00
Aug. 24, "	Smith & Bradbury	62.00
Sept. 6, "	Kansas City Switch & Frog Co	318.45
" 6, "	Pinkerton Detective Agency	576.00
" 6, "	Kansas City Bolt & Nut Co	139.50
" 6, "	Kansas City Bolt & Nut Co	387.50
.... ", "	Richards & Conover	29.04
.... .., "	Smith & Bradbury	8.17
.... .., "	Kansas City Switch & Frog Co	992.00
Sept. 27, 1890	Smith & Bradbury	824.40
.... "	Kansas City Switch & Frog Co	1,273.53
.... .., "	Smith & Bradbury	43.75
Dec. 22, 1890	H. R. & Co	1,602.00
Jan. 13, 1891	F. M. & Co	962.98
May 26, 1890	Smith & Bradbury	210.00
		3,500.00

That your orators are entitled in equity and good conscience to a credit upon the pretended account produced by the Trust
480 Company for each and all of the amounts above set forth and interest thereon at six per cent per annum from the dates when said payments were made, all of which have been improperly and unlawfully omitted from the said pretended account by the Trust Company.

(*d*) Your orators further show that by reason of the failure of the Trust Company to fully comply with the terms of and conditions of the said Stilwell contract and to furnish the right of way and depot required to be furnished by said Trust Company as a part of said contract, it became necessary to secure additional parcels of right of way, all of which the Trust Company was obligated to procure and furnish under the said Stilwell contract, and the Trust Company undertook to procure such right of way for the Suburban Company and did procure the same and in all cases charged the cost thereof, together with interest thereon, to the Belt Company, and the items so charged appear as debits in the pretended statement produced by the Trust Company; that in many instances the Trust Company caused the Suburban or Belt Company to itself purchase said necessary right of way and to execute notes for deferred payments thereon and said notes and the interest payments as they were made from time to time were duly charged to the Belt Company and appeared as debits in said pretended account; that the Trust Company failed to furnish a depot for the Suburban Company as in and by said contract it was obligated to do through itself or through its agent, the Construction Company, and the Trust Company after the pretended completion of said Stilwell contract undertook to and did construct a depot building for the Suburban Company at Second and Wyandotte Streets and charged the cost thereof to the Belt Company, and said charges appear as debits in the pretended account presented by the Trust Company. The amount so expended for right of way aggregates the sum of One Hundred and Twelve Thou-

sand, Two Hundred Thirty-nine and Eighteen-hundredths Dollars ($112,239.18) the itemized statement of which, showing the amounts and dates when the various items were charged to the Belt Company appears upon the itemized statement marked Exhibit "1" under the head of "Right of Way," hereto attached and made a part hereof. The interest paid on right of way notes as aforesaid, the payment of which was made necessary by the Trust Company's failure to comply with said Stilwell contract, aggregates the sum of Forty-three Thousand Sixty-six and 30-100 Dollars ($43,066.30), an itemized statement of which, showing the dates, and amounts paid is set forth in the said Exhibit "1" under the head of "Interest on Right of Way notes," herewith attached as aforesaid; and the Trust Company charged the Belt Company, and the Belt Company
481 paid the same in cash to the Trust Company, the following items of interest on said right of way notes aforesaid, none of said items appearing on the pretended statement presented by the Trust Company and for such items credit should be allowed the Belt Company and for pretended statement with interest thereon from the date of payment thereof:

Sept. 16th, 1892.	Interest on note of W. S. Taylor favor Berth Schoen	$127.80
Sept. 28th, 1892.	Interest on note of W. S. Taylor favor of Rosalie Sachs	214.77
Oct. 14th, 1892.	Interest on note and deeds of trust....	832.99
March 14th, 1893.	Interest on account of note of A. L. Howe for $49,333.33	1,480.00
March 30th, 1893.	Interest on two $5,000 notes secured by deed of trust on property at Second and Wyandotte Streets	300.00

(*e*) In addition to the amounts appearing upon the pretended statement of the Trust Company as so expended for right of way by the Trust Company and charged to the Belt Company, the Belt Company on or about June 2d, 1896, paid to Louise W. Crane and others, who were then owners of an undivided half interest in lot 124, block 12, of old town, all in Kansas City, Mo., the sum of Three Thousand Dollars ($3,000) as a partial payment for said interest in said lot; that it was the duty of the Trust Company or the duty of its agent the Construction Company, to procure and furnish this tract of land as a part of the right of way called for under the Stilwell contract of June 1, 1889, the said payment was made necessary because of the failure of the Trust Company or its agent, the Construction Company, to comply with and perform the terms of the said Stilwell contract and because of the unlawful action of the Trust Company in causing the Suburban Company to accept a partial compliance with said Stilwell contract as and for a full performance thereof; that said item of Three Thousand Dollars ($3,000.00) is wholly omitted in the pretended account or statement presented by the Trust Company and that the Belt Company is entitled to and should have credit for said item with interest thereon from the date [of] thereof.

(*f*) In addition to the amounts appearing upon the pretended statement of the Trust Company as so expended for right of way by the Trust Company and charged to the Belt Company, the Suburban Company on or about April 4, 1890, paid to Thomas J. Emery, who was then the owner of lots 141 and 142 of block fourteen
482 (14), old town, all in Kansas City, Mo., on account of the purchase of said lots the sum of Four Thousand Five Hundred Dollars ($4,500), and in addition thereto two notes of Five Thousand Dollars ($5,000) each were given as the balance of the purchase price of said lots in the manner hereinafter described; that it was the duty of the Trust Company or the duty of its agent, the Construction Company, to procure and furnish this tract of land as a part of the right of way that was called for under the Stilwell contract of June 1, 1889; and said payment was made necessary because of the failure of the Trust Company or its agent, the Construction Company, to comply with and perform the terms of the said Stilwell contract, and because of the unlawful action of the Trust Company in causing the Suburban Company to accept a partial compliance with said Stilwell contract as and for a full performance thereof; that said item of Four Thousand Five Hundred Dollars ($4,500) is wholly omitted in the pretended account or statement presented by the Trust Company and that the Belt Company is entitled to and should have a credit for said item with interest thereon from the date of the payment thereof.

(*g*) It was the duty of the Trust Company or the duty of its agent, the Construction Company, to procure and furnish to the Suburban Company a right of way across lots ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), and fifteen (15), block ten (10), of old town, and lot one hundred and one (101), of block ten (10), old town, all in Kansas City, Mo., as a part of the right of way called for under the Stilwell contract of June 1, 1889; that the right of way of the Suburban Company crosses the said lots and that the said Suburban Company's road, as so built by the Trust Company or its agent, the Construction Company, passes over and upon these said lots; that the Trust Company or its agent, the Construction Company, has omitted and wholly failed to procure and furnish such right of way for and upon said lots as called for and provided under the terms of the said Stilwell contract; that at the time of the institution of this action the reasonable value of the right of way over and upon lots ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14) and fifteen (15), of blocks ten (10), of old town, so omitted to be provided by the said Trust Company or its agent, the Construction Company, was Eleven Thousand Two Hundred and Fifty Dollars ($11,250); that at the time of the institution of this action the reasonable value of the right of way over and upon lot one hundred and one (101), block ten (10), old town, so omitted to be provided by the said Trust Company or its agent, the Construction Company, was Five Thousand Dollars ($5,000.00); that the reasonable value of the right of way over and upon
483 the said lots, to-wit, Eleven Thousand Two Hundred and Fifty Dollars ($11,250.00) and Five Thousand Dollars ($5,-

000.00) are wholly omitted in the pretended account or statement presented by the Trust Company, and that the Belt Company is entitled and should have credit for the said items of Eleven Thousand Two hundred and Fifty Dollars ($11,250.00) and Five Thousand Dollars ($5,000.00) with interest thereon from the date of the omission of said Trust Company or its agent, the Construction Company, to procure and furnish said right of way.

(*h*) There was paid by the Trust Company as rental for certain right of way, all of which said right of way the Trust Company was obligated to procure and furnish under the said Stilwell contract, and charged against the Belt Company in the pretended statement, the sum of One Thousand Two Hundred Eighty-three and Twenty-hundredths Dollars ($1,283.20), an itemized statement of which is set forth in said Exhibit "1", under the head of "Rental Paid for Right of Way", hereto attached, which said payment was made necessary because of the failure of the Trust Company to comply with and perform the terms of said Stilwell contract.

(*i*) In addition to the amounts appearing upon the pretended statements of the Trust Company as so expended for right of way and rental thereof by the Trust Company and charged to the Belt Company, the Belt Company, or its receivers, all of whom are your orators herein, between March, 1897, and January 1, 1902, were compelled to pay to the Pacific Express Company (who was then the owner of lot one hundred and one (101), block ten (10), of old town, all in Kansas City, Mo.), as rental for right of way of said Belt Company across said lot the sum of Fourteen Hundred Seventy-five Dollars ($1,475.00); that the amounts so expended by the Belt Company or its receivers are as follows:

Amount Paid by the Belt Company.

March,	1897	$25.00
April,	1897	25.00
May,	1897	25.00
May,	1897	25.00
June,	1897	25.00
June,	1897	25.00
Sept.,	1897	25.00
Oct.,	1897	25.00
Nov.,	1897	25.00
Dec.,	1897	25.00
Jany.,	1898	25.00
Feb.,	1898	25.00
March,	1898	25.00
April,	1898	25.00

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May,	1898	25.00
June,	1898	25.00
July,	1898	25.00
Aug.,	1898	25.00

Sept.,	1898	
Oct.,	1898	25.00
Nov.,	1898	25.00
Dec.,	1898	25.00
Jany.,	1899	25.00
Jany.,	1899	25.00
Feby.,	1899	25.00
March,	1899	25.00
March,	1899	25.00
May,	1899	25.00
June,	1899	25.00
June,	1899	25.00
July,	1899	25.00
Sept.,	1899	25.00
Oct.,	1899	25.00
Nov.,	1899	25.00
Dec.,	1899	25.00
Jany.,	1900	25.00
Feby.,	1900	25.00
March,	1900	25.00
April,	1900	25.00
May,	1900	25.00
June,	1900	25.00
July,	1900	25.00
Aug.,	1900	25.00
August,	1900	25.00
		25.00
		$1,100.00

Amounts Paid by the Receivers of the Belt Company.

October,	1900	$25.00
November,	1900	25.00
December,	1900	25.00
January,	1901	25.00
February,	1901	25.00
March,	1901	25.00
April,	1901	25.00
May,	1901	25.00
June,	1901	25.00
July,	1901	25.00
August,	1901	25.00
September,	1901	25.00
October,	1901	25.00
November,	1901	25.00
December,	1901	25.00
		25.00
		$375.00

485 That it was the duty of the Trust Company or the duty of its agent, the Construction Company, to procure and furnish the right of way over said lot as a part of the right of way called for under the Stilwell contract of June 1, 1889, and said payments were made necessary because of the failure of the Trust Company, or its agent, the Construction Company, to comply with and perform the terms of said Stilwell contract and because of the unlawful action of the Trust Company in causing the Suburban Company to accept a partial compliance with said Stilwell contract as and for a full performance thereof; that the said items of rental amounting to Fourteen Hundred and Seventy-five Dollars ($1,475.00) are wholly omitted in the pretended account or statement presented by the Trust Company and that the Belt Company and its receiver (your orators herein) are entitled to and should have credit for said items with interest thereon from date of payment thereof.

(*j*) There was expended by the Trust Company and charged to the Belt Company as appears in the said pretended statement the sum of Fifty-nine Thousand Two [Hundred] Sixty-five and Sixty-two-One Hundredths Dollars ($59,265.62) as the cost of the depot building at Second and Wyandotte Streets in Kansas City, Missouri, which said building should have been constructed by the Trust Company, or its agent, the Construction Company, under and in pursuance of the terms of said Stilwell contract; an itemized statement of the items composing the charge of Fifty-nine Thousand Two Hundred Sixty-five and 62-100 Dollars ($59,265.62) is set forth in said Exhibit "1", under the heading "Second and Wyandotte Depots", hereto attached.

(*k*) There was expended by the Trust Company and charged to the Belt Company, as appears in the said pretended statement, the sum of Twenty-two Thousand One Hundred Fifty-eight and Seventy-five Hundredths Dollars ($22,-58.75) as the cost of other station depots, platforms, sand house, round house and labor and material furnished, all of which should have been constructed, procured and furnished by the Trust Company or its agent, the Construction Company, under and in pursuance of the terms of the said Stilwell contract. An itemized statement of the items composing this charge of $22,158.75 is set forth in said Exhibit "1" hereto attached, under the head of "Other Buildings".

Your orators further say that all the foregoing matters, which appear (and are set forth in said exhibit) as debits in the pretended account presented by the Trust Company are unlawful and unjust and represent matters for which the Trust Company and not the Belt Company was and is responsible; that all of said items
486 should be eliminated from said account and the Belt Company should be credited with interest thereon from the respective dates when said charges were made; that all of the foregoing matters not appearing upon the pretended statement are items which the Trust Company has unlawfully and improperly omitted therefrom and with which the Belt Company, in equity, should be credited.

(*l*) Your orators further show that, by reason of the failure of

the Trust Company and its agents to fully complete said construction contract, it became necessary for the Suburban Company or its successor, the Belt Company, one of your orators herein, to acquire ground for right of way and switching yards in Kansas City, Missouri, upon the line of its road, which should have been furnished and provided by the Trust Company, or its agent, the Construction Company, under and in pursuance of the said Stilwell contract; that accordingly the Trust Company caused the Second Street Improvement Company, which was also one of the auxiliary companies created and officered by it, to execute a lease from it to the Consolidated Terminal Railway Company covering a strip of land in section twenty-five (25), township fifty (50), range thirty-three (33), in Jackson County, Missouri, containing twenty-eight (28) acres, which land adjoined the right of way and railroad tracks of the Suburban Company running parallel to such tracks at a distance of 4,809.8 feet. It was provided in said lease that the lessee should pay a yearly rental of Three Thousand Dollars ($3,000.00) and that the lessee should also have an option of purchase of said property on certain terms therein specified. Your orators duly paid said rent as it accrued from year to year, amounting to the aggregate sum of Twenty-six Thousand Two Hundred and Fifty Dollars ($26,250.00) and that the reasonable value of said property at the time of the institution of this action was Forty-Four Thousand One Hundred Twenty-five Dollars ($44,125.00). Your orators are entitled in equity and good conscience to be credited upon the pretended accounts produced by the Trust Company for each and all said rental payments with interest thereon at six per cent per annum from the date of such payments and for the value of said property at the time of the institution of this action, with interest thereon as above stated; all of which credits have been improperly and unlawfully omitted from said account by the Trust Company.

(*m*) Your orators further show that by reason of the failure of the Trust Company and its agents to fully complete said Stilwell contract it became necessary for the Belt Company to acquire cer-

487 tain property at Second and Wyandotte Streets in Kansas City, Missouri, being lots 112, 113 and 114, block 11, Old Town, Kansas City, Missouri, for depot purposes; that thereupon the Trust Company caused the said Second Street Improvement Company, one of its auxiliary corporations aforesaid, to lease to the Suburban Company for a period of ten years from June 1, 1891, lots one hundred and twelve (112) and one hundred thirteen (113), block eleven (11), Old Town, all in Kansas City, Mo., which said property, together with said lot 114, block 11, Old Town, Kansas City, Missouri, properly came within the terms of said Stilwell contract and should have been furnished and provided by the Trust Company or by its agent, the Construction Company; under the said lease for said lots 112 and 113 the Belt Company was caused to and did pay rental to the Second Street Improvement Company for the use of said lots from June 1, 1891, to October 31, 1901, a total of One Hundred and Twenty-Five (125) months, at the rental fixed in said lease of Two Thousand Five Hundred Sixty-Six and forty-

hundredths Dollars ($2,566.40) per annum, or a total of Twenty-Six Thousand Seven Hundred Thirty-three and sixty-four-hundredths Dollars ($26,733.64); and that the value of said lots at the time of the institution of this action was the sum of Twenty-Five Thousand Seven Hundred and Fifty Dollars ($25,750.00), and your orators are entitled in equity and good conscience to a credit upon the pretended account produced by the Trust Company for the sum paid as rentals with interest thereon at six per cent per annum from the date of each payment and for the said sum of Twenty-Five Thousand Seven Hundred and Fifty Dollars ($25,750.00), with interest thereon; all of which credits have been improperly and unlawfully omitted from said pretended account by the Trust Company.

(*n*) Your orators further show that on March 20, 1890, the McClelland, Stumpf & Peltzer Brick Manufacturing Company owned lots one hundred forty-three (143), one hundred forty-four (144), one hundred forty-five (145) and one hundred forty-six (146), in block fourteen (14); lots one hundred nineteen (119), one hundred twenty-two (122), one hundred twenty-three (123), one hundred twenty-five (125), and an undivided half interest in lot one hundred twenty-four (124), in block twelve (12), and lot one hundred thirty-eight (138), in block thirteen (13), all in Old Town, Kansas City, Missouri, all of which property is located in the vicinity of Second and Wyandotte Streets and is a part of the depot grounds of the Belt Company and was a part of the right of way to be acquired and furnished by the Trust Company or by its agent, the Construction Company, under the Stilwell contract of June 1, 1889.

In March, 1890, the said Brick Manufacturing Company
488 conveyed all of the foregoing property to Alfred L. Howe, agent or dummy of the Trust Company, and on the same date the said Howe executed two notes for Forty-Nine Thousand Three Hundred Thirty-Three and thirty-three hundredths Dollars ($49,333.33) each, to secure to the said Brick Manufacturing Company the balance of the purchase price of the same, and a deed of trust to secure said notes was placed upon all said property. On June 23d, 1890, the said Howe conveyed said property to the Belt Company. The first of said notes was for $49,333.33, which became due March 20, 1891, and the second became due March 20, 1892, both bearing six per cent interest; the first of said notes was paid by the Trust Company on March 23, 1891, and charged by it to the Belt Company. On March 14, 1890, the said Brick Manufacturing Company conveyed to W. S. Taylor, an agent and dummy of the Trust Company, lots nine (9), ten (10), eleven (11), twelve (12) thirteen (13), fourteen (14) and fifteen (15) in block eleven (11) of King & Bouton's Re-survey of the East Half of block eleven (11), Old Town, in Kansas City, Missouri, for a consideration of Forty-One Thousand One-Hundred Dollars ($41,100.00), and said Taylor executed to said Brick Manufacturing Company three notes in the sum of Ten Thousand Dollars ($10,000.00) each, dated June 1, 1890, to secure the unpaid purchase money, and gave a deed of trust to secure said notes. The property just described is located at Second and Wyandotte Streets, in Kansas City, Missouri, upon

which the depot building of the Belt Company was afterwards constructed, and it was a part of the property and right of way that should have been furnished by the Trust Company, or by its agent, the Construction Company, under the terms of the said Stilwell contract of June 1, 1889. The Kansas City Terminal Construction Company, in recognition of its obligation to pay for this property at or about the time of its purchase paid from its treasury to the said Brick Manufacturing Company or for it the sum of Eleven Thousand One Hundred Dollars ($11,100.00), which, with the said three notes of Ten Thousand Dollars ($10,000.00), given for deferred payments, made up the purchase price of said property; the said Taylor, after the execution of the said three notes, conveyed said property to the Belt Company. On April 7, 1890, Thomas J. Emery owned the following described real estate in Kansas City, Missouri, to-wit, lots twelve (12) and thirteen (13) of King & Bouton's Re-survey of the west half of block ten (10), Old Town; also lots one hundred forty-one (141) and one hundred forty-two (142), block fourteen (14), Old Town; on said date he duly conveyed said property to the said Alfred L. Howe, who was
489 acting in the same capacity as aforesaid; that said Howe gave back to said Emery two notes for Nine Thousand Three Hundred Seventy-Five Dollars ($9,375.00), with six per cent interest, to secure the unpaid portion of the purchase price, securing said notes with a deed of trust upon the property; and thereafter on June 23, 1890, conveyed lots one hundred forty-one (141) and one hundred forty-two (142) in block fourteen (14) to the Belt Company, and the remainder of the property was conveyed to the Second Street Improvement Company; that of said two notes Nine Thousand Three Hundred and Seventy-Five Dollars ($9,375.00) each, the sum of Ten Thousand Dollars ($10,000.00), or Five Thousand Dollars ($5,000.00) on each of said notes, represented the deferred payments on the property acquired for and deeded to the Belt Company; that all of said Emery property was a part of the property and right of way that should have been procured and furnished by the Trust Company or by its agent, the Construction Company, under the terms of the said Stilwell contract of June 1, 1889.

Your orators further show that the notes described representing deferred payments on property purchased for and afterwards conveyed to the Belt Company are as follows:

Drte of note.	Date due.	Int.	In favor of.	Amount.
4- 4-1890	6- 4-1891	6 per cent	T. J. Emery.....	$5,000.00
4- 4-1890	4- 4-1892	6 per cent	T. J. Emery.....	$5,000.00
6- 117890	6- 1-1891.	6 per cent	McClelland, Stumpf Peltzer Brick Mfg. Company	$10,000.00
6- 1-1890	6- 1-1892	6 per cent	Do.....	$10,000.00
6- 1-1890	6- 1-1893	6 per cent	Do.....	$10,000.00
3-20-1890	3-20-1892	6 per cent	Do.....	$49,333.33

Your orators further show, that on or about October 15, 1897, the Belt Company was embarrassed financially and insolvent and that it had outstanding notes of a large amount, including the notes above mentioned, which were secured by a first mortgage as aforesaid; that the stock of the Belt Company was depressed in value and certain of the officers of the Trust Company and certain investors in it and in the Belt Company became desirous of improving the financial condition of the Belt Company by getting off its books certain of its bills payable, including the notes mentioned, in order that by certain manipulations a dividend might be declared, and the market in the stocks of the Belt Company might be improved and the parties interested might profit therefrom in their stock dealings and transactions. Accordingly, an arrangement was made between certain officers of the Trust Company and J. de Goeijen, by the terms of which the Trust Company assumed and agreed to pay the said real estate notes, including the notes above mentioned,
490 and the amount of said notes, including the said sum of Eighty-Nine Thousand Three Hundred and Thirty-Three and thirty-three-hundredths Dollars ($89,333.33), was by the Trust Company charged to the Belt Company on the books of the Trust Company, and the same now appears as a debit to the Belt Company in the pretended statement submitted by the Trust Company. At the time of said transaction, and on or about October 15, 1897, pursuant to the plan aforesaid, the said J. de Goeijen purchased certain bonds belonging to the Belt Company, which were by the Trust Company credited upon its books to the Belt Company in an amount sufficiently large to cover all of said notes, so that upon the books of the Belt Company all of said bills payable had been eliminated, and the Belt Company was thus enabled to make out and send to stockholders and financial publications a clean statement showing an improved financial condition for the purpose of bolstering up the market value of its stock aforesaid, all of which was accordingly done. The said statements showing said credits extended by the Trust Company and the improved financial condition of the Belt Company resulting therefrom, were sent out to stockholders and investors and the financial publications aforesaid, and the public was invited to purchase and trade in the stocks as well as the bonds of the Belt Company, in reliance upon such statements. And your orators aver that thereafter the public did deal in, buy and sell the stocks and bonds of the Belt Company, and investments were made in reliance upon said statements.

Your orators further show, that on or about the month of April, 1899, and after the appointment of receivers for the Gulf Company, the Trust Company had good reason to believe and did believe that it would soon lose control of the Belt Company, and that other and independent directors and officers would be elected, and it thereupon set about to relieve itself of its assumption and agreement to pay the said notes above mentioned aggregating Eighty-Nine Thousand Three Hundred Thirty-Three and 33-100 Dollars, and thereupon made the pretense and claim that the aforesaid credit which it extended to the Belt Company on or about October 15, 1897, was on

the understanding that the funds for such credit should be supplied by the said J. de Goeijen, and that said J. de Goeijen had failed to supply said funds; and thereupon said Trust Company undertook by an entry upon its own books to relieve itself of its said assumption and agreement to pay said notes aggregating $89,333.33, but failed, neglected and refused upon so doing to credit the account of the Belt Company with said sum, as it should have done. At that time the said De Goeijen was indebted to the Trust Company in an amount in excess of said sum, which said De Goeijen was unable to pay, or by reason of their intimate financial relationship the Trust Company was unable or unwilling to collect from De Goeijen, and thereupon the Trust Company contrived the plan of causing the Belt Company to take over its worthless account against De Goeijen, in lieu of crediting the Belt Company with such sum, as it should have done as aforesaid. At said time the Trust Company well knew that said account against De Goeijen was worthless and uncollectable, and its action in causing said entries to be made on the books of the Belt Company and in refusing, itself to credit the Belt Company, was a fraudulent and unlawful attempt on the part of the Trust Company to relieve itself of its assumption of the agreement to pay said notes in said sum of $89,333.33, and at the same time to release said amount charged to the Belt Company on account of such assumption. By reason of the premises, the Trust Company is estopped to deny that the credit it extended to the Belt Company as aforesaid was an absolute credit, and is estopped from saying that said credit was a conditional one, and cannot in equity and good conscience claim the right to unload upon the Belt Company the worthless claim against De Goeijen in lieu of crediting the Belt Company or paying said notes, neither of which has been done by the Trust Company.

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Your orators claim, therefore, that the charge of Eighty-Nine Thousand Three Hundred Thirty-Three and 33-100 Dollars ($89,333.33), made by the Trust Company to the Belt Company on or about October 15, 1897, which appears in the pretended statement submitted by the Trust Company, should be eliminated therefrom, together with all charges of interest which also appear in said pretended statement, and that the Belt Company should be credited with same amount and interest thereon from said date of October 15, 1897, together with interest upon the charges of interest made in connection therewith as aforesaid.

(1) Your orators further state that on or about May 9, 1890, when the Suburban Company and the Construction Company undertook, as above stated, to declare the contract between them for the construction of the first section of the Suburban Company's road duly performed in all respects, the said Construction Company had an overdraft at one of the banks in Kansas City, Missouri, in the sum of Three Hundred and Thirteen and 76-100 Dollars ($313.76), whereby the said Construction Company owed said bank the said sum of money; that the Trust Company, through its officers and agents, unlawfully and fraudulently caused the Suburban Company to take up and pay said overdraft in said sum on the 7th day

of May, 1890, and said sum is wholly omitted in the pre-
492 tended statement of account submitted, and the Belt Company should be and is entitled to be credited with interest thereon from the day of payment thereof.

(2) Your orators further show that upon the organization of the various companies above named, to-wit, the Suburban Company, the Consolidated Company, the Union Company, the Air Line and the Northern Connecting Company, the Trust Company as above set forth caused these companies respectively to issue stocks and bonds, and thereupon the Trust Company undertook the disposition of said stocks and bonds, in some instances going through the form of purchasing said stocks and bonds itself and in other cases disposing of said stocks and bonds to others, and in connection therewith made large and exorbitant charges to the Belt Company under the guise of commissions for so doing.

(*a*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of commissions in connection with the Belt Company:

Aug. 8, 1890	$15,000.00
Dec. 22, 1894	4,000.00
Oct. 10, 1894	1,250.00
July 29, 1897	1.58
Feb. 8, 1899	75.00
Apr. 6, 1894	22.50
Nov. 20, 1895	62.50

(*b*) In addition to the foregoing amounts, the Trust Company on or about November 27, 1891, charged the Belt Company the sum of One Thousand Dollars ($1,000.00), as and for a commission in connection with the Belt Company; and the said amount was paid to the Trust Company by the Belt Company. The amount of this payment does not appear on the pretended statement presented by the Trust Company.

(*c*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of commissions in connection with the Consolidated Company:

Oct. 26, 1891	$522.50
Apr. 4, 1892	6,000.00
Oct. 26, 1891	30,000.00
Dec. 17, 1891	6,000.00
Oct. 27, 1891	402.50
Oct. 26, 1891	120.00
Nov. 13, 1891	320.00
Nov. 2, 1891	150.00
493 Nov. 2, 1891	80.00
Nov. 12, 1891	1,182.50
Nov. 16, 1891	463.18
Nov. 21, 1891	750.00
Nov. 23, 1891	4,455.00
Dec. 4, 1891	24.00

Dec. 7, 1891	
Dec. 19, 1891	24.00
Jan. 9, 1892	300.00
Jan. 12, 1892	30.00
Jan. 30, 1892	300.00
Feb. 11, 1892	750.00
Feb. 26, 1892	90.00
Feb. 29, 1892	60.00
Mar. 11, 1892	225.00
Mar. 19, 1892	30.00
Mar. 19, 1892	60.00
Apr. 6, 1892	750.00
Apr. 12, 1892	2,802.80
July 13, 1892	1,200.00
Aug. 2, 1898	240.00
Feb. 8, 1899	40.88
	46.00

(*d*) In addition to the foregoing charges that appear upon the said statement, the Trust Company took and appropriated to its own use the stock and bonds of the Consolidated Terminal Company under the guise of commissions as follows:

Dec. 17, 1891, 1000 shares of stock of the value of $32,220.00.

Dec. 17, 1891, 30 bonds of the value of $25,410.00.

Mar. 17, 1892, 240 shares of the stock of the value of $7,732.00.

July —, 1892, 3100 shares of stock of the value of $103,333.33.

(*e*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of commissions in connection with the Union Terminal Company:

	Dec. 31, 1892	
	Jan. 13, 1893	$500.00
	Jan. 23, 1893	7,500.00
	Jan. 26, 1893	3,200.00
	Apr. 5, 1893	15,000.00
	Sept. 16, 1898	6,250.00
	Oct. 6, 1898	50.00
494	Oct. 18, 1898	100.00
	Jan. 17, 1899	50.00
	Jan. 18, 1899	231.25
	Feb. 17, 1899	277.50
	Aug. 2, 1898	230.00
	Feb. 8, 1899	90.63
		117.00

(*f*) In addition to the foregoing charges the Trust Company charged the Belt Company under the guise of commissions and caused the Belt Company to pay the same in connection with the Union Company the following sums:

September 26, 1892	$4,400.00
October 7, 1892	500.00
November 10, 1892	800.00
December 31, 1892	550.00
January 7, 1893	250.00

The amount of these payments does not appear on the pretended statement presented by the Trust Company.

(*g*) In addition to the foregoing items appearing upon the pretended statement, the Trust Company took, appropriated and converted to its own use, under the guise of commissions, three hundred (300) shares of Union Company stock of the value of Nine Thousand Eight Hundred Sixty-Four Dollars ($9,864.00), which does not appear upon said statement.

(*h*) In addition to the foregoing items the Trust Company took, appropriated and converted to its own use, under the guise of commissions for services rendered, the following stocks and bonds of Union Company:

October 21, 1892, 60 bonds of the value of.....	$54,000.00
1,500 shares of stock of the value of.....	49,320.00

(*i*) In addition to the foregoing items the Trust Company took, without consideration, appropriated and converted to its own use one thousand (1,000) shares of Union Company stock of the value of Thirty-Two Thousand Eight Hundred and Eighty Dollars ($32,880.00).

(*j*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of commissions in connection with the Air Line:

Mar. 17, 1892.....	$520.00
June 20, 1892.....	50.00
July 6, 1892.....	700.00

(*k*) In addition to the foregoing appearing on said statement there was taken and appropriated by the Trust Company and
495 by it converted to its own use, on or about December 9, 1891, the following:

13 mortgage bonds of the Air Line of the value of $11,193.00.

500 shares of stock of the Air Line of the value of $15,950.00, for which no credit is given to the Belt Company in said statement.

(*l*) In addition to the foregoing appearing on said statement there was taken and appropriated by the Trust Company and by it converted to its own use in the year 1892, 500 shares of Air Line stock of the value of $15,950.00.

(*m*) In addition to the foregoing items the Trust Company in the year 1895 took, appropriated and converted to its own use under the guise of commissions and service for promotion in connection with the Air Line, 80 shares of stock of the East Kansas City Land Company (then the property of the Belt Company) of the value of Eight Thousand Dollars ($8,000.00).

(*n*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of commissions in connection with the Kansas City & Northern Connecting Railroad Company:

July 19, 1896	$400.00
July 29, 1896	400.00
Oct. 1, 1899	50.00
Dec. 10, 1896	8,250.00
Dec. 10, 1896	3,012.00
Dec. 23, 1897	50,000.00
Dec. 23, 1897	15,791.00
Dec. 23, 1897	1,250.00
Feb. 9, 1898	250.00
Feb. 24, 1898	300.00
Sep. 8, 1898	950.00
Dec. 27, 1898	250.00
May 23, 1899	62.50

Your orators further show that as above set forth the Trust Company, at all times while it was handling the stocks and bonds of the companies mentioned, absolutely dominated and controlled said companies and was using them, and each of them, as its own instrumentality or dummy for its own benefit and profit; that the Trust Company occupied a fiduciary relation to said companies and that any contract or contracts made or claimed to have been made between the Trust Company and said companies respectively,
496 providing for commissions, donations or services were unlawful, inequitable and oppressive, and neither said contracts nor the charges above made were ever submitted to or approved by the parties in interest in said companies; that the said charges and exactions made under the guise of commissions or services were not only exorbitant, but by reason of the relationship between the Trust Company and the said companies the Trust Company did not have the right in law to charge the said companies any commissions whatsoever for the sale or handling of said securities or for anything done or services performed on account of which said charges were made; that the charges for said commissions contained in said pretended statement should be eliminated and the Belt Company should be credited upon said account with interest on said charges from the dates when they were made; and in respect to the charges for commissions not appearing upon said pretended statement, the Belt Company should be and is entitled to a credit from the Trust Company with interest from the date of the payment thereof; and the value of the stocks and bonds so appropriated by the Trust Company as aforesaid, together with interest thereon from the dates respectively of such appropriation, should be credited to the Belt Company upon said statement.

3. Your orators further show that upon the organization of the various companies above named, to-wit, the Suburban Company, the Consolidated Company and the Union Company, the Trust Company as above set forth caused these companies respectively to issue stocks and bonds, and thereupon the Trust Company undertook the handling and disposition of said stocks and bonds, and, in addition to the exaction of commissions as above stated, the Trust Company exacted and caused the Belt Company to pay certain other

charges under the name of trustee's fees, which your orators allege are wrongful and unlawful charges, for the reasons hereinbefore and hereinafter set forth, said charges being as follows:

(*a*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of trustee's fees in connection with the Union Company, as follows:

Jan. 13, 1893	$22,500.00
Jan. 23, 1893	9,600.00
Apr. 5, 1893	18,750.00
Feb. 27, 1893	375.00

In addition to the foregoing charges the Trust Company charged the Belt Company under the guise of Trustee's fees and caused the Belt — to pay the same in connection with the Union Company, the following sums:

497	Sept. 26, 1892	$13,200.00
	Oct. 7, 1892	1,650.00
	Nov. 10, 1892	2,400.00
	Dec. 31, 1892	1,650.00
	Jan. 7, 1893	750.00

The amount of these payments does not appear on the pretended statement presented by the Trust Company.

(*b*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of trustee's fees in connection with the Consolidated Company:

Apr. 25th, 1892 ..... $7,000.00

(*c*) In the pretended statement presented by the Trust Company there are the following charges to the Belt Company under the guise of trustee's fees in connection with the Suburban Company, to-wit:

From September, 1891, to and including May, 1900, at the rate of $17.00 per month, aggregating $1,326.00.

(*d*) In addition to the foregoing charges that appear upon the said statement, the Trust Company took and appropriated to its own use, the following stocks of the Suburban Company under the guise of trustee's fees or services, as follows:

Sept. 12, 1892, 1 share of the value of $33.00.

Your orators further show that, as hereinbefore set forth, the Trust Company at all times while it was handling the stocks and bonds of the companies mentioned absolutely dominated and controlled said companies and was using them and each of them as its own instrumentality or dummy for its own benefit and profit; that the Trust Company occupied a fiduciary relation to said companies and that any contract or contracts made, or claimed to have been made, between the Trust Company and said companies respect-

ively, providing for trustee's fees, were unlawful, inequitable and oppressive, and neither said contracts nor the charges above made were ever submitted to or approved by the parties in interest in said companies; that the said charges and exactions made under the guise of trustee's fees were not only exorbitant, but, by reason of the relationship between the Trust Company and the said companies, the Trust Company did not have the right in law to charge the said companies any trustee's fees whatsoever in connection with the sale or handling of said securities or for anything done or services performed, on account of which said charges were made;

498 that the charges for said trustee's fees contained in said pretended statement should be eliminated and the Belt Company should be credited upon said account, with interest on said charges from the date when they were made and in respect to the charges for trustee's fees not appearing upon said pretended statement of the Trust Company, the Belt Company should be and is entitled to a credit from the Trust Company with interest from the date of payment thereof; and the value of the stocks so appropriated by the Trust Company as aforesaid, together with interest thereon from the date of such appropriation, should be credited to the Belt Company upon said statement.

4. Your orators further show that upon the organization of the various companies above named, to-wit, the Suburban Company and the Consolidated Company, the Union Company, the Air Line and the Northern Connecting Company, the Trust Company as above set forth caused these companies respectively to issue stocks and bonds, and thereupon the Trust Company undertook the handling and disposition of said stocks and bonds and appropriated and converted to its own use large amounts of the stock of said companies under the pretense that said stock was taken by the Trust Company as a bonus.

(*a*) On or about August 8, 1890, the Trust Company took and appropriated, under the guise of a bonus, 2,200 shares of stock of the Suburban Company, of the value of $72,600.00.

(*b*) Upon the following dates the Trust Company appropriated and converted to its own use, under the guise of a bonus, the following shares of stock of the Consolidated Company:

Dec.	7, 1891,	248 shares of the value of	$ 7,990.56
Nov.	7, 1892,	16 shares of the value of	515.52
Nov.	7, 1892,	104 shares of the value of	3,350.88
Dec.	8, 1892,	388 shares of the value of	12,501.36
Dec.	4, 1891,	24 shares of the value of	773.28

(*c*) Upon the following dates the Trust Company appropriated and converted to its own use, under the guise of bonus, stock of the Union Company, as follows:

Oct.	31, 1892,	230 shares of the value of	$ 7,595.28
Dec.	31, 1892,	9 shares of the value of	295.92
Dec.	31, 1892,	2 shares of the value of	65.76
Jan.	5, 1893,	5 shares of the value of	164.40

Jan. 7, 1893,	20 shares of the value of.....	657.60
Jan. 7, 1893.	2400 shares of the value of.....	78,912.00
Jan. 23,1893,	504 shares of the value of.....	16,571.52
Apr. 5, 1893,	1000 shares of the value of.....	32,880.00
Jan. 20, 1894,	350 shares of the value of.....	11,508.00

499 (*d*) Upon the following dates the Trust Company appropriated and converted to its own use, shares of stock of the Kansas City & Independent Air Line under the guise of bonus, as follows:

June 23, 1892,	70 shares of stock of the value of.....	$ 2,333.00
June 23, 1892,	7 shares of stock of the value of.....	223.30

(*e*) Upon the following dates the Trust Company took from the Belt Company and appropriated and converted to its own use the following shares of stock of the Kansas City & Northern Connecting Railroad Company, under the guise of bonus:

Oct. 9, 1896,	2000 shares of the value of.....	$ 6,000.00
Sept. 21, 1897,	70 shares of the value of.....	210.00

And on the following dates the Trust Company took from the Belt Company and appropriated to itself and converted to its own use the second mortgage bonds of the Kansas City & Northern Connecting Railroad Company as follows:

July 20, 1896,	140 bonds.....	$63,000.00
Sept. 21, 1897,	4 9–10 bonds.....	2,205.00

Your orators further show that as hereinbefore set forth the Trust Company at all times while it was handling the stocks and bonds of the companies mentioned, absolutely dominated and controlled said companies, using them and each of them as its instrumentality or dummy for its own benefit and profit; that the Trust Company occupied a fiduciary relation to said companies and was the promoter and organizer of each and all of them; that there was no consideration whatever for the above mentioned stocks and bonds so taken by the Trust Company as between the Trust Company and the Belt Company, but that said stocks and bonds were so taken by the Trust Company solely by virtue of its domination and control over it; that in equity and good conscience the Trust Company should account to the Belt Company for the value of all of said stocks and bonds so unlawfully taken by it from the Belt Company, and the Belt Company is entitled to credit upon the pretended statement presented by the Trust Company for the value of said stocks and bonds so unlawfully appropriated as aforesaid, together with interest thereon from the dates respectively of such appropriations.

5. Your orators further show that upon the organization of the various companies above named, to-wit: The Suburban Company, the Consolidated Company, the Union Company, the Air Line, and the

Northern Connecting Company, the Trust Company began the practice of loaning money to the said companies, taking the
500 promissory notes of the company to which the money was so loaned, and charging such loan to the Belt Company; that from time to time moneys were advanced by the Trust Company to or for said companies, and the same were charged to the Belt Company in open account and from time to time the securities, consisting of stocks and bonds of said companies, were bought by the Trust Company from said companies, or sold by the Trust Compay, for them, and the proceeds credited in open account to the Belt Company; that in this manner there were from time to time many notes of large amounts given by the Belt Company upon which the Trust Company charged the Belt Company with interest and discount in large sums; that interest on daily balances upon said open accounts was also computed, usually at the close of each month, and if the balance was in favor of the Belt Company an allowance was made of interest on the average daily balance for such month at the rate of two per cent per annum, but if the balance was in favor of the Trust Company, interest upon the average daily balance for such month was allowed at the rate of from seven per cent to ten per cent, and the amount of such interest charged to the Belt Company in open account, and the interest so charged to the Belt Company in open account was included in the daily balances for subsequent months, and also in the promissory notes of the Belt Company taken from time to time, and in that manner the interest exacted by the Trust Company was compounded monthly upon daily balances, and at stated periods upon the said promissory notes.

Your orators further show that in the pretended statement of account presented by the Trust Company there are unlawful charges of interest and discount as follows:

(*a*) Between the dates of June 14, 1890, and June 4, 1900, there is charged in open account by the Trust Company against the Belt Company various items of interest on daily balances at the per cent. above stated, which, after the deduction of interest allowed the Belt Company on daily balances, amounts to the sum of $16,105.45, an itemized statement of which, showing the dates upon which said charges were made upon the pretended statement presented by the Trust Company, and the amount of each charge is set forth in a statement under the heading "Interest on Daily Balances," hereto attached and made a part hereof as Exhibit "2."

The item shown on the Exhibit in red represents the allowance of interest on daily balances where the same are in favor of the Belt Company; the items in blue show the charges of interest in favor of the Trust Company and against the Belt Company.

501 (*b*) On May 16, 1892, there was charged in open account as shown by the pretended statement presented by the Trust Company in connection with the Air Line Company against the Belt Company Eighty-five and 18-100 Dollars ($85.18), interest on open account, and the Trust Company charged the Air

Line and the Air Line paid the same in cash to the Trust Company the following items of cash, none of said items appearing on the pretended statement presented by the Trust Company.

Interest on Air Line Notes.

July	28, 1892,	Interest on note	$ 840.00
October	24, 1892,	Interest on note	291.05
March	22, 1893,	Interest on note	1,616.67

Interest on Air Line Overdrafts with the Trust Company.

January	14th, 1893,	Interest on overdraft	$1,459.85
March	22nd, 1893,	Interest on overdraft	211.62
April	24th, 1893,	Interest on overdraft	85.21
June	5th, 1893,	Interest on overdraft	48.78

(*c*) Between the dates of June 14th, 1890, and November 7th, 1899, there was charged by the Trust Company against the Belt Company for discount on said notes, the sum of Nineteen Thousand Eight Hundred Thirty-Two and 9-100 Dollars ($19,832.09); an itemized statement of which, together with the dates upon which said charges were made in the pretended statement presented by the Trust Company, with the amount of each charge, appears on said Exhibit "2" under the head "Discount on Notes."

(*d*) Between the dates of June 14, 1890, and November 7, 1899, there was charged by the Trust Company upon its books against the Belt Company for interest on said notes above mentioned, the sum of Forty-Four Thousand Seven Hundred Sixty-Three and 48-100 Dollars ($44,763.48), and same appears as charges against the Belt Company upon the pretended statement presented by the Trust Company, an itemized statement of which, with the dates upon which said charges were made, and the amount of each charge is shown on said Exhibit "2," under the heading of "Interest on Notes," and the Trust Company charged the Belt Company and the Belt Company paid the same in cash to the Trust Company, the following items of interest, none of said items appearing on the pretended statement presented by the Trust Company.

502 *Interest on Belt Company's Notes.*

August	30, 1892,	Interest on note	$1,104.70
September	5, 1892,	Balance of interest on account Sept. 1, 1892	151.76
September	19, 1892,	Interest	703.33
January	12, 1897,	Interest	109.80
July	24, 1899,	Interest	113.34
January	12, 1900,	Interest	500.00

Interest on Belt Company's Overdrafts with Trust Co.

January 14, 1893, Interest on daily balance May, 1892, to November, 1892.....$ 699.03
March 22, 1893, Interest on overdraft..... 1,102.48

(*e*) During the year 1892 there were charged as shown upon the pretended statement of the Trust Company, in connection with the Air Line, against the Belt Company, items of interest upon notes given by the Air Line to the Trust Company as hereinbefore described, as follows:

May 16, 1892.....$146.67
June 17, 1892..... 437.50
Dec. 8, 1892..... 66.67

(*f*) Between the dates of September 1, 1896, and January 1, 1897, there were charged in open account, as shown by the pretended statement, by the Trust Company, against the Belt Company, certain items of interest upon alleged anticipated payments upon the subscriptions by various parties, including the Trust Company, to the bonds of the Northern Connecting Company, and that said items are as follows:

September 28, 1896.....$ 41.91
October 7, 1896..... 1,179.77
December 11, 1896..... 3.64
" " 1896..... 14.88
" " 1896..... 17.22

(*g*) On August 11, 1892, there were charged in open account, as shown on the pretended statement by the Trust Company, in connection with the Consolidated Company, against the Belt Company, certain items of interest upon alleged anticipated payments upon the subscriptions by various parties to the bonds of the Consolidated Terminal Company, amounting to the sum of $10,195.93.

(*h*) In addition to the amounts appearing upon the pretended statement presented by the Trust Company between the dates September 15, 1896, and June 4, 1900, there were charged by the Trust Company against the Belt Company by reason of the Belt Company constructing the railroad of the Connecting Com-
503 pany, various items of interest on daily balances at the per cent above stated, which after deduction of interest allowed the Belt Company on daily balances amount to the sum of Twenty-Eight Thousand Three Hundred Thirty and 1-100 Dollars ($28,330.01), an itemized statement of which showing the amount of each charge, is set forth in the statement, under the heading "Interest on Daily Balance," hereto attached and made a part hereof as Exhibit "3;" the items shown on the exhibit in red represent the amount of interest on daily balances where the same are in favor

of the Belt Company; the items in blue show the charges of interest in favor of the Trust Company, as against the Belt Company.

(*i*) In addition to the amounts appearing upon the pretended statement presented by the Trust Company between the dates of September 15, 1896, and June 4, 1900, there was charged by the Trust Company, or the Trust Company caused other persons to charge against the Belt Company, for interest on notes that the Trust Company caused the Belt Company to give by reason of the Belt Company constructing the Connecting Company, the sum of Thirty-Six Thousand Four Hundred Nineteen and 86-100 Dollars ($36,419.86), an itemized statement of which, showing the said charges and the amount of said charges, is set forth in the statement under the heading of "Interest on Notes," hereto attached and made a part hereof as Exhibit "3."

(*j*) That the amount of compound interest so compounded as hereinbefore described by the Trust Company and charged against the Belt Company by the Trust Company amounts to the sum of Seventeen Thousand Nine Hundred Twenty-Nine and 44-100 Dollars ($17,929.44).

(*k*) In addition to the foregoing charges of interest and discount there were other charges of interest and discount made by the Trust Company against the Belt Company to the amount of One Hundred and Fifty Thousand Dollars ($150,000.00), which the Belt Company was caused by the Trust Company to pay from funds in its treasury.

Your orators further show that as hereinbefore stated, the Trust Company at all times, covering the period of the charges aforesaid, absolutely dominated and controlled the said companies and was using them, and each of them, as its own instrumentality or dummy for its own benefit and profit; that the Trust Company, as the promoter of said companies, and by reason of its control and domination over them, at all times occupied a fiduciary relation to
504 said companies and was not entitled in equity and good conscience to make said excessive and unreasonable charges and exactions; that by reason of the relationship between the Trust Company and the said companies as hereinbefore stated, the Trust Company did not have the right to charge the said companies any interest whatever upon daily balances, or otherwise, and that the charges for said items of interest contained in said pretended statement should be eliminated, and the Belt Company should be credited upon said account with interest on said charges from the dates when they were made, and there should be credited upon said account also the amount of compound interest and the interest which the Belt Company was caused to pay from its own funds to the Trust Company, together with interest on said payments from the time when they were made respectively, and credit for the items of interest shown as paid and omitted from the pretended statement of the Trust Company, should be allowed upon said pretended statement with interest from the date of payment thereof.

6. Your orators further show that the Trust Company during

the period beginning with the year 1892 down to the year 1900, maintained what it called its "Building Department," which consisted of a limited number of employes, whose duty it was to make contracts for such building or construction work as the Trust Company might desire to have done in carrying out its various enterprises in connection with its auxiliary companies, including the Belt Com-any, the Consolidated Company, the Union Company, the Air Line, the Elevator Company and Amusement Company; that all of the work done for said companies could, and should, have been done by said companies, respectively, but the Trust Company contrived the scheme of its Building Department in order that work of that character might be done by the Trust Company and large and exorbitant charges made therefor, from which the Trust Company might reap a large profit by causing the Belt Company to pay, not only the cost of such work and materials, but also large sums in addition thereto under the guise of superintendence; that the aforesaid plan was carried out to the extent that a large amount of work was done by the said Building Department, for the companies above named, and the Trust Company caused the Belt Company to pay not only the cost thereof, but from ten per cent, to fifteen per cent, additional under the guise of superintendence; that the amount of said superintendence so charged by the Trust Company to the Belt Company, together with the dates on which said charges were made, and the amount of each charge, is shown under the heading of "Superintendence," on Exhibit "2," hereto attached, and aggregates the sum of
505 Forty Thousand Four Hundred Fifty-Six and 32-100 Dollars ($40,456.32); that of said sum fifty (50) per cent. was clear profit to the Trust Company; that the Trust Company charged to the Belt Company the said sum of $40,456.32, and the same appears upon the pretended statement presented by the Trust Company; that the Trust Company by reason or its relation to the said companies did not have the right in law to charge the said companies any sum whatsoever as superintendence in excess of the actual cost thereof, and did not have the right to profit out of said transactions; that the said profits of the Trust Company arising from said transactions should be eliminated from said pretended statement, and the Belt Company should be credited upon said account with interest on the amounts so eliminated from the dates when the said charges were made.

7. Your orators further show to the court that in the year 1895 the Trust Company, under the pretense of increasing the earnings of the Air Line, caused by the incorporation of the Fairmount Amusement Company, and the establishment and exploitation of Fairmount Park, and in so doing the Trust Company caused to be expended by the Air Line and by the Belt Company large sums of money in the acquisition of a large tract of land near the railroad of the Air Line between Kansas City and Independence, and the construction of buidings thereon and the adaptation of said grounds for the purpose of a public park; that the moneys so

furnished by the Air Line as aforesaid were afterward, by the direction of the Trust Company, charged to and assumed by the Belt Company so that ultimately all of the expenses in connection with the exploitation of Fairmount Park were charged to the Belt Company, and the various items making the aggregate thereof appear as debits to the Belt Company upon the pretended statement presented by the Trust Company; that the result of the organization and operation of Fairmount Park was a net loss of Two Hundred Ninety-Three Thousand Three Hundred three and 68-100 Dollars ($293,303.68), all of which the Belt Company was required by the Trust Company to stand; that the scheme of Fairmount Park was a financial failure and the Trust Company knew, or should have known, that it would be such failure, and the conduct of the Trust Company in causing the Belt Company to organize and carry on said enterprise and to stand the loss arising therefrom was and is inequitable, unjust and oppressive, and the Trust Company should in equity and good conscience be required to stand said loss itself, and the amount of said loss should be eliminated from the charges against the Belt Company upon the pretended statement produced by the Trust Company, or if that is impossible by reason of inability to identify the various items going to make
506 the deficiency, then the amount of said loss, together with interest thereon, should be credited upon said pretended statement.

8. Your orators further show to the court that the Trust Company caused the incorporation of the Missouri Elevator and Terminal Company on or about January 4, 1892, and after its incorporation the Trust Company caused to be constructed for it by the building department of the Trust Company three elevators, and caused the Elevator Company to operate said elevators and to execute upon its corporate property mortgages in large amounts to pay the purchase price of its properties.

(*a*) The operation of said elevator by the Elevator Company resulted in a loss, which was represented in part by a charge upon the books of the Trust Company against the Elevator Company in the amount of Three Hundred Ninety-One and 17-100 Dollars ($391.17); that the Trust Company on or about the 29th day of April, 1893, found that the Elevator Company was hopelessly insolvent and unable to pay said amount, and thereupon it charged said amount so due it from the Elevator Company, together with other items alleged to be due from the Elevator Company, to the Trust Company, amounting in all to the sum of Fifteen Thousand Two Hundred Ninety-Six and 68-100 Dollars ($15,296.68) to the Belt Company, and said charge of $15,296.68 now appears in the pretended statement presented by the Trust Company as a charge against the Belt Company; that the action of the Trust Company in so charging against the Belt Company the debt of the Elevator Company was wrongful, and said charge was without consideration, and the said charge should be eliminated from the said pretended statement.

(*b*) On or about June, 1893, and while the Trust Company,

then holding all of the stock of the Elevator Company in its name and in the names of its directors and officers and their wives, knew that the Elevator Company was hopelessly involved and could not be made a success, the Trust Company caused the Belt Company to go through the form of an agreement with the Elevator Company, by the terms of which the Belt Company was to acquire and take title to all of the elevators and other properties of the Elevator Company, except one thousand four hundred and sixty-one (1461) shares of stock of the Belt Company theretofore exchanged by the Trust Company and its directors, officers and their wives, for Elevator stock, and in consideration thereof the Belt Company was to issue to the Elevator Company 146.1 shares of the capital stock of the Belt Company and to assume the liabilities of the Elevator, all of which were then owing by the Elevator Company to the Trust Com-
507 pany; that said shares of stock were duly issued by the Belt Company and delivered to the Elevator Company and the liabilities of the Elevator Company were charged to the Belt Company, but the contract was never carried out in any other respect. The said 146.1 shares, upon being so received by the Elevator Company, together with the shares of the Belt Stock above referred to, were caused by the Trust Company to be delivered to it and its directors and officers and their wives, so that the Belt Company never at any time received any consideration for said 146.1 shares of Belt stock, of the reasonable value of Four Thousand Seven Hundred and Seventy Dollars ($4,770.00), which said amount should be allowed as a credit upon the pretended statement presented by the Trust Company, together with interest thereon at the rate of six per cent. per annum from said 8th day of June, 1893.

(*c*) From September, 1892, to September, 1894, the Trust Company caused the Belt Company to pay out from its own treasury to the Trust Company for the completion of the property of the Elevator Company the sum of Fourteen Thousand One Hundred Eighty-Five and 4-100 Dollars ($14,185.04), for which the Belt Company received no consideration. The said sum of $14,185.04 was paid out of funds of the Belt Company advanced to it by the Trust Company, and charged in the pretended statement presented by the Trust Company, and, therefore, said sum with interest thereon should be credited to the Belt Company on said statement.

(*d*) On or about September 1, 1894, the Trust Company caused the Belt Company to go through the form of an agreement with the Elevator Company, by the terms of which the Elevator Company was to reacquire and take title to all the property of the Elevator Company that had been received by the Belt Company by reason of the pretended agreement of June, 1893, above mentioned, together with all improvements and additions made upon and to the said elevators and property by the Belt Company, amounting in value to the sum of Fourteen Thousand One Hundred Eighty-Five and 4-100 Dollars ($14,185.04), and in consideration thereof, the Elevator Company was to issue and did issue to the Belt Company 425 shares of the Elevator Company's stock, and was to re-assume and did re-assume Thirty-Two Thousand Dollars ($32,000.00) of

the liabilities of the Elevator Company that had been assumed by the Belt Company by reason of the said agreement of June, 1893; and the Belt Company, in addition to the transfer of said property to the Elevator Company, was to continue its assumption of the balance of the liabilities of the Elevator Company, amounting to Fifteen Thousand Two Hundred Ninety-Six and 68-100 Dol-
508 lars ($15,296.68), that had been assumed by the Belt Company by reason of said agreement of June, 1893. The stock of the Elevator Company so received by the Belt Company was worthless, as the Trust Company well knew, and the said $32,000 of liabilities re-assumed by the Elevator Company was evidenced by certain promissory notes of the Elevator Company secured by certain deeds of trust upon the elevators and properties of the said Elevator Company.

Between Sept. 1, 1894, and June 1, 1900, the excess of expenditures occasioned by the operation of the properties and elevators of the Elevator Company over the receipts therefrom amounted to Seventeen Thousand Eight Hundred Seventy-Seven and 92-100 Dollars ($17,877.92), and this loss to the Elevator Company, the Trust Company, solely by reason of its coercion, domination and control over the Belt Company, unlawfully caused to be charged to and paid by the Belt Company without any consideration therefor; the act of the Trust Company in having said charge made and paid was inequitable and oppressive and the Belt Company is entitled to a credit upon the pretended statement of the Trust Company for ($17,877.92), with interest thereon, from the date of payment thereof.

(*e*) In addition to the charges appearing upon the pretended statement, the Trust Company unlawfully caused the Belt Company to pay to it, without consideration therefor, between December, 1894 and June 1899, as interest upon the said $32,000 of notes of the Elevator Company all of which were the obligations of said Elevator Company, the sum of Ten Thousand Dollars ($10,000.00); of this amount so paid Two Thousand Dollars ($2,000.00) appear as charges against the Belt Company upon the pretended statement presented by the Trust Company; and the Belt Company was caused by the Trust Company to pay the balance, Eight Thousand Dollars ($8,000.00), to it from funds in its treasury; all of said payments were made solely by reason of the coercion, domination and control of the Trust Company and said payments are inequitable and oppressive; the Belt Company is entitled to a credit upon the said pretended statement for the said Two Thousand Dollars ($2,000.00) with interest thereon from the date of payment thereof; and the Belt Company is further entitled to a credit from the Trust Company for the said $8,000.00 with interest thereon from the date of payment thereof.

9. Your orators further state that in the year 1895, the Trust Company caused to be incorporated a railroad corporation under the laws of the State of Missouri, called the "Kansas City & Northern Connecting Railroad Company," herein referred to as the
509 Connecting Company, for the purpose of constructing a line of railroad from Kansas City, Missouri, to Pattonsburg, Mis-

souri, in order to connect with the railroads at that time running eastwardly to Chicago, Illinois, and northwardly to Council Bluffs, Iowa.

Afterwards, and in the same year, the Trust Company caused the Belt Company to enter into a contract with the Connecting Company, by the terms of which the Belt Company undertook to acquire the right-of-way and to construct the railroad of the Connecting Company between the points aforesaid, in consideration of which the Connecting Company agreed in said contract to execute, issue and deliver to the Belt Company, bonds and stocks of the Connecting Company; that the Belt Company was caused by the Trust Company to enter upon the execution of said contract and to construct the said railroad, and the Belt Company did secure the right-of-way and construct the railroad of the Connecting Company between Kansas City and Pattonsburg. In so doing the Belt Company was caused to expend large sums of money for right-of-way, material and for construction, and the stocks and bonds of the Connecting Company were wholly inadequate in value to reimburse the Belt Company for the money so expended, so that there resulted a large loss to the Belt Company in the matter of said contract, amounting to the sum of One Hundred Sixteen Thousand Six Hundred Forty-Four and 53-100 Dollars ($116,644.53), all of which of said deficiency was by the Trust Company charged to the Belt Company and the various items going to make the said deficiency appear upon the pretended statement presented by the Trust Company as charges against the Belt Company.

Your orators further state that the action of the Trust Company in so requiring the Belt Company to enter into said contract and construct said railroad, resulting in said loss, was wrongful, oppressive and was done solely for the benefit of the Trust Company that it might profit from the handling of the securities of the Connecting Company, which, under said contract, would be received nominally by the Belt Company, but in reality by the Trust Company; that the Trust Company knew and should have known that said venture would result in a large loss to the Belt Company, and the amount of said loss in equity and good conscience ought not to be charged to and borne by the Belt Company, and the same should be eliminated from the pretended statement presented by the Trust Company, together with interest thereon; or, if the same cannot be identified, then that credit be given for the amount thereof with interest.

510 10. Your orators further show that on January 1, 1897, July 1, 1897, January 1, 1898, and July 1, 1898, there fell due certain coupons upon bonds of the Kansas City & Northern Connecting Railroad Company, outstanding in the hands of various holders; that said coupons were the obligations of said Connecting Company, and were not in any manner obligations, either direct or contingent on the part of the Belt Company.

(*a*) When the said coupons became due on said dates respectively, the Kansas City & Northern Connecting Railroad Company was without funds to pay the same, and the Trust Company in or-

der to bolster up and protect the credit of the Kansas City & Northern Connecting Company, and to prevent a default on its part in the payment of its interest, did take up and pay said coupons in the amounts and on or about the dates hereinafter stated, to-wit:

Jan. 18, 1897	Interest allowed to Jan. 1, 1897, on $100,000 K. C. & N. C. R. R. bonds.	$2,500.00
July 14, 1897	Interest allowed on $51,000 K. C. & N. C. R. R. 5 per cent bonds, due July 1, 1897	1,275.00
Aug. 3, 1897	Interest on $100,000 K. C. & N. C. R. R. bonds due July 1, 1897.....	2,500.00
Oct. 12, 1897	Interest on $300,000 K. C. & N. C. R. R. bonds, due July 1, 1897.....	7,500.00
Dec. 31, 1897	Interest on $100,000 K. C. & N. C. R. R. bonds, due July 1, 1898	2,500.00
Dec. 31, 1897	Interest on $700,000 K. C. & N. C. R. R. 5 per cent bonds, due Jan. 1, 1898, interest being computed from date bonds were sold	7,375.67
Aug. 13, 1898	Interest paid on $51,000 K. C. & N. C. R. R. 5 per cent bonds	1,275.00
July 28, 1898	Interest on $10,000 K. C. & N. C. R. R. 5 per cent bonds, due July 1, 1898, paid by Trust Company to A. & P. Roberts	250.00
	Interest on $1,234,000.00 K. C. & N. C. R. R. 5 per cent bonds, due July 1, 1898	30,850.00
	Total	$56,025.67

511 (*b*) Your orators further show that the Trust Company by virtue of its domination and control over the Belt Company did cause the Belt Company to pay, and it did pay from the funds in its treasury, the interest upon certain bonds of the Kansas City & Northern Connecting Railroad Company, falling due as aforesaid at or about the said dates, to the persons and in the amounts following, to-wit:

Oct. 14, 1897.	John H. Carr, interest on $4,000 K. C. & N. C. R. R. 5 per cent bonds, due July 1, 1897	$100.00
Oct. 13, 1897.	Estate of P. C. Hollis, interest on $5,000 K. C. & N. C. R. R. 5 per cent bonds, due July 1, 1897	125.00
Oct. —, 1897.	F. B. Hubbell, interest on $1,000 K. C. & N. C. R. R. bonds, due July 1, 1897	25.00
Oct. —, 1897.	Mrs. Frances A. Weeks, interest on $1,000 K. C. & N. C. R. R. bonds, due July 1, 1897	25.00
Oct. —, 1897.	Wm. H. Nicholson, interest on $5,000 K. C. & N. C. R. R. 5 per cent bonds, due July 1, 1897	125.00
Oct. —, 1897.	Wells-Fargo Company, interest on $100,000 K. C. & N. C. R. R. 5 per cent bonds, due July 1, 1897	2,500.00
— —, 1897.	N. Norton, Asst. Secretary, account various parties, interest on $249,000 K. C. & N. C. R. R. 5 per cent bonds, due Jan. 1, 1898	6,225.00
	Total	$9,125.00

The amount of these payments does not appear on the pretended statement furnished by the Trust Company.

(c) Your orators further show that all of the foregoing payments made by the Trust Company are charged to the Belt Company in the pretended statement of account except the item of $9,125.00 in the amounts and at the dates above set forth and there is also charged to the Belt Company in said statement interest upon the said payment of $30,850.00, amounting to $167.95, and also the amount of $77.13 as commission or brokerage for paying said coupons.

The said charges made by the Trust Company against the Belt Company and entered on said pretended statement, including the item of Nine Thousand One Hundred Twenty-five Dollars ($9,125.00) are unlawful, inequitable and were caused to be paid by the Belt Company or made arbitrarily by the Trust Company without reason or excuse, but for the pretended reason that the claim of the Trust Company arising out of its payments of said interest could not be collected from the Kansas City & Northern Connecting, because of its financial inability to make said payment, and that the Belt Company being in better financial standing could be made to pay same by charging it to the account of the Belt Company; and your orators are entitled to have said items so appearing in said pretended account eliminated as charges against the Belt Company. The aforesaid payments made by the Belt Company on account of said interest coupons were unlawful and inequitably made by the Belt Company as a result of the coercion and domination of the Trust Company, and not by reason of any liability therefor on the part of the Belt Company, and the Belt

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Company is in equity and good conscience entitled to be credited with the amount thereof, together with interest thereon from the dates of payment at the rate of six per cent per annum.

(*d*) Your orators further show that on or about July 31, 1898, the Belt Company was the owner of the first mortgage bonds of the Kansas City & Northern Connecting Company, and also the owner of Three Hundred and Fourteen (314) coupons attached thereto, which said coupons were then due; that said coupons were the direct obligation of the Kansas City & Northern Connecting Railroad Company, due and payable to the Belt Company, said bonds being at that time in the control of the Trust Company. The Trust Company on or about said date, did wrongfully cause the said coupons, amounting in value to the sum of Seven Thousand Eight Hundred and Fifty Dollars ($7,850.00) to be taken from said bonds and cancelled as having been paid, and denied and still denies to the Belt Company the right to said coupons or the interest thereon; that said act of the Trust Company was wrongful and inequitable and operated to deprive the Belt Company of said sum of Seven Thousand Eighty Hundred and Fifty Dollars ($7,850.00) and interest thereon at six per cent from said date, for which in equity and good conscience the Trust Company should account to the Belt Company and said sum has been omitted by the Trust Company from its pretended statement.

(*e*) Your orators further state that in the pretended account presented by the Trust Company in connection with the Belt Company the following charges appear:

Sept.	1, 1893	$700.00
Feb.	26, 1894	6,800.00
Mar.	1, 1894	700.00
Aug.	30, 1894	6,800.00
Sept.	1, 1894	700.00
Feb.	26, 1895	6,800.00
Mar.	1, 1895	700.00
Aug.	31, 1895	6,800.00
Dec.	20, 1895	700.00
Feb.	27, 1896	6,800.00
Mar.	2, 1896	700.00
Aug.	27, 1896	6,800.00
Sept.	1, 1896	700.00
	Feb. 26, 1897	6,800.00
513	Feb. 27, 1897	700.00
	Aug. 26, 1897	6,800.00
Aug.	28, 1897	700.00
Feb.	26, 1898	6,450.00
Mar.	1, 1898	1,050.00
Aug.	29, 1898	6,450.00
Aug.	31, 1898	1,050.00
Mar.	1, 1899	6,450.00
Mar.	1, 1899	1,050.00

That all of said charges were made against the Belt Company on account of interest on first mortgage bonds of the Air Line which were alleged by the Trust Company to have been paid by it to the holders of the coupons evidencing the same including the Trust Company; that the Belt Company had not assumed or become liable to pay the interest on said Air Line bonds and was not in any way liable therefor; that the action of the Trust Company in making said charges to the Belt Company was not warranted and unlawful and was solely by reason of its power and domination over the Belt Company and said charges should be eliminated from the said pretended account, and the Belt Company should be credited with interest on said amounts respectively at six per cent from the dates respectively when the said charges were made.

11. Your orators further state that on or about September 25, 1893, the Belt Company was the owner of Two Hundred second mortgage bonds of the par value of One Thousand Dollars ($1,000) each, issued by the Kansas City & Independence Air Line and secured by a mortgage upon the property of that company. The Belt Company on that day was also the owner of Twenty-five Hundred (2,500) shares of stock of the par value of One Hundred Dollars ($100.00) each, issued by the Union Company. On said 25th day of September, 1893, a contract in writing was entered into between the Belt Company and the Trust Company, which recited that the Belt Company was the owner of the entire issue of the second mortgage bonds of the Kansas City & Independence Air Line, which issue consisted of Two Hundred (200) bonds of the par value of One Thousand Dollars ($1,000.00) each, subject to the interest which the Trust Company had as trustee in thirty (30) of said bonds, numbered from one seventy-one (171) to two hundred (200), both inclusive, aggregating the principal sum of Thirty Thousand Dollars ($30,000.00), and held in trust by the Trust Company under the mortgage or deed of trust, given by the Kansas City & Independence Air Line of date March 1, 1893, and also reciting that the Belt Company was the owner of Twenty-Five Hundred (2,500) shares of the capital stock of the Union Terminal Railroad Company, of the par value of One Hundred Dol-
514 lars ($100.00) each; and further reciting that the Belt Company was desirous of selling and disposing of the entire issue of said second mortgage bonds and the said 2,500 shares of stock for the purpose of raising money and means to properly extend, equip, repair, maintain and operate its road and to meet its obligations then and thereafter incurred, and that the Trust Company had agreed to purchase said bonds and stock at and for the price and sum thereafter stated in said contract. It was, therefore, mutually agreed in said written contract, that the Belt Company should sell and deliver and that the Trust Company should purchase and receive and pay for the entire issue of the second mortgage bonds of the Kansas City & Independence Air Line, aggregating the principal sum of Two Hundred Thousand Dollars ($200,000.00), and also Two Thousand Five Hundred (2,500) shares of the capital stock of the Union Terminal Railroad Company, of the par value of Two

Hundred and Fifty Thousand Dollars ($250,000.00) at and for the price of the earned interest on said bonds, at the time of their delivery to the Trust Company, and the sum of One Hundred and Fifty Thousand Dollars ($150,000.00), to be paid upon the terms and at the times thereinafter stated; that is to say that the Belt Company should deliver to the Trust Company the said 2,500 shares of the capital stock of the Union Terminal Railroad Company upon the execution of said contract, and whenever the Belt Company should demand the Trust Company should take in amounts of Ten Thousand Dollars ($10,000.00), par value or multiples thereof, so many of said second mortgage bonds as the Belt Company might deliver; and the Trust Company agreed to pay the Belt Company therefor upon said contract all of the earned interest on the bonds so delivered to it and seventy-five per cent (75) of the face value of the principal sum thereof. It was further agreed in said written contract that said second mortgage bonds, numbered from one (1) to one hundred and seventy (170) both inclusive, aggregating the principal sum of One Hundred and Seventy Thousand Dollars ($170,000.00), should be delivered and paid for on or before eighteen (18) months from the date of said contract, and that so many of said bonds, numbered from one hundred and seventy-one (171) to two hundred (200), both inclusive, aggregating the principal sum of Thirty Thousand Dollars ($30,000.00), as should remain unsold by the Trust Company as trustees, under and by virtue of the terms of said mortgage or deed of trust, securing said bonds, on the first day of March, 1898, should be delivered and paid for within six months from said March 1, 1898.

(*a*) Your orators further show that in accordance with said contract there was delivered to the Trust Company by the Belt
515 Company the entire issue of said second mortgage bonds, being two hundred (200) bonds, of the par value of One Thousand Dollars ($1,000.00) each, and the Trust Company gave to the Belt Company credit for one hundred and thirty (130) of said bonds at the sum or price of Seven Hundred and Fifty Dollars ($750.00) each, — follows:

Oct., 1893,	100	bonds at 75.....	$75,000.00
Mar., 1894,	6	bonds at 75.....	4,500.00
Jan., 1895,	6	bonds at 75.....	4,500.00
Mar., 1895,	6	bonds at 75.....	4,500.00
Dec., 1895,	6	bonds at 75.....	4,500.00
Mar., 1896,	6	bonds at 75.....	4,500.00
			$97,500.00

Your orators further state that the Trust Company failed, neglected and refused within the time limited in said contract, or at any time thereafter, to purchase and pay for the remaining seventy (70) second mortgage Air Line bonds, of the par or face value of One Thousand Dollars ($1,000.00) each, as specified in said contract; but on the contrary, the Trust Company afterwards discovered

that the said second mortgage bonds could not be sold upon the market, and were worthless, and it thereupon devised a plan or scheme to re-sell and unload the same upon the Belt Company; and accordingly to carry out said plan it caused the Belt Company to enter into a pretended agreement rescinding said contract of September 25, 1893, and attempting to release the Trust Company from its obligation to take the remaining seventy (70) of said bonds, all of which was inequitable and against good conscience and the same is not binding upon your orators.

(*b*) In further consummation of said fraudulent plan the said Trust Company caused entries to be made upon its books and upon the books of the Belt Company charging the Belt Company as and for a return of said 130 bonds so purchased by the Trust Company at Seven Hundred and Fifty Dollars ($750.00) each as aforesaid, as follows:

July 1894, 80 bonds at 75.....	$60,000.00
June, 1896, 50 bonds at 75.....	37,000.00
	$97,500.00

(*c*) Your orators further show that the Trust Company in equity and good conscience should be held to account and pay to the Belt Company the contract price of the said seventy second mortgage bonds, being the amount of Fifty-Two Thousand Five Hun-
516 dred Dollars ($52,500.00), together with interest thereon at 6 per cent from the 25th day of March, 1895.

(*d*) Your orators further show unto the court that the 2,500 shares of the Union Company stock, so delivered to the Trust Company under said contract as aforesaid, were appropriated by the Trust Company to its own uses and for its own benefit and that it never at any time returned said stock to the Belt Company or accounted for the proceeds thereof. *On* or about May, 1894, the Trust Company exchanged said stock with the Belt Company for 2,500 shares of the par value of $100.00 each of the capital stock of the Belt Company, which was worth at that time Sixty-Two Thousand Five Hundred Dollars ($62,500.00); that the Trust Company received and thereafter disposed of the said stock of the Belt Company and has never accounted to your orators therefor, as in equity and good conscience it is bound to do, together with interest thereon at six per cent per annum from the 25th day of March, 1895.

Your orators are entitled to have allowed to them upon the pretended account presented by the Trust Company a credit represented by the contract price of said seventy bonds, to-wit, the sum of Fifty-Two Thousand Five Hundred Dollars ($52,500.00) with interest thereon, or if the court should find that said contract was duly rescinded, then your orators are entitled to a credit, represented by the value of said 2,500 shares of stock, to-wit, the sum of Sixty-Two Thousand Five Hundred Dollars ($62,500.00) and interest thereon.

Your orators further show that the act of the Trust Company in charging back to the Belt Company the said One Hundred and

thirty (130) bonds at Seven Hundred and Fifty Dollars ($750.00) per bond was unlawful and inequitable for the reason that said bonds were then worthless, as the Trust Company well knew, and that in equity and good conscience said charges should be eliminated from said pretended account.

12. Your orators further show that the Trust Company caused to be constructed the railroad of the Air Line and used for that purpose a corporation previously created by it, called the Kansas City Terminal Construction Company.

The Trust Company caused the Air Line to enter into a contract with said Construction Company for the construction, equipment and completion of the railroad of the Air Line; under the terms of said contract the Construction Company was to receive the stocks and bonds of the Air Line in certain amounts fixed in said contract.

The Construction Company entered upon the construction of
517 said railroad, but before the same was fully completed, the Trust Company caused the Air Line and the said Construction Company to go through the form of an agreement by the terms of which the Air Line was to accept the then partially completed railroad as and for full compliance with said contract and was to turn over to the Construction Company the securities provided in said contract to be turned over, upon its final completion.

And it was further provided that the Air Line should assume all the liabilities of the Construction Company and should succeed to and take over all of its assets. This plan was carried out and the uncompleted railroad was turned over to the Air Line, the securities were delivered to the Trust Company and the Air Line assumed the liabilities and took over the assets of the Construction Company.

(*a*) Among the assets of the Construction Company was the subscription made by the Trust Company in the name of A. E. Stilwell, trustee, to the capital stock of the Construction Company in the sum of Twenty Thousand Dollars ($20,000.00), which had been duly subscribed by the Trust Company, but upon which nothing had ever been paid. In the disposition of *of* the securities received by the Construction Company as aforesaid, this unpaid subscription on the part of the Trust Company was treated as paid, and a proportionate amount of the securities of the Air Line, to-wit: One Hundred and Ninety-Five (195) shares of stock, Twenty-Four and 375-1000 bonds (24.375) of the then aggregate value of Twenty-Six Thousand Dollars ($26,000.00) was turned over to and received and retained by the Trust Company but the Trust Company notwithstanding refused, and has ever since refused to pay such subscription, or any part thereof, but caused entries to be made upon its books and upon the books of the Air Line, cancelling said stock subscription by a fictitious charge. Your orators show, therefore, that by reason of the premises the Trust Company ought in equity and good conscience to account for and pay over to the Belt Company the amount of said subscription, to-wit: Twenty Thousand Dollars ($20,000.00) with interest thereon from the date that same was made, to-wit: March 30th, 1891, at the rate of six (6) per cent per annum to date, or that the Trust Company should account for and pay over

to the Belt Company the reasonable value of the securities so wrongfully received by the Trust Company as aforesaid, together with interest thereon at the rate of six per cent per annum from the date of such delivery to-wit: the 18th day of March, 1892, and that your orators are entitled to a credit upon the pretended statement presented by the Trust Company in the amount of said subscription, with interest, or in the amount of the value of said securities with interest, as your orators may elect.

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Your orators further show that if it should be claimed by the Trust Company and made to appear that the subscription mentioned in the preceding paragraph as hav- been made by A. E. Stilwell, trustee, was not in fact and in law the subscription of the Trust Company, then your orators show that the said charge made by the Trust Company against the Air Line for the sum of Twenty Thousand Dollars ($20,000.00), some two years after the transactions mentioned in the preceding paragraph, was an unlawful and fictitious charge and fraudulent as against the Belt Company; that the reason assigned by the Trust Company for making said charge was that it was for services, when as a matter of fact, no services were rendered by the Trust Company, and the charge was merely an unlawful method adopted by the Trust Company to get rid of its liability on said stock subscriptions.

(*b*) Your orators further state that on or about May 17, 1892, when the Air Line and Construction Company undertook, as above stated, to declare the contract between them for the construction of said Air Line road duly performed in all respects, the said Construction Company had an overdraft of $2,436.08, and owed the Trust Company in open account the sum of $13,436.08; the Trust Company, through its officers and agents, unlawfully and fraudulently caused the said overdraft of $2,436.08 and $600.00 of said open account to be charged in open account upon the books of the Trust Company against the Air Line; and $10,400.00 of said open account that was paid by the Air Line to the Trust Company does not appear on the pretended statement; and charges afterwards, by the consolidation of accounts, becoming a charge against the Belt Company; the said $600.00 and $2,436.08 items appear as debit charges against the Belt Company in the pretended statement presented by the Trust Company, and the Belt Company should be and is entitled to a credit for the said items on the pretended statement, including the item of $10,400.00, with interest thereon from the date of payment thereof.

(*c*) Your orators further show that by reason of the failure of the Trust Company and its agents to fully complete said contract for constructing, equipping and completing the Air Line, the Air Line was compelled to and did expend large sums of money to complete the construction and equipment of said railroad, all of which should have been provided by the Trust Company, or by its agent, the Construction Company, under said contract, and which should have been so furnished but for the unlawful action of the Trust Company in causing the Air Line to accept the partial compliance with said contract as and for the full performance

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thereof. A partial list of the sums of money so expended by the Air Line are as follows:

January, 1892, For cross-ties	$20.75
January, 1893, For Cross-ties	38.25
April, 1892, For completion of Air Line Depot at Independence, Missouri	2,512.48

All of the above sums were paid in cash to the Trust Company and do not appear upon the pretended statement of the Trust Company.

March 21, 1892, Partial payment for 2 Air Line Engines $5,000.00

The preceding item appears as a charge to the Air Line upon the pretended statement presented by the Trust Company.

1892 to 1895, for balance purchase price paid by Air Line to Burnham & Williams upon said engines	$10,000.00
1892 to 1893, for right of way grading and completion of Air Line	25,000.00

The preceding two items do not appear upon the pretended statement presented by the Trust Company.

That your orators are entitled in equity and good conscience to a credit upon the pretended account produced by the Trust Company for each and all of the amounts above set forth, omitted from said pretended statement of the Trust Company, and interest thereon at 6 per cent per annum from the date when said payments were made; and the above items set forth appearing on said pretended statement should be eliminated and a credit should be given upon said account with interest upon said charges from the date when made, all of which have been improperly and unlawfully omitted from said pretended account by the Trust Company.

13. Your orators further show that in December, 1891, a contract was entered into between the West Kansas City Land Company and the Consolidated Terminal Railroad Company, under the terms of which the Land Company agreed to sell to the Consolidated Company a strip of land twenty-eight (28) feet in width over and across certain land in Kansas City, Jackson County, Missouri, for a consideration of Ten Thousand Dollars ($10,000.00) of which amount Four Thousand Dollars ($4,000.00) was to be paid upon the delivery of a warranty deed and the balance three years thereafter; while the contract was in the name of the Consolidated Company, it was for the benefit of the Belt Company and the said payment of $4,000.00 was made by the Belt Company. The Belt Company in November, 1892, gave its note to the West Kansas City Land Company for Five Thousand Six Hundred Dollars ($5,600.00), being the balance of the purchase price of said land, and the Trust Company guaranteed the payment of said note and interest to the West Kansas City Land

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Company and took from the Belt Company the sum of $5,600.00 in cash and retained the same as a special deposit to cover its liability on said note and agreed to pay interest thereon at the rate of six (6) per cent per annum; that afterwards such proceedings were had that your orators, by the judgment and decree of the Circuit Court of Jackson County, Missouri, affirmed by the judgment of the Supreme Court of the state, were adjudged to pay and did pay said note and interest on June 13, 1901, amounting to Seven Thousand Nine Hundred Ten and 32-100 Dollars, ($7,910.32); and thereupon the Trust Company became in duty bound to return and refund to your orators the said sum of Five Thousand and Six Hundred Dollars ($5,600.00), and interest thereon; but the Trust Company has failed and refused and ever since has failed and refused to pay said sum to your orators, and the Trust Company has failed in its pretended account to give your orators credit therefor, to which in equity and good conscience, it is entitled; that the same appears upon the pretended account submitted by the Trust Company as a charge against the Belt Company under date of November 28, 1892, which said charge is unlawful and should be expunged; and the interest thereon should be credited to the Belt Company.

14. Your orators further state that on or about November, 1899, a judgment in the sum of Five Thousand Dollars ($5,000.00) was rendered against the Belt Company in the suit of one Zumwalt to recover for personal injuries sustained by him. That the Belt Company thereupon appealed said case to the Supreme Court of the State of Missouri, and gave an appeal bond as by law required; that the Trust Company signed said appeal bond as surety and required the Belt Company to deposit with it the sum of Five Thousand Dollars ($5,000.00) to cover its liability as surety on said bond; that such proceedings were had that the judgment in said case of Zumwalt was on or about the 19th day of May, 1903, reversed without being remanded and thereupon the liability of the trust Company, as such surety, ceased, but notwith-
521 standing such release from liability the Trust Company has refused and still refuses to account for or pay over to your orators the said sum of $5,000.00, together with interest thereon, to which your orators in equity and good conscience are entitled; and the Trust Company has failed and omitted to credit your orators on its said pretended statement of account with said sum of $5,000.00 to which, with interest thereon from said 29th day of November, 1899, your orators are entitled.

15. Your orators further show to the court that it was the habit and practice of the Trust Company in the disposition of bonds and stocks of the Belt Company, the Consolidated Company, the Air Line and the Union Company, or other stock or bonds belonging to said railroads, to make sales of said bonds and stocks at such prices as the Trust Company should decide upon, and then when such sales had been made, to credit the Belt Company with a less amount, representing to the Belt Company that the sale so made by the Trust Company as aforesaid, had been made at and

for a much less price than the amount or rate at which the sale had actually been made. In other instances the Trust Company would have an opportunity to make an advantageous sale of stock or bonds, and with such sale in view would cause the Belt Company to go through the form of selling such stocks or bonds to the Trust Company, and the latter would then, or within a short time thereafter, consummate the sale in contemplation; or the Trust Company in other instances would cause the Belt Company to go through the form of selling said stock or bonds to the Trust Company at a price much less than their value, shortly thereafter the Trust Company would sell such stock and bonds at a greater price than was allowed by the Trust Company to the Belt Company for said stock or bonds. In this manner, the Trust Company derived large profits from the transactions in addition to all the charges for commissions and services hereinbefore mentioned, the said profits consisting of the difference between the amounts at which the sales would be made by the Trust Company and the amounts reported by it to the Belt Company as the amount of the sale, and for which the Belt Company received credit, or the amount of the pretended purchase by the Trust Company; that the amount of said profits is to your orators unknown, but your orators are informed and believe, and so charge upon their information and belief, that the profits so received by the Trust Company, and unlawfully retained by it, exceed the sum of Two Hundred and Fifty Thousand Dollars ($250,000.00); that the Trust Company has never at any time accounted to the Belt Company for such profits so unlawfully retained by it, and your orators are entitled to have said profit
522 ascertained and determined and the amount thereof, with interest thereon, credited upon the pretended statement presented by the Trust Company.

16. Your orators further show that on the 24th day of August, 1893, the Belt Company was insolvent, as its directors, who were made up of the officers and directors of the Trust Company, then well knew; that nothwithstanding such insolvency the said directors were caused by the Trust Company to go through the form of declaring a dividend payable in the capital stock of the Company and, accordingly the Belt Company acting under the domination and control of the Trust Company and being coerced into such action, did declare a stock dividend and did deliver to its various stockholders its capital stock of the par value of Fifty-One Thousand Two Hundred Sixty-Two and 20-100 ($51,262.20) Dollars and of the reasonable market value of Seventeen Thousand Eighty-seven and 40-100 Dollars ($17,087.40), all of which was unlawful and fraudulent as against the Belt Company and amounting to an appropriation by the Trust Company of the capital stock of the Belt Company in said amount; that of the said stock dividend so paid the Trust Company received as a holder of the capital stock of the Belt Company its stock of the par value of Four Thousand Six Hundred Eighteen and 20-100 Dollars ($4,618.20) and of the market value of One Thousand Five Hundred Thirty-Nine and 40-100 Dollars ($1,539.40); your orators show, therefore, that in equity and good

conscience they are entitled to a credit upon the pretended statement presented by the Trust Company in the sum of $17,087.40 with interest thereon at six (6) per cent from the 1st day of November, 1893.

17. Your orators further show, that on the 7th day of April, 1894, the Belt Company was insolvent, as its directors who were made up of the officers and directors of the Trust Company then well knew; that notwithstanding such insolvency the said directors were caused by the Trust Company to go through the form of declaring a dividend payable in the capital stock of the Company, and, accordingly, the Belt Company, acting under the domination and control of the Trust Company and being coerced into such action, did declare a stock dividend and did deliver to its various stockholders its capital stock of the par value of Seventy-eight Thousand Six Hundred Fifteen and 86-100 Dollars ($78,615.86) and of the reasonable market value of Twenty-six Thousand Two Hundred Five and 28-100 Dollars ($26,205.28), all of which was unlawful and fraudulent as against the Belt Company and amounting to an appropriation by the Trust Company of the capital stock of the Belt Company in said amount; that of the said stock dividend so paid the Trust Company received as a holder of the
523 capital stock of the Belt Company, stock of the par value of Sixteen Thousand Three Hundred Thirty-eight and 20-100 Dollars ($16,338.20) and of the market value of Five Thousand Four Hundred Forty-six and 6-100 Dollars ($5,446.06); your orators show, therefore, that in equity and good conscience they are entitled to a credit upon the pretended statement presented by the Trust Company in the sum of Twenty-six Thousand Two Hundred Five and 28-100 Dollars ($26,205.28) with interest thereon at six (6) per cent from the 1st day of May, 1894.

18. Your orators further show that in November, 1897, the Belt Company was wholly insolvent as the Trust Company then well knew, but notwithstanding that fact the Trust Company caused the Belt Company to go through the form of declaring a dividend of one and one-half per cent upon all outstanding stock and a resolution was accordingly adopted by the directors of the Belt Company declaring such dividend; that thereafter the Belt Company so acting under the coercion and control of the Trust Company, as aforesaid, did pay out as and for such dividend the sum of Seventy-one Thousand Two Hundred and Fifty Dollars ($71,250.00), of which said amount the Trust Company, as a stockholder of the Belt Company, received a large amount. That the action of the Trust Company in so requiring said dividend to be paid was unlawful, wrongful and the amount so caused to be paid out by the Belt Company together with interest thereon should in equity and good conscience be allowed as a credit upon the pretended statement by the Trust Company.

19. Your orators further show that after the incorporation of the Union Terminal Railroad Company the Trust Company caused it to execute its bonds in the sum of Two Million Dollars, and in order to secure the same to execute a mortgage upon all of its corporate property, then or thereafter acquired; that it was provided in said

mortgage that the proceeds of all of the bonds, except one hundred and fifty (150) reserved for interest-paying purposes, should be used in the construction and equipment of the railroad of said company; that after said railroad had been constructed the Trust Company caused the Union Company to deliver to the Belt Company and caused the Belt Company to deliver to the Trust Company one thousand one hundred and sixty (1,160) Union Company bonds of the par value of One Million One Hundred and Sixty Thousand Dollars ($1,160,000.00) and the cash value of One Million, Forty-four Thousand Dollars ($1,044,000.00); that although the Trust Company was the Trustee in said mortgage and knew of the authorized
524 purpose for which said bonds could be used as aforesaid, it wrongfully sold said bonds to various investors and used the proceeds thereof to credit the account of the Belt Company, the debit side of which had been greatly augmented in amount by the fraudulent conduct on the part of the Trust Company in making to the Belt Company excessive and exorbitant charges for services, interest and commissions and upon other pretexts in the manner hereinbefore set forth; that the said bonds so wrongfully put afloat by the Trust Company by their terms drew interest at the rate of five (5) per cent per annum and the Belt Company which had theretofore been required by the Trust Company to guarantee said bonds was thereafter required and compelled by the Trust Company to pay interest in large amounts upon said bonds in the amount of Four Hundred and Thirty-two Thousand Dollars ($432,000.00); that the conduct of the Trust Company in the premises was wrongful and in violation of its trust and resulted in imposing upon the Belt Company the unnecessary burden of said interest payments which appear as charges to the Belt Company in the pretended statement by the Trust Company. That your orators are entitled in equity and good conscience to have said charges of interest eliminated from said statements or if the said charges in respect to the particular bonds cannot be identified with certainty in said account, then to have said account credited with the amount so paid by the Belt Company, together with interest thereon from the respective dates of payment.

20. Your orators further show that on or about April 28th, 1892, the Trust Company sold to one Caroline A. Perkins three Consolidated Company bonds for twenty-five hundred and fifty dollars ($2,550.00); that said bonds were the property of the Belt Company, but that the Trust Company fraudulently and wrongfully refused and neglected and has ever since refused and neglected to pay said proceeds of said bonds to the Belt Company, or to in any way account for them, and the Belt Company is entitled to credit for said sum as of said date, together with interest thereon.

21. Your orators further state that on or about the 12th day of December, 1895, the Trust Company charged against the Belt Company the sum of Five Thousand Dollars ($5,000.00) and credited the same to "Arkansas Lands;" that your orators are informed and believe that said charge was fictitious and fraudulent and that in truth and in fact said sum of Five Thousand Dollars was not then nor at

any time advanced by the Trust Company to or for the Belt Company, and that the Belt Company received no benefit or consideration therefrom and that the said charge of Five Thousand Dollars in equity and good conscience ought to be eliminated from the
525 pretended statement presented by the Trust Company and that the Belt Company should be credited with interest on said amount from the time when said charge was made.

(*b*) Your orators further state that the inpretended account presented by the Trust Company in connection with the Belt Company, the following charges and credits appear.

Sept. 30, 1899.	To payment to National Bank of Commerce for draft on New York remitting for coupon interest	$40,000.00
September 30, 1899.	By proceeds of sale of draft by K. C. Sub. Belt R. R. Co. at 30 days on de Goeijen, Jr., for florins 100,000; draft endorsed by Trust Company, amount to apply as credit to above charge of $40,000.00.....	$39,437.50
Jan'y 2, 1900.	By proceeds of sale of draft by K. C. Suburban Belt R. R. Co., on J. de Goeijen, Jr., bearing endorsement of Trust Company, draft for florins 37,735.84 sold at 39¾.....	$15,000.00
Jan'y 2, 1900.	To drafts of Kuhn & Co., of London, dated December 20, 1899, on Trust Company as endorser to take up drafts on J. de Goeijen, Jr., Sept. 30, 1899, for $39,437.50 not paid by him, $41,000.00 less allowances by Kuhn & Co., account of excess and exchange 667.40....	$40,332.60
Jan'y 25, 1900.	To draft of Kuhn & Co., London, dated January 12th, 1900, on Trust Company as endorsers to take up draft on J. de Goeijen, Jr., Jan. 2nd, not paid by him.	$15,000.00

Leaving a net charge against the Belt Company of $40,895.10; that the Trust Company did not furnish to the Belt Company said sums or any part thereof for the purpose of paying or taking up coupons of the Union Terminal bonds due August 1st, 1899, or for any other purpose or purposes; that said charges and credits and the resulting net charge against the Belt, were made arbitrarily by the Trust Company against the Belt Company and without consideration to the Belt Company and do not represent money ad-

vanced or paid out to or for the Belt Company or at its instance or request, and said charges and credits should be eliminated from the pretended statement presented by the Trust Company.

(c) Your orators further state that in the pretended account presented by the Trust Company, in connection with the Belt Company, there are the following charges made by the Trust Company against the Belt Company as follows:

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Sept. 7, 1899.	Draft, W. S. Taylor to pay 40 coupons Union Terminal Ry., due August 1, 1899.....	1,000
Sept. 7, 1899.	Draft, W. S. Taylor to pay 120 coupons Union Terminal Ry. Co., due Aug. 1, 1899	3,000
Sept. 11, 1899.	Draft, W. S. Taylor to pay 20 coupons Union Terminal Ry. Co., due August 1, 1899..	500
Sept. 13, 1899.	Draft, W. S. Taylor to pay 40 coupons Union Terminal Ry. Co., due August 1, 1899..	1,000
Sept. 16, 1899.	Draft, W. S. Taylor to pay 40 coupons Union Terminal Ry. Co., due August 1, 1899..	1,000
Sept. 19, 1899.	Draft, W. S. Taylor to pay 40 coupons Union Terminal Ry. Co., due August 1, 1899..	1,000
Sept. 21, 1899.	Draft, W. S. Taylor to pay 40 coupons Union Terminal Ry. Co., due August 1, 1899..	1,000
Sept. 25, 1899.	To payment draft W. S. Taylor dated Sept. 23rd, 1899, for payment of 20 coupons Union Terminal Ry. due August 1, 1899.	500
Sept. 26, 1899.	To payment draft W. S. Taylor dated Sept. 26, 1899, for payment 40 coupons Union Terminal Ry., due August 1, 1899....	1,000
Oct. 4, 1899.	To payment draft W. S. Taylor 20 coupons Union Terminal Ry., due August 1st, 1899	500
Oct. 11, 1899.	To funds deposited with Drexel & Co. for payment of coupons of Union Ter. Ry. and Consolidated Ter. Ry. Co.....	1,000

And that said charges represent payments made by the Trust Company to itself or others on account of 450 Union Terminal Coupons due August 1st, 1899, owned or claimed to be owned by the Trust Company; that the amount of said coupons have heretofore been again paid in cash to the Trust Company so that the Trust Company has received payment twice in respect to said coupons and that the aforesaid charges are therefore unauthorized and invalid, and should be eliminated from the said pretended statement presented by the Trust Company.

(d) Your orators further state that in the pretended account presented by the Trust Company in connection with the Belt Company there are the following charges:

Premium paid on bond in replevin suit		$300.00
September 26, 1900.	Commission paid A. G. Hay	.....
	343 1940-2240 tons of rails at 25	85.96
	16 1712-200 tons fasteners at 25	4.21
	Loading cars	17.85
	Demurrage on cars	194.00
	Switching	81.25
	Expenses of A. J. Singer from Chicago to St. Louis account sale	87.50
		$770.77

527 And that said charges and outlays were not made at the instance or the request of said Belt Company and were not authorized by it, and the Belt Company received no consideration for said charges and the same were not properly payable by the Belt Company and hence they should be eliminated from the pretended account by the Trust Company.

22. Your orators further show to the court that about the year 1892, the Trust Company caused the incorporation of the Fruit Auction and Cold Storage Company under the laws of the State of Missouri; that the incorporators of said company were Arthur E. Stilwell, Arthur A. Mosher, Edward L. Martin and William S. Taylor; that the articles of incorporation of said company recited that one-half of the capital stock thereof, to-wit, Seventy-five Thousand Dollars ($75,000.00) had been paid up in lawful money of the United States, when in truth and in fact no part of said capital stock had been paid up; that the Trust Company caused said Cold Storage Company to engage in the business of the sale of fresh fruits in Kansas City, Missouri, and after said business had been conducted for a few months it went out of business owing the Trust Company a large sum of money; that thereupon and on or about the 13th day of February, 1894, the Trust Company, in order to recoup its losses sustained in the matter of said Fruit Auction & Cold Storage Company, appropriated to its own use two hundred and eighty-six (286) shares of the stock of the Union Company belonging to the Belt Company of the value of Six Thousand Two Hundred Ninety-two Dollars ($6,292.00) and used the same to wipe out the debt owing by the said Cold Storage Company to the Trust Company; that the taking of said stock and its appropriation to wipe out the debt of said Cold Storage Company on the books of the Trust Company was fraudulent and wrongful as against the Belt Company as was without any consideration whatsoever given to it; the pretended statement presented by the Trust Company does not contain any credit for the value of said stock but your orators show that a credit for such amount with interest thereon should be allowed.

23. Your orators further state that in the pretended account presented by the Trust Company, there is, under date of September 13, 1898, a charge against the Belt Company of Two Thousand and Five Hundred Dollars ($2,500.00) for moneys represented to be paid by the Trust Company in unlawful stock transactions in the stock of

the St. Joseph & Grand Island Railroad Company purchased as a speculation on margins alleged to have been carried on the account of the Belt Company; and in the same account, under date of
528 September 15, 1898, there appears a charge of Two Thousand Dollars ($2,000.00) and on the 9th day of December, 1898, a charge of Two Thousand Dollars ($2,000.00) for similar unlawful transactions in margins in stock of the St. Joseph & Grand Island Railroad Company alleged to have been for the account of the Belt Company; that said transactions were unlawful and beyond the corporate power of either the Trust Company or the Belt Company and it is inequitable and unfair that the said transactions and the loss resulting therefrom in the sum of Five Thousand Nine Hundred Eighty-nine and 50,100 Dollars ($5,989.50) should be charged against the Belt Company and said entries therefor- are incorrect and should be expunged from the alleged account, and credit allowed for interest thereon.

24. Your orators further show that, in addition to the stock of the Belt Company taken and appropriated by the Trust Company as above set forth, the Trust Company did *on* or about September, 1890, take, appropriate and convert to its own use Four Hundred and Ninety-nine Thousand Dollars ($499,000) par value of the capital stock of the Belt Company, of the actual value of that time of One Hundred Sixty-six Thousand Three Hundred Thirty-three and thirty-three one-hundredths Dollars ($166,333.33) for which the Trust Company has failed and refused to account upon its pretended statement, or otherwise; and your orators are entitled to be credited upon the said pretended statement with the value of said stock as aforesaid, together with interest thereon from the date when the same was so appropriated.

25. Your orators further show that *on or* about the year 1892, the Trust Company took, appropriated and converted to own use 2,455 shares of the capital stock of the Union Company of the par value of Two Hundred Forty-five Thousand Five Hundred Dollars ($245,500.00) and of the actual value of Forty-nine Thousand One Hundred Dollars ($49,100.00), for which the Trust Company has failed, neglected and refused to account on its pretended statement, and your orators are therefore entitled to credit on said statement for said sum of Forty-nine Thousand One Hundred Dollars ($49,100.00) with interest thereon from said date.

26. Your orators further show that the Trust Company caused to be constructed the railroad of the Air Line and used for that purpose a corporation previously created by it called the Kansas City Terminal Construction Company, as set forth in paragraph twelve herein; that the Trust Company caused the Air Line to enter into a contract with the said Construction Company for the construc-
529 tion and completion of the railroad of the Air Line; under the terms of said contract the Construction Company was to receive Two Hundred Thousand Dollars par value of the stock and Two Hundred fifty Thousand Dollars par value of the first mortgage bonds of the Air Line. The Construction Company entered upon the Construction of said railroad, but before the same was fully com-

pleted the Trust Company caused the Air Line and the said Construction Company to go through the form of an agreement by the terms of which the Air Line was to accept the then partially completed railroad as and for a full compliance with said contract and was to turn over to the Construction Company the securities provided in said contract to be turned over upon its final completion as aforesaid, and thereupon the said railroad was turned over to the Air Line and the said securities above mentioned, which had at all times remained in the custody of the Trust Company, were by the Trust Company appropriated to its own use; that the actual cost to the Trust Company of the construction of said Air Line was the sum of One Hundred Seventy Thousand Seven Hundred Forty-seven and twenty-nine one-hundredths Dollars ($170,747.29), and the Trust Company realized from said transaction a profit of One Tundred Twenty-nine Thousand Two Hundred Fifty-two and seventy-one one-hundredths Dollars ($129,252.71); that, by reason of the relation of the parties as hereinbefore more specifically set out, it is unjust and inequitable that the Trust Company should retain said profits or any of them, but it should be required to account to the Belt Company therefor and the same should be allowed as a credit upon the pretended statement presented by the Trust Company together with interest thereon.

27. Your orators further show that in connection with the contract between the Belt Company and the Connecting Company aforesaid, and as a part of the obligation assumed by the Belt Company to procure the right of way for the railroad of the Connecting Company, the Belt Company was caused by the Trust Company to purchase and acquire certain lands along the line of said railroad in addition to the right of way and take the title thereto in a corporation which the Trust Company caused to be organized under the laws of the State of Missouri, called the Northern Townsite Company, hereinafter referred to as the Townsite Company, one of the defendants herein, which corporation was at all times officered by the officers and employes of the Trust Company and at all times dominated and controlled by the Trust Company.

a. The Trust Company caused the Belt Company to advance to the Townsite Company and also to advance in the purchase of
530 lands which were conveyed to the Townsite Company a large sum of money, to-wit, the sum of $46,463.75; that all the lands now held by the Townsite Company were purchased with money so caused to be furnished by the Belt Company and the greater portion of said lands still stand in the name of the Townsite Company; but certain lands heretofore standing in the name of the Townsite Company have been sold and the proceeds thereof are now held by your orators, Stuart R. Knott and Edward F. Swinney, as Receivers of the Townsite Company heretofore appointed by this court. That the Trust Company furnished to the Townsite Company the sum of $6,288.57 and no more. Your orators show, therefore, that by reason of the premises they are entitled to have the properties now standing in the name of the Townsite Company conveyed to them as and for the property rightfully belonging to the Belt Company and also to have the said moneys arising from the sale of

said lands and also from the rentals thereof, transferred to them in like manner, together with any other assets of the Townsite Company arising or growing out of the moneys so furnished by the Belt Company as aforesaid; or at the option of your orators they are entitled to credit upon the pretended statement presented by the Trust Company with the amount of moneys so furnished by the Belt Company as aforesaid, with interest thereon from the dates when said moneys were so furnished.

(*b*) The Trust Company in connection with the affairs of the Townsite Company charged and collected a commission of 10 per cent on moneys handled or land sold for it and these charges made between July, 1896, and 1901, amounting to Ten Hundred and Eighty-five Dollars ($1,085.00) are unlawful and improper charges by reason of the relations of the companies to each other and should be eliminated from the pretended statement presented by the Trust Company.

28. Your orators further show that in the pretended statement submitted by the Trust Company under date of April 20th, 1891, there is a charge against the Belt Company in the sum of Three Thousand Eight Hundred Thirty-five and 50-100 Dollars ($3,835.50) and afterwards under date of November 19, 1891, a credit against the same charge of One Thousand Seven Hundred Eighty-one Dollars ($1,781.00), leaving a net charge against the Belt Company of Two Thousand and Fifty-four and 50-100 Dollars ($2,054.50), purporting to be charged for rent of engines Numbers 51 and 52 from January 20, 1891, to Oct. 31, 1891, 284 days, at $7.0 $1,988.00; also rental of engine No. 51, October 31st to November 19th, 19 days, at $3.50, $66.50; total $2,054.50. This charge of $2,054.50
531 should be eliminated from the pretended statement and credit allowed thereon as of date November 19, 1891, for the following reasons: In January, 1891, the Belt Company had a large credit balance with the Trust Company in excess of Two Hundred Thousand Dollars ($200,000.00), upon which it was receiving no interest from the Trust Company and such credit balance extended for many months thereafter. In January, 1891, the Trust Company caused the Belt Company to purchase two engines, being locomotives Nos. 51 and 52, and instead of permitting the Belt Company to pay for the same as it should have done, the Trust Company in April, 1891, gave to the vendors of the locomotives its own note and charged said note and the interest on said note to the Belt Company, and afterwards, in November of the same year, the Trust Company caused entries to be made so as to show that it had purchased said engines in order that it might sell the same to the Kansas City Terminal Construction Company and the Consolidated Company, and thereupon unlawfully and oppressively charged to the Belt Company said sum of $2,054.50, pretending that the same was rental upon said engines at the rate of $3.50 each per day; that said charge of rental covers the period during which the engines were as shown by the books of the Trust Company and also the books of the Belt Company, the property of the Belt Company. Your orators, therefore, claim that said charge should be eliminated from the pretended statement and that credit with interest

should be allowed the Belt Company for said amount from the date when said charge was made.

29. Your orators further show that on or about July 1, 1898, the Trust Company caused the Belt Company to lease from the Second Street Improvement Company parts of lots 12, 13, 14 and 15 in block 10, King & Bouton's Re-survey, in Kansas City, Missouri, comprising a piece of land 25 by 75.4 feet, the rental named in said lease being at the rate of One Hundred Dollars ($100.00) per month, and the Second Street Improvement Company, by the terms of said lease, reserved the privilege of cancelling the same upon thirty days' written notice; on the same day the Trust Company caused the Belt Company to lease all of said land to Wells, Fargo Express Company for Twenty-five Dollars ($25.00) per month, the Belt Company reserving the right to cancel said lease upon thirty days' written notice, provided, however, that if such notice should be given within two years from the date of the lease the Belt Company should pay to the Express Company the Sum of One Thousand Dollars ($1,000.00). Your orators further show that said land was not necessary for a right of way or for the operation of the Belt Company, but the Trust Company caused it to be leased to the Belt Company and by
532 the latter sub-leased to the Express Company for the purpose of aiding the Second Street Improvement Company to the extent of Seventy-five Dollars ($75.00) per month, the Improvement Company being at that time one of the auxiliary companies of the Trust Company and dominated and controlled by it and officered by the officers and employees of the Trust Company.

Your orators further show that the act of the Trust Company in causing the said lease to be made, was wrongful and oppressive and imposed an unnecessary charge of $75.00 per month on the Belt Company; that between the dates of July, 1898, and December, 1899, the Belt Company was caused to pay to the said Improvement Company the sum of Eighteen Hundred Dollars ($1,800.00), and during the same period it collected from the Express Company under said lease the sum of Four Hundred and Fifty Dollars ($450.00), leaving a net expenditure as a result of the making of said lease in the sum of Thirteen Hundred and Fifty Dollars ($1,350.00), for which, with interest thereon from the dates of the payments made, your orators are entitled to credit upon the pretended statement presented by the Trust Company.

In consideration whereof and for as much as your orators are remediless in the premises except in a court of equity, your orators therefore pray the aid of this court:

(*a*) That an accounting be taken of the various transactions and dealings between the Trust Company and the Belt Company; or by the Trust Company for the use and benefit of and as trustee and agent for the Belt Company, and that the Trust Company be required to pay the balance found to be due by it, if any, upon such accounting; that in taking such accounting all claims and demands alleged to be held by the Trust Company against the Belt Company in Kansas and Missouri, where the Trust Company used the Belt Company simply as an instrumentality and agency for its own use

and benefit, be charged against the Trust Company and it be held liable for all losses incurred or claimed to have been incurred by the Belt Company about the same.

(*b*) That the said notes hereinabove described may be found and decreed by this court to have been executed in the fraudulent manner and for the fraudulent purposes above set forth and without consideration; and that said notes may be by this court directed to be surrendered up and cancelled, and that each and all of the stocks, bonds and other securities, including the assigned account above mentioned, fraudulently delivered to the Trust Company by its officers and employes in the manner hereinabove set forth, may be ordered by this court surrendered and delivered up or reassigned to the Belt Company.

533 (*c*) That each and all of the property purchased with the money of the Belt Company and belonging in equity to it, the legal title to which is held in the name of any of the companies hereinbefore set forth, may be required by the decree of this honorable court to be conveyed to the Belt Company, or to its receiver for it.

And your orators pray for a continuance of the writ of injunction herein against the Guardian Trust Company, its agents, servants and employes, restraining and enjoining them and each of them from selling, transferring or in any wise disposing of the said notes above mentioned and so executed by the Belt Company to the Trust Company; and from selling, transferring or in any wise disposing of the said bonds and stocks and other property hereinabove described, delivered to said Trust Company as collateral security for said notes.

And may it please your honors to grant unto your orators the subpœna of the United States of America issuing out of and under the seal of this Honorable court directed to the Guardian Trust Company, the Missouri Elevator & Terminal Company, the Fairmount Amusement Company, the Central Improvement Company and Thomas T. Crittenden, its receivers, the Northern Townsite Company, and the Cambria Steel Company, the defendants herein respectively therein and thereby commanding them on a day certain therein to be named and under a certain penalty to be and appear before this honorable court then and there to answer (but not under oath, an answer under oath being hereby expressly waived), all and singular the premises, and to stand and perform and abide by such orders, directions or decrees as may be made in the premises, and as shall seem meet and agreeable to equity and good conscience.

And your orators will ever pray.

S. W. MOORE &
T. R. MARKS,
Solicitors for Complainants.

____ ____,
Of Counsel.

STATE OF MISSOURI,
County of Jackson, ss:

Edward F. Swinney, being first duly sworn, says that he is the Receiver of the Kansas City Suburban Belt Railroad Company, one of the complainants in the foregoing second amended supplemental ancillary bill; that he has read the said bill of complaint and knows the contents thereof and that the allegations therein contained
534 are true so far as they relate to his own acts and the acts of his co-receiver; that so far as they relate to the acts of others, he believes them to be true.

EDWARD F. SWINNEY.

Subscribed and sworn to before me, this 11th day of January, 1906.

[L. S.]

CLARENCE R. HALL,
Notary Public, Jackson County, Missouri.

My commission expires Oct. 10, 1908.

Afterwards, to-wit, on the 2nd day of July, 1906, the Answer and Pleas of the Guardian Trust Company to the Second Amended and Supplemental Ancillary Bill of Complaint was filed:

Said Answer and Pleas are in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2468.

CAMBRIA STEEL COMPANY, Complainant,
vs.
THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City and Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company et al., Complainants,
vs.
CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver; Northern Townsite Company and Fairmount Amusement Company, Defendants.

Ancillary Bill.

Answer and Pleas of the Guardian Trust Company to the Second Amended and Supplemental Ancillary Bill of Complaint.

Now comes the defendant, Guardian Trust Company, and now and at all times hereafter saving and reserving to itself all benefit

and advantage of exceptions, which can or may be taken to the many errors, uncertainties and other imperfections in the said bill contained, for its separate answer and pleas thereto, or to so
535 so much thereof and such portions thereof as this defendant is advised it is necessary or essential for it to answer or plead unto, and answering and pleading, says:

1. That as and for its answer and pleas to the second amended and supplemental ancillary bill of complaint, this defendant adopts its answer and pleas filed in this court and cause on the 1st day of June, 1905, to the first or original supplemental ancillary bill of complaint herein, as fully and to the same extent as if the same were set out herein in full (See foot note).*

2. Further answering said second amended and supplemental ancillary bill of complaint, defendant admits that since the filing of the original ancillary bill herein, Stuart R. Knott has resigned as receiver of the Kansas City Suburban Belt Railroad Company and that Edward F. Swinney has been continued as such receiver herein, and defendant denies that at any time it, in any wise, dominated and controlled the affairs of the Belt Company and its constituent railroad companies, and defendant denies that it at any time charged the Air Line with any items of interest on notes and over drafts of the Air Line due to this defendant, except such as this defendant was lawfully entitled to receive, and avers that any and all interest paid to this defendant by the Air Line was paid to it voluntarily, openly, in the ordinary course of business, and with the full knowledge of the officers, directors and stockholders of the Air Line, who have at all times acquiesced in the same, and the said Air Line and Belt Company are now estopped from questioning the same; denies that defendant made any charges against the Belt Company on account of interest accruing on first mortgage bonds of the Air Line except such as this defendant was lawfully entitled to make; avers that all payments of interest made by this defendant on first mortgage bonds of the Air Line, charged to the Belt Company, were paid at the special instance and request of the Belt Company and for its benefit, and with its full knowledge and consent; that the said Belt Company at all times during which any such charges were made was the owner of all of the outstanding capital stock of the Air Line and hence was the beneficial owner thereof, and the said Air Line was at all said times operated by the said Belt Company as part of its own system and the Belt Company collected and received the revenues derived from such operation; defendant denies that it at any time caused the Belt Company to go through the form
536 of selling any stocks or bonds to defendant at a price less than their value, but on the contrary states that all of said sales were actual bona fide sales, made in the usual and ordinary course of business, and for full value and that all of such transactions were fully known to and were acquiesced in and ratified by the

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* The original paging of the first amended and supplemental ancillary bill is shown in ink on the margins of the pages of the second amended ancillary bill.

officers, directors and stockholders of the Belt Company and of all its constituent railroad companies with which any such transactions were had; defendant admits that certain charges and credits set out in subdivision B, paragraph 21, of said second amended and supplemental ancillary bill of complaint appear on the open account due from the said Belt Company to this defendant and states that said credits and charges are correct and properly made, denies that said credits or charges were arbitrarily or unlawfully made, but on the contrary states that, as fully appears from said account, the net charge due to defendant from said Belt Company on account of the transactions therein set forth, represent money actually paid out by this defendant in payment of certain bills of exchange, drawn by said Belt Company, for its own benefit, which bills of exchange the said Belt Company was unwilling or unable to pay, and which this defendant by reason of its endorsement of said bills of exchange, was obliged to pay and defendant denies that the items charged by it against the Belt Company, set forth in sub-division C, of paragraph 21, of said second amended ancillary bill, have at any time been paid to this defendant; and defendant again states that all the charges made by it in its open account against the said Belt Company were fairly and justly made for full consideration received by the Belt Company, and that the said Belt Company is liable therefor.

3. And by way of addition to paragraph 54 of its answer to the amended and supplemental ancillary bill of complaint, herein adopted by defendant as its answer to the second amended supplemental ancillary bill of complaint, in relation to the Central Improvement Company, hereinafter called the Improvement Company, defendant states that said Improvement Company was a corporation organized and managed just as any other corporation is organized and managed; that it had its own treasury, collected and disbursed its own income; that the said Improvement Company and the Belt Company treated all real estate standing in the name of the Improvement Company as the property of the Improvement Company and not as the property of the Belt Company or any other of the stockholders of the Improvement Company; that all rentals or other income received by the Improvement Company went into its treasury
537 and was disbursed out of said common fund for the general corporate purposes of the Improvement Company; that as and when the said Improvement Company raised capital for its operations it issued to the person or corporation furnishing such capital its shares of stock covering dollar for dollar the amount of the capital so furnished; that said capital was used not only for the purpose of buying real estate but also for the expense of management and other legitimate expenses of the said Improvement Company; that it was not intended by the Belt Company that it should own or have any interest in any parcel of real estate owned by the said Improvement Company, but on the contrary it was intended by the Belt Company that its sole interest in the Improvement Company should be represented by stock of the Improvement Company purchased by the Belt Company from time to time as aforesaid.

4. And by way of supplement to the averments set forth in para-

graph 90 of defendant's answer to the said first amended and supplemental ancillary bill of complaint, this defendant states: That the Kansas City Southern Railway Company, hereinafter called the Southern Company, is a railroad corporation organized under the laws of the State of Missouri, on or about March 19, 1900, and still exists as such; that on or about March 19, 1900, and ever since, the said Southern Company was and is the owner and holder of substantially all of the capital stock and substantially all of the mortgage bonds issued by the Belt and its constituent companies, which securities had been acquired by the said Southern Company through and by the Reorganization Committee mentioned in said paragraph 90, pursuant to and in conformity with the reorganization plan referred to in said paragraph 90, which reorganization plan had been introduced in evidence before the master to whom the issues herein have been referred and for greater definiteness defendant prays leave to refer to said plan, and defendant states that all of said stock and all of said bonds were acquired by said committee for said Southern Company under and by virtue of certain reorganization agreements, made pursuant to said plan, in writing, with all of the stockholders and all of the bondholders of the Belt and its constituent companies, that all of said reorganization agreements are of the same tenor and effect, and that a true and correct copy of said reorganization agreement has been introduced in evidence before the said master and for greater definiteness defendant prays leave to refer thereto; and defendant states that on the 6th day of September, 1900, the said Southern Company, as the owner of all of the mortgage bonds issued by the said Belt and its constituent companies, through the said committee, caused to be filed in this
538 court by the Provident Life and Trust Company, which was trustee in the said mortgages, securing the said bonds, four separate bills of foreclosure against the Belt Company, Union Terminal Company, The Consolidated Terminal Company and The Air Line Company, respectively, and that, afterward, said causes, were, by order of this court, consolidated, and that such proceedings were had in said causes that on the 6th day of November, 1901, a decree of foreclosure and sale was rendered in said causes, and thereafter, to-wit: on or about December 31, 1901, there was conveyed to the said Southern Company under the terms of said decree by the special master appointed to make sale in the said foreclosure suits, all of the property of the said Belt Company and its constituent companies, including all and singular the rents, tolls, income, issues and profits of the said railroad premises and properties, and all of the estate, right, title and interest, legal and equitable, and present and future, of the said Belt Company, in and to the same and every part thereof, also all the corporate and other rights, privileges, liberties and franchises of the said Belt Company connected with or pertaining to the said railroad or the construction, acquisition, maintenance or use thereof, as well those thereafter acquired as those then held.

And defendant states that at the time said committee settled and compromised with J. De Goeijen, Jr., his claim of about three hundred thousand dollars ($300,000.00), against the Gulf Company as

in said paragraph 90 set forth, the said committee, pursuant to authority conferred on it by the said reorganization agreement made with the stockholders and bond holders of the Belt Company as aforesaid, was engaged in adjusting the floating indebtedness of the Belt Company and the Gulf Company, and that at the time the said committee settled and compromised the said claim with said De Goeijen, as in said paragraph 90 set forth, the said Southern Company was a party to said settlement and compromise; that said Southern Company then and there, and at all times prior thereto, claimed that said De Goeijen owed the Belt Company said sum of $89,333.33, being the balance due on account of the securities by him bought as in said paragraph 90 set forth, and being also the exact amount due on said depot mortgages in said paragraph 90 referred to, and said Southern Company further claimed and asserted that being the owner of all of the stocks and bonds of the Belt Company, and that having acquired all of the property and rights of the Belt Company, at foreclosure, as hereinabove set forth, it, the said Southern Company, was entitled to collect and receive the said sum of $89,333.33, from said De Goeijen; and thereupon a
539 general settlement and compromise was had of all controversies of all kinds then pending between the said Southern Company, the said committee, the Gulf Company, and the Belt Company, on the one hand, and the said De Goeijen on the other hand, and the said committee and the said Southern Company and the said Provident Life and Trust Company, the then holders of the said depot mortgages, and each of them, did on June 16th, 1902, execute releases under seal unto the said De Goeijen, forever discharging him from any further claim or claims on account of any matter or thing arising or resulting from their reorganization or ownership of the property, rights and franchises of the Belt Company including said claim of $89,333.33, and arising out of every other matter or thing or transaction whatsoever; and defendant states that said settlement and compromise was made and the said releases were executed by the said committee, and the said Southern Company with the full knowledge and consent of complainants Knott and Swinney, the then receivers of the Belt Company; that the said Knott, at the time said settlement was made, and the said releases were executed, was the president of the said Southern Company and its managing officer, and that the said releases were drawn and executed under the supervision of one Max Pam, counsel for the said receivers; that the claim and assertion made by the Southern Company that it was lawfully entitled to collect and receive from said De Goeijen, said sum of $89,333.33 was made with the full knowledge and consent of said complainants, and their said counsel, and they fully acquiesced in said claim; and so defendant says that the said committee, and the said Southern Company, it being through its ownership of all of the stocks and bonds issued by the Belt Company and of all the rights and property of the Belt Company the beneficial owner of said Belt Company, having with the full knowledge and approval of complainants once collected said claim of $89,333.33 from said De Goeijen, as aforesaid, the said Belt Com-

pany and its said receiver, ought not now be permitted to come into a court of equity and assert the same claim against defendant; for greater certainty defendant prays leave to refer to the said instruments of release passing between said De Goeijen, said committee and the said Southern Company, which are dated June 16th, 1902, and have been offered in evidence herein, before the master before whom the testimony has been taken on the issues herein; defendant states that by inadvertence and mistake it is averred by this defendant in said paragraph 90 of its said answer that the receivers of the said Belt Company paid to the Provident Life and Trust Company the real estate mortgage notes aggregating eighty-nine thou-
540 sand, three hundred thirty-three and thirty-three one-hundredths ($89,333.33) dollars, therein referred to; defendant states that it is not true that said real estate mortgage notes have been paid by the Belt Company or its receivers, but on the contrary states that the said Belt Company and its receivers have at no time paid the said notes and defendant further states that said notes after the said settlement between the Kansas City Southern Railway Company and De Goeijen were fully paid and satisfied by said Kansas City Southern Railway Company, as it was in duty bound to do, and said notes are not now an outstanding lien on any real estate now or at any time owned by the Belt Company.

5. And by way of supplement to defendant's answer to the said first amended and supplemental ancillary bill of complaint, defendant states that on March 27, 1905, it paid to the First National Bank of Kansas City, Missouri, the sum of $34,061.46, in satisfaction of a certain judgment rendered by the Circuit Court of Jackson County, Missouri, in cause No. 1604, entitled The First National Bank of Kansas City, Missouri, vs. The Guardian Trust Company, and affirmed by the Supreme Court of Missouri, on March 16, 1905, which said judgment was entered against this defendant on a certain promissory note made by the said Belt Company on March 26, 1900, in favor of said Bank for $25,000.00, due sixty days after date, with interest after maturity at the rate of seven per cent per annum until paid, which said note was endorsed by this defendant, solely for the accommodation of said Belt Company, the full proceeds of said note having been paid by said Bank to said Belt Company which derived the sole benefit thereof and this defendant prays that it may have judgment against the said Belt Company and its receivers for the said sum of $34,061.46, with interest thereon at the legal rate from said March 27th, 1905.

6. All of which matters and things hereinbefore stated this defendant is ready to aver, maintain and prove as this Honorable Court may direct, and hereby prays that judgment may be rendered by this Honorable Court against the Kansas City Suburban Belt Railway Company and the said Swinney, as its receiver, in favor of this defendant for the amount of each and all of the promissory notes together with interest thereon, mentioned and set forth in its answer aforesaid, for the amount of the open book account mentioned and set forth as "Exhibit A" of said answer with interest thereon from the first day of April, 1900, and that this defendant

may have judgment against the said Belt Company and its receiver for any and all further sums or amounts that may be found due this defendant; that the court may by proper order protect and
541 enforce the interests of this defendant in and to the stocks, bonds, accounts and property deposited with and held by this defendant as collateral and its said receiver may be ordered and directed to pay to this defendant whatever sums of money this defendant may be found entitled to herein, and this defendant have also judgment for its reasonable costs, charges and expenses in this behalf most wrongfully expended and sustained, and for such other and further relief as to the court shall seem meet and just in the premises.

GUARDIAN TRUST COMPANY,
By HARRY S. MECARTNEY AND
J. C. ROSENBERGER,
Its Solicitors.

Afterwards, to-wit, on the 2nd day of July, 1906, the following Stipulation was filed:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, at Kansas City.

CAMBRIA STEEL COMPANY, Complainant,
vs.
GUARDIAN TRUST COMPANY et al., Defendants.

Bill.

EDWARD F. SWINNEY, Receiver of the Kansas City Suburban Belt Railroad, Complainant,
vs.
GUARDIAN TRUST COMPANY et al., Defendants.

Ancillary Bill.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Intervenor, Complainant,
vs.
GUARDIAN TRUST COMPANY et al., Defendants.

Intervening Petition.

Stipulation.

It is hereby stipulated by and between the parties to the above entitled cause as follows:

I.

Making up the issues:

(*a*) Edward F. Swinney, as Receiver of the Kansas City Sub-

urban Belt Railroad Company and the Kansas City Suburban Belt Railroad Company, the complainants, shall have leave to file a second amended and supplemental ancillary bill of complaint as per printed copy thereof this day furnished to counsel for the Guardian Trust Company which, for identification has been labeled on the front cover thereof as follows:

"For identification. J. C. Rosenberger and S. W. Moore."

542 Thereupon and within ten (10) days from the filing thereof the Guardian Trust Company shall file its answer thereto in form for identification marked on the front cover thereof as follows:

"For identification. J. C. Rosenberger and S. W. Moore."

And thereupon the said complainants shall forthwith file their replication to said answer.

(*b*) The Kansas City Southern Railway Company agrees to forthwith withdraw*n* its exceptions filed to the answer of the Guardian Trust Company to the Intervening Petition of said Railway Company, and to forthwith file replication to said answer.

(*c*) Said pleading when so filed shall stand referred without further order to Hon. Shannon C. Douglass, Special Master but the taking of proofs shall nevertheless be deemed to be closed by all the parties hereto.

In regard to depositions.

Whereas, the parties in the above entitled cause have taken depositions in said cause on December 9th, to 14th, 1905, of sundry witnesses, to be used as evidence in the said cause, to-wit: The deposition of R. B. Cone, in Detroit, Michigan, and the depositions of Herman Seilcken, William V. Rowe, McDougal Hawkes and Thomas L. Chadbourne, in the City of New York, and it appears from the depositions of said William V. Rowe and said Herman Seilcken, that the Guardian Trust Company offered in evidence certain documents which were identified by the respective notaries taking said depositions, and which are referred to in said depositions, and it further appears that said Notaries failed to attach to the said depositions either the original or a copy of said documents so referred to as exhibits.

Now, Therefore, it is accordingly stipulated:

1. That the paper hereto attached, marked "Exhibit 1" is a true copy of the paper referred to on page 15 of said Seilcken's deposition as "Exhibit No. 1," therein, as Trial Balance prepared by former Auditor Neal S. Doran.

2. That the paper set forth at page 30385 in Volume 50, as Heynecker's Exhibit "12" in the testimony heretofore taken in this cause before S. C. Douglass, Esquire, Special Master, is a true and correct copy of the paper referred to on page 26 of said Seilcken's deposition, as a certified copy of Report of Minutes of the Reorganization Committee of its meeting held July 10, 1900.

543 3. That the paper set forth at page 30411 in Volume 50 as Heynecker's "Exhibit 15" in said testimony taken before the master is a true and correct copy of the paper referred to as "Exhibit

No. 21" page 27, of said Seilcken's deposition, as the release signed by William F. Harrity, et al., members of the Reorganization Committee to De Goeijen, Jr., dated June 16th, 1902.

4. That the paper set forth at page 30388, in Volume 50 of said testimony as Heynecker's "Exhibit 3" is a true and correct copy of the paper referred to as "Exhibits Nos. 3 and 4" on page 28 of said Seilcken's deposition, as a copy of contract of release dated June 16, 1902, between Arkansas Construction Company, Kansas City Southern Railway Company and J. De Goeijen, Jr.

5. That the paper hereto attached and marked "Exhibit 2" is a true and correct copy of the paper referred to on page 38 of said Seilcken's deposition, as certified copy of the Bill of Complaint filed in the Circuit Court of the United States for the Eastern District of Pennsylvania, by the Kansas City Southern Railway Company against the Provident Life and Trust Company et al.

6. That the papers hereinbefore referred to are true copies of the papers referred to and shown as offered in evidence on pages 12 and 13 of the said deposition of William V. Rowe.

7. The signature of said McDougal Hawkes to his deposition aforesaid may be and is waived.

8. That said papers hereinbefore referred to may be considered as in evidence as fully and to the same extent as if the same had been actually attached by the respective Notaries to the said depositions, and that all informalities in the certification by the respective Notaries of any of the depositions aforesaid and in the return thereof to and filing thereof with the Clerk of said court are hereby waived.

III.

Any party to this cause shall have the right, upon the hearing of this case to refer to any part of the record in the four consolidated causes of the Provident Life and Trust Company v. The Kansas Suburban Belt Railroad Company et al., Nos. 2464, 2465, 2466, and 2467, filed September 6th, 1900, in the Circuit Court of the United States for the Western Division of the Western District of Missouri, or in the cause of the State Trust Company v. Kansas City, Pittsburgh and Gulf Railroad Company, filed in the same court on or about April 28th, 1899.

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IV.

The Kansas City Southern Railway Company agrees to furnish without charge for the record of the master, one printed copy of the General Mortgage issued by it under date April 2, 1900, and recorded in the office of the Recorder of Deeds of Jackson County, Missouri, in Book B 747, at page 1. Also a like number of copies of instrument entitled Supplemental indenture, conveying terminal properties at Kansas City, executed by the Kansas City Southern Railway Company to the Mercantile Trust Company et al., trustees, dated January 15, 1902, and recorded in the office of the Recorder of Deeds of Jackson County, Missouri.

V.

Without prejudice to the right to object thereto for incompetency, irrelevancy or immateriality, the objections heretofore offered to the following documents offered in evidence before the master by the Guardian Trust Company, on the ground that same did not constitute the best evidence, and have not been proved to be correct copies of the originals, are hereby withdrawn.

(*a*) A certain statement in writing made to the Committee on stock list of the New York Stock Exchange on or about the 14th day of August, 1900, and signed by A. W. Krech, second Vice-president of the Kansas City Southern Railway Company making application for the listing of the securities issued by said Railway Company on the regular list of the New York Stock Exchange.

(*b*) A certain agreement purporting to be executed on the — day of October, A. D. 1900, by and between members of the Philadelphia Reorganization Committee so called, and the Kansas City Southern Railway Company, with the exhibits theerto attached, providing for a settlement of the accounts between the said committee and the said railway company, and for other matters or in lieu thereof the complainants may produce a copy thereof.

VI.

The Guardian Trust Company, subject to its right to object thereto on the ground of incompetency, irrelevancy or immateriality, withdraws its objection that the following copies of writings heretofore offered in evidence by the said Southern Railway Company or the said Complainants, are secondary evidence, and have not been proved to be correct copies of the originals:

545 A. The copies of letter impressions books of various let-ers introduced in evidence by the complainants upon the last recall examination of Neal S. Doran.

B. Copies of correspondence passing between the Guardian Trust Company and the Re-organization Committee.

C. Certain documentary evidence and copies of letters offered in evidence by the complainants at the hearing held on December 30th, 1905, including the letter of the Kansas City Southern by E. H. Harriman to the Provident Life & Trust Company, dated June 27th, 1901, and the attachments thereto; and the letter of W. F. Harrity to E. H. Harriman, dated July 11th, 1900; and the letter of J. de Goeijen Jr. to Wm. F. Harrity, dated April 23rd, 1900; and letter of Kansas City Southern by E. H. Harriman to Re-organization Committee, dated June 27th, 1901; and receipt of Sullivan-Cromwell for one hundred and fifty thousand dollars ($150,000.00).

VII.

No party hereto shall predicate upon anything in this stipulation contained any application for postponement or delay of the hearing

of this cause or in any setting thereof heretofore made by the Special Master.

S. W. MOORE &
T. R. MARKS,
For K. C. So. Ry. Co., Swinney, Rec., & Sub. Belt.
H. S. MECARTNEY AND
J. C. ROSENBERGER,
Solrs. for Guardian Trust Co.

6/30/06.

Afterwards, to-wit, on the 19th day of October, 1906, the Answer of the Central Improvement Company and T. T. Crittenden, its Receiver, to the Second Amended and Supplemental Ancillary Bill of Complaint of Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company and Kansas City Suburban Belt Railroad Company was filed. Said Answer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

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In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company and Northern Townsite Company, Defendants.

Bill.

STUART R. KNOTT and EDWARD F. SWINNEY, as Receivers of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver; Northern Townsite Company and Fairmount Amusement Company, Defendants.

Ancillary Bill.

Answer of the Central Improvement Company and T. T. Crittenden, Its Receiver, to the Second Amended and Supplemental Ancillary Bill of Complaint of Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company and Kansas City Suburban Belt Railroad Company.

These defendants now and at all times hereafter saving to themselves all and all manner of benefit of exceptions or otherwise that

can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, answering say:

1. That as and for their answer and pleas to the Second Amended and Supplemental Ancillary Bill of Complaint, these defendants adopt their answer and pleas filed in this Court and cause on the 9th day of June, 1905 to the Amended and Supplemental Ancillary Bill of Complaint, of Stuart R. Knott and Edward F. Swinney, Receivers of the Kansas City Suburban Belt Railroad Company and Kansas City Suburban Belt Railroad Company, herein, as fully and to the same extent as if the same were set out here in full.

547 2. Further answering, these defendants admit that all the facts and matters alleged and set forth in pages 1, 2, 3, 4, 5, 6, and 7, of the Second Amended and Supplemental Ancillary Bill of Complaint of Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad and Kansas City Suburban Belt Railroad Company, are true.

And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by the said bill charged, without this, [—] there is any other matter, cause or thing in said complainants' Second Amended and Supplemental Ancillary Bill of Complaint material or necessary for these defendants to make answer to not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true, to the knowledge and belief of these defendants, all of which matters and things these defendants are ready and willing to aver, maintain and prove as this Honorable Court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

T. B. BUCKNER,
Solicitor for Defendants.

Afterwards, to-wit, on the 2nd day of July, 1906, the following Replication was filed:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, at Kansas City.

CAMBRIA STEEL COMPANY, Complainant,
vs.
GUARDIAN TRUST COMPANY et al., Defendants.

Bill.

No. 2468.

EDWARD F. SWINNEY, Receiver of the Kansas City Suburban Belt Railroad, et al., Complainants,
vs.
GUARDIAN TRUST COMPANY et al., Defendants.

Ancillary Bill.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Intervenor, Complainant,
vs.
GUARDIAN TRUST COMPANY et al., Defendants.

Intervening Petition.

Replication of Edward F. Swinney, Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Sub-
548 *urban Belt Railroad Company, to the Answer and Pleas of the Guardian Trust Company to the Second Amended and Supplemental Ancillary Bill of Complaint.*

These replicants saving and reserving to themselves all and all manner of advantage of exceptions which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendant for replication thereunto saith that they do and will aver, maintain and prove their said bill to be true, certain, and sufficient in the law to be answered unto by said defendant and that the answer of said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by these replicants; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed or denied, is true; all which matters and things these replicants are ready to aver, maintain, and prove as this honorable court shall direct, and humbly — as in and by their said bill they have already prayed.

S. W. MOORE &
T. R. MARKS,
Solicitors for Edward F. Swinney, Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company.

Afterwards, to-wit, on the 2nd day of July, 1906, the following Replication was filed:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, at Kansas City.

CAMBRIA STEEL COMPANY, Complainant,
v.
GUARDIAN TRUST COMPANY et al., Defendants.

Bill.

No. 2468.

EDWARD F. SWINNEY, Receiver of the Kansas City Suburban Belt Railroad, Complainants.
v.
GUARDIAN TRUST COMPANY et al., Defendants.

Ancillary Bill.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Intervenor, Complainant,
v.
GUARDIAN TRUST COMPANY et al., Defendants.

549 Intervening Petition.

Replication of the Kansas City Southern Railway Company, Intervenor, to the Answer and Pleas of the Guardian Trust Company to the Amended Intervening Petition of the Kansas City Southern Railway Company.

This replicant saving and reserving to itself all and all manner of advantage of exceptions which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendant, for replication thereunto saith that it does and will ever maintain and prove its said bill to be true, certain, and sufficient in the law to be answered unto by said defendant, and that the answer of said defendant is very uncertain, evasive, and insufficient in the law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain and prove as this Honorable Court shall direct, and humbly — as in and by its said bill it has already prayed.

S. W. MOORE,
T. R. MARKS,
Solicitors for the Kansas City Southern Railway Company.

Afterwards, to-wit, on the 16th day of November, 1907, an Application for leave to file Supplemental Bill was filed.

Said Application is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERminal Railroad Company, Kansas City and Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

550 EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company; The Kansas City Suburban Belt Railroad Company, Complainants.

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company, and T. T. Crittenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company; The Kansas City Suburban Belt Railroad Company, The Kansas City Southern Railway Company, Complainants,

vs.

GUARDIAN TRUST COMPANY, Defendant.

Supplemental Bill.

Comes now The Kansas City Southern Railway Company, Edward F. Swinney, as Receiver, and the Kansas City Suburban Belt
551 Railroad Company, and exhibit to the Court their supplemental bill against the Guardian Trust Company, one of the defendants, and pray that leave may be granted to file the same.

S. W. MOORE,
Their Solicitors.

Afterwards, to-wit, on the 16th day of November, 1907, the following Order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERMINAL Railroad Company, Kansas City and Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company, and T. T. Crittenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company; the Kansas City Suburban Belt Railroad Company, the Kansas City Southern Railway Company, Complainants,

vs.

GUARDIAN TRUST COMPANY, Defendant.

Supplemental Bill.

Order.

Leave is hereby granted to The Kansas City Southern Railroad Company, Edward F. Swinney, Receiver, and the Kansas City Suburban Belt Railroad Company to file their supplemental bill of complaint against the Guardian Trust Company.

(Signed) SMITH McPHERSON, *Judge.*

552 Afterwards, to-wit, on the 16th day of November, 1907, a Supplemental Bill of Edward F. Swinney, Kansas City Suburban Belt Railroad and the Kansas City Southern Railway Company against the Guardian Trust Company was filed:

Said Supplemental Bill is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERminal Railroad Company, Kansas City and Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company, and T. T. Crittenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendant-.

Ancillary Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company; The Kansas City Suburban Belt Railroad Company, The Kansas City Southern Railway Company, Complainants,

vs.

GUARDIAN TRUST COMPANY, Defendant.

Supplemental Bill.

Supplemental Bill of Edward F. Swinney, Kansas City Suburban Belt Railroad Company, and the Kansas City Southern Railway Company against the Guardian Trust Company.

To the Judges of the United States Circuit Court for the Western Division of the Western District of Missouri, sitting in Equity.

1. Your orators, Edward F. Swinney as Receiver of the Kansas City Suburban Belt Railroad Company, the Kansas City Suburban Belt Railroad Company, and The Kansas City Southern Railway Company, with leave of court, brings this supplemental bill of complaint against the Guardian Trust Company; each and all of
553 which said corporations, both complainant and defendant, are corporations organized and existing under and by virtue

of the laws of the state of Missouri and citizens and residents of said state and each of them being an inhabitant of the Western Division of the Western District there*to*.

(*a*) Your orators state that the original complainant in this action, the Cambria Steel Company, on September 6, 1900, exhibited to this Honorable Court its bill of complaint against the Kansas City Suburban Belt Railroad Company, Union Terminal Railroad Company, Kansas City and Independence Air Line, Guardian Trust Company, Missouri Elevator and Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company and Northern Townsite Company, in and by which said bill of complaint said Cambria Steel Company as such complainant set up the recovery of a judgment by it against the Kansas City Suburban Belt Railroad Company in the sum of One Hundred Thousand Nine Hundred Sixty Two and 91/100ths Dollars ($100,962.91) and the issuance and delivery and return unsatisfied of an execution thereon, and in and by said bill of complaint sought to subject to the payment and satisfaction of said judgment certain rights, properties and assets belonging to the Kansas City Suburban Belt Railroad Company and the other defendants above named.

(*b*) The bill of the Cambria Steel Company was in the nature of a creditor's bill in which it was sought to reach certain assets and property of the Kansas City Suburban Belt Railroad Company (hereinafter for convenience referred to as the "Belt Company") and to subject them to the payment of the said judgment in favor of the Cambria Steel Company. It was alleged in said bill that the defendant, Guardian Trust Company (hereinafter for convenience referred to as the "Trust Company"), caused to be organized and incorporated all of its co-defendants, to-wit: the Belt Company, Union Terminal Railroad Company (hereinafter for convenience referred to as the "Terminal Company"), Kansas City and Indepedence Air Line (hereinafter for convenience referred to as the "Air Line"), Missouri Elevator & Terminal Company (hereinafter for convenience referred to as the "Elevator Company"), Central Improvement Company (hereinafter for convenience referred to as the "Central Company"), Second Street Improvement Company (hereinafter for convenience referred to as the "Second Street Company"), Fairmount Amusement Company (hereinafter for convenience referred to as the "Amusement Company"), and the Northern Townsite Company (hereinafter for convenience referred
554 to as the "Townsite Company"); that the Trust Company caused each and all of said companies so incorporated and organized by it to issue large amounts of stocks and bonds, as follows: That it caused the Terminal Company to execute mortgage bonds in the amount of Two Million Dollars ($2,000,000.00) and capital stock in an equal amount; the Belt Company to issue bonds to the amount of One Million Dollars ($1,000,000.00) and stock in the amount of Two Million Seven Hundred and Fifty Thousand Dollars ($2,750,000.00); the Consolidated Terminal Company to issue bonds in the amount of Seven Hundred and Fifty Thousand Dollars

($750,000.00) and stock in an equal amount; the Air Line to issue stock in the sum of Five Hundred Thousand Dollars ($500,000.00) and bonds in the sum of Three Hundred Thousand Dollars ($300,000.00); the Central Company to issue stock in the sum of One Hundred Forty-One Thousand Five Hundred Dollars ($141,500.00); the Elevator Company to issue stock in the sum of Forty-Two Thousand Dollars ($42,00-.00); the Amusement Company to issue stock in the sum of Twenty-Five Hundred Dollars ($2,500.00); that the Trust Company at all times dominated and controlled each and all of said companies by the election of its own officers and directors to the positions of officers and directors of said other companies and caused them to execute their official duties in the interest and for the benefit of the Trust Company; that the Trust Company caused all of said stocks and bonds so issued as aforesaid to be transferred to it and it proceeded to use said stocks and bond nominally for the benefit and profit of the companies issuing them, but in reality for its own benefit and profit, and that it refused at all times to render any true or correct statement of account and to account to the said corporations and each of them for the disposition made of said stocks and bonds or the proceeds thereof. The said bill of complaint further alleged that, in various other and sundry ways, the Trust Company mismanaged the property and affairs of the said corporations and that at various times amounts were charged by the Trust Company to the Belt Company purporting to represent indebtedness from the other defendant companies to the Trust Company, and that, as a result of said transactions, there was a pretended indebtedness shown upon the books of the Belt Company and of the Trust Company in favor of the latter and against the former in a large amount, and that in 1899 it became apparent that the Belt Company and the other companies were about to become bankrupt and the Trust Company caused the officers of the Belt Company, who were also officers and interested in the Trust Company, to cause to be pledged to the Trust Company all of the bonds, stocks and other property or evidence of indebtedness possessed by the Belt Company and subject to pledge or hypothecation.

555 The promissory notes so alleged in said bill to have been executed by the Belt Company are more specifically described as follows:

Note dated March 31, 1899, payable on July 2, 1899, for $50,000, with interest at the rate of 6 per cent per annum.

Note dated July 26, 1899, payable on demand with 6 per cent interest for $203,900.

Note dated Sept. 21, 1899, payable on demand, with 8 per cent interest for $23,056.48.

Note dated Oct. 23, 1899, payable on demand, with 8 per cent interest, for $7,162.40.

Note dated November 7, 1899, due January 9, 1900, with 8 per cent interest, for $50,000.00.

Note dated January 25, 1900, due May 25, 1900, with 6 per cent interest for $25,000.

Note dated February 8, 1900, due May 12, 1900, with 6 per cent interest for $109,500.00.

Note dated February 9, 1900, due June 11, 1900, with 8 per cent interest, for $10,400.

The said bill of the Cambria Company further alleged that the stocks and bonds and other property which the Trust Company fraudulently caused its own officers and employes as officers and directors of the Belt Company to turn over to it for the purpose of securing the payment of the said pretended notes are as follows:

338 first mortgage, 30 year 5 per cent gold bonds of the Kansas City & Northern Connecting Railroad Company of the denomination of $1,000, dated January 1, 1897, being bonds numbered 1467, 1769 to 1703, both inclusive; 1799 to 1818, both inclusive; 1324 to 1331, both inclusive; 1756 to 1768, both inclusive; 1184 to 1216, both inclusive; 1466, 1369 to 1400, both inclusive; 1431 to 1440, both inclusive; 1609 to 1658, both inclusive; 1659 to 1708, both inclusive; 1819 to 1851, both inclusive; 1774 to 1798, both inclusive; 1301 to 1323, both inclusive, and 76 of said bonds the numbers of which are not known to your orators; also 50 of said bonds numbered 1129 to 1178, both inclusive.

67 and 9-10 second mortgage, 30 year 5 per cent income bonds of the Kansas City & Northern Connecting Railroad Company, of the denom-nation of $1,000 each, dated January 1st, 1897, being bonds numbered 1064 to 1098, both inclusive; 1149 to 1157,
556 both inclusive; 1162 to 1173, both inclusive; 1192 to 1202, both inclusive.

Certificate No. 227, entitling the holder to 250-1,000 of said mortgage income bonds.

Certificate No. 229, entitling the holder to 250-1,000 of said second mortgage income bonds.

Certificate No. 220, entitling the holder to 150-1,000 of said second mortgage income bonds.

25 shares of the capital stock of the Fairmount Amu-ement Company of the par value of $100 each, as evidenced by certificates Nos. 9, 6, 5 and 4.

1,120 shares of the capital stock of the Central Improvement Company of the par value of $100 each, as evidenced by certificate Nos. 148, 149 and 147.

439 shares of the capital stock of the Northern Townsite Company of the par value of $100 each, as evidenced by certificate No. 11.

425 shares of the capital stock of the Missouri Elevator and Terminal Company of the par value of $100 each, as evidenced by certain certificates Nos. 36, 34, 37, 40 and 38.

19,997 shares of the 20,000 shares constituting the capital stock of the Union Terminal Railroad Company.

4,994 shares of the capital stock of the Kansas City and Independence Air Line.

15 Kansas City and Northern Connecting Railroad Company's second mortgage income bonds.

About 600 tons of new steel rails, theretofore purchased by, and then belonging to said Belt Company, and being stored in its yards.

It is further alleged that at or about the same time of the pretended pledging of the above security the Trust Company caused the Belt Company to assign to it an open account against the Kansas City, Pittsburg & Gulf Railroad Company in an amount of One Hundred Thirty-Three Thousand Fifty-Eight and 4-100ths Dollars ($133,058.04) to secure said alleged indebtedness.

Said bill of the Cambria Steel Company prayed that an accounting might be had between the Trust Company and the other defendants and that upon a true accounting it would be found that nothing would be justly due from the Belt Company to the
557 Trust Company, but that on the other hand a large sum would be found to be due from the Trust Company to the Belt Company, and the Cambria Company prayed that the collateral above mentioned should be decreed to be released from the alleged pledge and subject to the payment of complainant's judgment; that the assets of the Belt Company be marshalled for distribution in accordance with the practice of courts of equity and for an injunction against the Trust Company and all persons claiming through, by or under it, or each of them, enjoining and restraining it from in any manner directly or indirectly selling, transferring, assigning or pledging, or otherwise disposing of or parting with the possession of or control of any of the property, assets, notes, stocks, bonds and claims and demands above mentioned and also any of the notes above mentioned.

(*c*). Upon the filing of said bill and on September 6, 1900, this court made an order appointing Stuart R. Knott and Edward F. Swinney, Receivers, generally of all the assets, property, rights, titles and interests, legal or equitable, of the Belt Company; and the court further ordered that the Trust Company and all persons claiming by, through or under it and each of them, and their several and respective officers, agents, employes and representatives, be restrained until the further order of the court from in any manner directly or indirectly selling, transferring, assigning, pledging or otherwise disposing of or parting with the possession or control of any of the property, assets, notes, stocks, bonds, claims and demands mentioned and referred to in the bill of complaint above set forth, and any of the said notes, bonds or other collateral above described. The Elevator Company, the Townsite Company, the Amusement Company, the Central Company, the Second Street Company and each of them, were restrained and enjoined from in any manner directly or indirectly selling, encumbrancing, pledging, transferring or assigning, or otherwise disposing of or parting with the possession or control of any part of the assets, property, moneys or demands of said companies respectively.

(*d*). Afterwards, and on the 8th day of November 1900, this court appointed a receiver for the Elevator Company, Central Company and Townsite Company; afterwards by order of this court the Elevator Company was turned over to the Trust Company as the mortgagees of its property for the purpose of the administration of the same; that the receivership of the Central Company has been continued and T. T. Crittenden is now the Receiver thereof and is in

charge of and is operating the property of that company; that the Receiver of the Townsite Company has been continued and com-
558 plainant Edward F. Swinney, is now the Receiver of said Company and in control of and in the administration of the assets of said company.

(*e*). All the defendants named in the bill of the Cambria Company filed their answers thereto and the issues have long since been made up and testimony taken as hereinafter stated.

(*f*) Your orators pray leave to refer to the bill of the Cambria Company and order *appearing* receivers thereunder to answers of the defendants to said bill, the reports of the receivers from time to time and the other orders made therein to the same extent and with like effect as if herein set forth at length.

2. Your orators further state that — the 20th day of November, 1901, your orator, Edward F. Swinney, together with Stuart Knott, the latter being at the time a co-receiver with your said orator, but since discharged of his trust, together with the Kansas City Suburban Belt Railroad Company acting under the authority of their appointment as receivers of the Belt Company as set forth in the foregoing paragraph, filed their ancillary bill of complaint against the Cambria Steel Company, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, and T. T. Crittenden its Receiver, Northern Townsite Company and the Fairmount Amusement Company; and afterwards, on the 26th day of March, 1905, filed their first amended and supplemental ancillary bill of complaint, and afterwards, on July 2, 1905, filed their second amended and supplemental and ancillary bill of complaint.

(*a*). In the original, as well as in the first and second amended and supplemental ancillary bill of complaint, the complainants therein averred that the Trust Company caused the organization and incorporation of the companies for the purposes and in the manner stated in the foregoing paragraph 1, sub paragraph "*b*"; also the execution by said companies of the bonds and stock as therein alleged; and domination and control by the Trust Company of each and all of said companies and the appropriation by the Trust Company of all of said stocks and bonds to its own benefit and profit and its refusal to render any true or correct statement of account and to account to said corporations and each of them for the disposition of said bonds and stocks or the proceeds thereof; that the Trust Company in various other and sundry ways mismanaged the property and affairs of said corporation and that at various times amounts were charged by the Trust Company to the Belt Company purporting to represent indebtedness from the other defendant companies to the Trust Com-
559 pany and that as a result of said transactions there was a pretended indebtedness shown upon the books of the Belt Company and of the Trust Company in favor of the latter and against the former in a large amount; that in 1899 it became apparent to the Trust Company that the Belt Company and other companies were about to become bankrupt and the Trust Company caused the officers of the Belt Company, who were also officers and interested in the Trust Company, to cause to be pledged to the Trust Company all of

the bonds, stocks and other property or evidence of indebtedness possessed by the Belt Company and subject to pledge or hypothecation; that the Trust Company caused the Belt Company to execute the promissory notes specifically described in said paragraph 1, sub paragraph "*b*", and that the Trust Company fraudulently and unlawfully caused its own officers and employes, as officers and directors of the Belt Company, to turn over to the Trust Company for the purpose of securing the payment of the pretended notes, the stocks and bonds specifically described in said paragraph 1, sub-paragraph "*b*", and to assign the account therein specifically set forth.

It is further alleged in the said amended and ancillary bill of complaint that the Trust Company caused to be organized the Central Improvement — a corporation under the laws of the State of Missouri, with a capital stock of $200,000.00, of which $141,500.00 par value has been issued; that said company was organized for the purpose of holding the title to various pieces of real estate in Kansas City, Missouri, and elsewhere, purchased for the use and benefit of the Belt Company, and other of the companies above mentioned so organized, dominated and controlled by the Trust Company; that the officers and employes of the Central Improvement Company, all of whom were officers, servants or employes of the Trust Company continued nominally in office and to control and to manage such company until about the month of April, 1900; that certain pieces of real estate of vital importance to the Belt Company are held in the name of the Central Improvement Company; that the Trust Company took upon itself the duty of purchasing the said pieces of property and using for that purpose funds of the Belt Company; that various sums of money were, during the period above mentioned, paid out by the Belt Company to the Trust Company for the purpose of purchasing such pieces of real estate; that the Trust Company has never truly accounted to the Belt Company, though often requested so to do, for the sums of money so received by it and the disposition made by it of such sums of money, and it has never accounted at all therefor, except as hereafter stated; that a large amount of property was purchased
560 with money advanced by the Belt Company, the title to which property, however, was taken in the name of the Improvement Company; that all of said property in truth and in fact belong to the Belt Company, and that the Belt Company has never been reimbursed for the money so advanced as aforesaid; that on the eighth day of November, 1900, a receiver was appointed for the Improvement Company and that T. T. Crittenden is now the duly qualified and acting receiver thereof; that another company organized by the Trust Company was the Northern Townsite Company, a Missouri corporation, with an authorized capital of $100,000.00, of which $92,800.00 has been issued; that said company was organized by the Trust Company in connection with the Construction of the Kansas City Northern Connecting Railroad for the purpose of acquiring property at or near townsites along the line of said road; that the Trust Company, in the same manner as it dominated the other corporations above named, caused its own servants and employes to be elected and maintained as officers and directors of said Townsite Com-

pany, and at all times dominated and controlled the affairs of said Townsite Company; and the Trust Company caused the Belt Company to advance to it upwards of $47,000.00, which it used in the purchase of property which was taken in the name of the Townsite Company; that the Trust Company furnished the Townsite Company the sum of $6,288.57 and no more; that the property standing in the name of the Townsite Company and the proceeds realized from the sale of such of the townsite properties as have been sold should be conveyed and turned over to the Belt Company.

The complainants in said amended and supplemental ancillary bill of complaint then proceed to specify a large number of particular instances wherein it is claimed that, by reason of the domination and control by the Trust Company over the Belt Company and the other companies above described and allied with it, the Trust Company caused improper charges to be made against the Belt Company and refused to allow credits which should have been allowed to it, so that if said accounts were properly sifted and adjusted the Belt Company would be entitled to a credit in excess of $1,500,000.00 and that said pretended notes would be entirely wiped out and the Belt Company would be entitled to a judgment for a large amount against the Trust Company. The prayer is as follows:

That an accounting be taken of the various transactions and dealings between the Trust Company and the Belt Company; or by the Trust Company for the use and benefit of and as trustee and agent for the Belt Company, and that the Trust Company be required to pay the balance found to be due by it, if any, upon such ac-
561 counting; that in taking such accounting all claims and demands alleged to be held by the Trust Company against the Belt Company in Kansas and Missouri, where the Trust Company used the Belt Company simply as an instrumentality and agency for its own use and benefit, be charged against the Trust Company and it be held liable for all losses incurred or claimed to have been incurred by the Belt Company about the same.

That the said notes hereinabove described may be found and decreed by this court to have been executed in the fraudulent manner and for the fraudulent purposes above set forth and without consideration; and that said notes may be by this court directed to be surrendered up and cancelled, and that each and all of the stocks, bonds and other securities, including the assigned account above mentioned, fraudulently delivered to the Trust Company by its officers and employes in the manner hereinabove set forth, may be ordered by this court surrendered and delivered up or reassigned to the Belt Company.

That each and all of the property purchased with the money of the Belt Company and belonging in equity to it, the legal title to which is held in the name of any of the companies hereinbefore set forth, may be required by the decree of this honorable court to be conveyed to the Belt Company, or to its receiver for it.

And your orators pray for a continuance of the writ of injunction herein against the Guardian Trust Company, its agents, servants and employes, restraining and enjoining them and each of

them from selling, transferring or in any wise disposing of the said notes above mentioned and so executed by the Belt Company to the Trust Company; and from selling, transferring or in any wise disposing of the said bonds and stocks and other property hereinabove described, delivered to said Trust Company as collateral security for said notes.

(*b*) The Trust Company duly answered the said amended and supplemental ancillary bill of complaint and by various allegations sought to justify the statement of accounts made between it and the Belt Company, averred the execution by the Belt Company of the promissory notes above described and the pledging and transfer to it of the account and collateral security above mentioned; averred that it had sold certain of said collateral security, and that as to the remaining collateral security it had been temporarily enjoined at the suit of the Cambria Steel Company from the selling or otherwise subjecting certain of the above named stocks and bonds to the payment of the alleged indebtedness of the Belt Company to it;
562 but that certain of said collateral security has under the order of this court been sold by the Trust Company and the proceeds of certain sales are now held by the Trust Company in accordance with the order of this court to await the final determination of this cause; that as to the claim and account of the Belt Company against the Kansas City, Pittsburg & Gulf Railroad Company it was averred that said account had been assigned to and was held by the Trust Company as collateral security and that the Trust Company had filed said statement of account by intervening petition in the suit of the State Trust Company, complainant, against the Kansas City, Pittsburg & Gulf Railroad Company and others, defendants, in this court, and that said intervention is still pending and undetermined; and the Trust Company prayed that judgment might be rendered by this court against the Belt Company and the complainants in said amended and supplemental ancillary bill in favor of the Trust Company for the amount of each and all of the said promissory notes, together with interest thereon, and for the amount of an open book account, with interest thereon, from April 1, 1900; that the court by proper order should protect and enforce the interest of the Trust Company in and to the stocks, bonds, accounts and property so held by the Trust Company as collateral security as aforesaid. The other defendants in said amended and supplemental ancillary bill filed their answers and the issues have long since been made up.

(*c*) The properties of the Central Improvement Company consist in a general way of parcels and tracts of land in and about Kansas City of the value of approximately $200,000.00; that nearly all of said lands were purchased with funds supplied by the Belt Company and the title thereto was taken in the Central Improvement Company as a matter of convenience; that T. T. Crittenden is now the duly qualified and acting receiver in charge of and administering said properties; that numerous orders have been heretofore made by this court respecting the properties of the Central Improvement Company.

(*d*) The properties of the Northern Townsite Company are still in the hands of Edward F. Swinney, Receiver, appointed by this court, and consist in a general way of a large number of town lots, except such as have been sold, in which event the proceeds are in the hands of the said Receiver awaiting disposition by this court. A number of orders have been made by this court directing the administration of said property and providing for such sales as have been made.

(*e*) In November, 1901, this court made an order in the case of Bierce vs. Guardian Trust Company upon the application of
563 the Trust Company and its Receiver, providing for the sale of ninety nine (99) bonds of the Kansas City & Northern Connecting Railroad Company, being a part of the collateral above named, together with coupons thereto attached, and the same were sold and the proceeds aggregating $40,000.00 were, in pursuance of said order of this court, received by the Guardian Trust Company and by its receiver to take the place of said bonds and held by them separate and apart from the other funds subject to any claim thereto which might therafter be established by the Kansas City Suburban Belt Railroad Company and the Cambria Steel Company.

(*f*) All of the bills, answers, orders, reports and other proceedings mentioned in this paragraph are a part of the record in this case and your orators pray leave to refer to the same at any hearing *of* the same effect as though they were duly incorporated herein.

3. Your orators further state that on the 27th day of February, 1905, your orator The Kansas City Southern Railway Company, by leave of court and by stipulation of the parties, filed its intervening petition in this cause, in which it claimed certain of the collateral above described in paragraph one (1) and the proceeds of the same where any part thereof had been sold; the general nature of the claim of said intervenor is as follows:

(*a*) The intervenor, it was alleged in said intervening petition, was the purchaser at foreclosure sale in 1900 of the railroad properties of the Kansas City Pittsburg & Gulf Railroad Company, and in 1902 of the Kansas City Suburban Belt Railroad Company and Kansas City and Independence Air Line. That each of said sales was made in the foreclosure proceeding to foreclose mortgages upon each of said properties; that said mortgages not only covered the specific railroad properties in existence at the time they were made, but also carried a broad after-acquired property clause sufficient in equity to include and embrace all other property acquired for railway purposes after the execution of said mortgages.

Intervenor then alleged the incorporation of the said Central Improvement Company for the purpose of holding the legal title to real estate that might be needed and required for right of way and other purposes necessary for and in connection with the operation of said various railroad companies; that all of the moneys used by said Improvement Company were contributed by the Belt Company; the Air Line and by the Gulf Company for the purchase of right of way and terminal properties necessary for the use and operation

of said railways respectively; that the amount contributed
564 by the Belt Company was $129,673.00; by the Air Line, $16,101.00, and by the Gulf Company $23,673.00; that as a matter of convenience when funds were provided by said companies, or any of them, for the purchase of right of way which such company might need for railroad purposes, that amount of stock subsantially equivalent thereto was issued by the Improvement Company to the railway company supplying the funds; that in this way 1407 shares of stock of the Improvement Company were issued and not otherwise, and said stock was appropriated by the Trust Company in 1899 for the fraudulent purpose of securing the pretended indebtedness aforesaid; that the Trust Company was a Trustee in each of said mortgages and actually and by operation of law charged with a notice that all of said properties in equity belonged to the various railway companies for which they were purchased and that the after-acquired property clause of the mortgages respectively attached to said properties, so that in equity they were covered by said mortgages and upon a foreclo-use sale the title thereto passed to and vested in said intervenor.

(*b.*) The intervenor further alleged that the steel rails which the Trust Company took possession of on or about February 1, 1900, being approximately 600 tons, more or less, as aforesaid, were charged with a lien of said after-acquired property in said mortgage of the Belt Company and that thereby the intervenor acquired title thereto at foreclosure sale and was entitled to recover the same or their proceeds from the Trust Company.

(*c.*) The intervenor further claims that the account of the Belt Company against the Gulf Company in the sum of $133,000.00 fraudulently transferred to the Trust Company as aforesaid, was likewise covered by the after-acquired property clause of the mortgage of the Belt Company so that the intervenor upon foreclosure sale became entitled thereto and entitled to have the pretended assignment thereof to the Trust Company cancelled.

(*d.*) The intervenor further claimed that the other collateral, consisting of stocks and bonds above described, were charged with a lien by virtue of said after-acquired property clause, and that the intervenor as purchaser at foreclosure sale became entitled to the same or to its proceeds where the same had been sold.

(*e.*) The prayer of the intervenor is as follows:

a. For the judgment, order and decree of this court requiring the Central Improvement Company and its Receiver to convey to
565 your intervenor all the real estate or other property standing in its name and to turn over to your intervenor all the moneys held by the Central Improvement Company, or its Receiver, or owing to it, or them, arising from the sale or the proceeds of said property.

b. That the defendant, Guardian Trust Company, be required to account for and pay to your intervenor the value of the steel rails and fastenings mentioned in paragraph seven (7), together with interest thereon.

c. That the defendant, Guardian Trust Company, be required to account for and pay to the intervenor the value of the five thousand

(5,000) shares of Union Terminal stock, together [woth] the value of four thousand nine hundred and ninety-four (4,994) shares of the capital stock of the Air Line and also the value of the fourteen thousand nine hundred and ninety-seven (14,997) shares of the capital stock of the Terminal Company, together with interest thereon.

d. That the defendant, Guardian Trust Company, be required to account for and pay to your intervenor the value of the bonds of the Kansas City and Northern Connecting Railroad Company mentioned in the preceding paragraph nine.

e. That the defendant, Guardian Trust Company, be required to assign to your intervenor the account of the Belt Company against the Gulf Company mentioned in the foregoing paragraph ten.

f. That the defendant, Guardian Trust Company, be required to release to your intervenor all of the capital stock of the Northern Townsite Company and that said Northern Townsite Company and its receivers be required to convey to your intervenor all of the property held by said Northern Townsite Company and its receivers, together with all the moneys in their possession or owing to them as the proceeds of the property formerly held by said Townsite Company upon repayment to the Trust Company for such sum as the court may find was contributed by said Trust Company for the purchase of property taken in the name of the Townsite Company.

g. That the defendant Guardian Trust Company be required to account for and pay to the intervenor the amount of the proceeds of the bonds of the Union Company diverted by it from the purposes for which said bonds were issued, as set forth in paragraph thirteen.

(*e.*) The Trust Company filed its answer to the intervening petition of The Kansas City Southern Railway Company in
566 which in a general way it denied that the properties mentioned in the intervening petition were covered by said after-acquired property clause and denied that it was liable to The Kansas City Southern Railway Company for any of the matters therein charged; the Trust Company in its answer referred to the said promissory notes above set forth as having been executed by the Belt Company and to its open account, and alleged that the intervenor The Kansas City Southern Railway Company by reason of the reorganization plan under which the Kansas City, Pittsburg & Gulf Railroad Company, the Belt Company, Air Line Company, and other companies, were re-organized, all of the floating debt of the Belt Company or other of the foreclosed companies have been assumed by The Kansas City Southern Railway Company, its allegations in that respect being as follows:

This respondent, the Guardian Trust Company, further shows that on or about the 14th day of June, A. D. 1899, William F. Harrity, B. M. Baker, August Hecksher, Edward Wagner, Samuel R. Shipley, Silas W. Pettit and Winthrop Smith entered into an agreement for the reorganization of the Kansas City, Pittsburg & Gulf Railroad Company, Kansas City Suburban Railroad Company, and the Port Arthur Channel and Dock Company and their so-called subsidiary or auxiliary companies, including said Kansas City Subur-

ban Belt Railroad Company, Union Terminal Railroad Company, Consolidated Terminal Railroad Company, and Kansas City and Independence Air Line Railroad Company; that said persons calling themselves a reorganization committee formed a so-called "plan of reorganization," which was promulgated under date of November 7, 1899, and invited all holders of bonds and stocks of said several companies above named, to deposit the same with said reorganization committee under said plan of re-organization which proposed to organize a new corporation to be known as the Kansas City Southern Railway Company, which should acquire the properties of all said above named corporations, and issue in payment therefor the bonds and stocks of said re-organized or new corporation in the proportions and on the terms and in the manner set out in the said plan of re-organization, which is hereby referred to and read to be produced upon the hearing of this cause.

That after the promulgation of said plan on November 7, 1899, there was deposited with said re-organization committee the proportion of bonds and stock required by said plan to make the same operative; and on the 20th day of December, 1899, said plan
567 was declared operative; that thereafter said committee caused to be organized and incorporated the Kansas City Southern Railway Company under the statutes of the State of Missouri for the purpose of acquiring title to the properties of said corporations named in the foregoing paragraph, and the stocks and bonds of said new corporation were thereafter exchanged for the stocks and bonds of said several corporations in the proportion and manner set out in said organization plan; that by means of said exchange said Kansas City Southern Railway Company came to be the owner of practically all the bonds and stocks of said corporations above mentioned, and particularly of the said Kansas City Suburban Belt Railroad Company, and said corporation caused to be elected directors and officers of said Belt Railroad Company, who conducted the same and managed and operated it in the interests of and as a component part of the railroad system of said Kansas City Southern Railway Company.

This respondent further shows that the organization of said Kansas City Southern Railway Company and exchange of its stocks and bonds above alleged for the stocks and bonds of said Belt Railroad Company, and the other steps taken in pursuance of said re-organization plan; effected a consolidation of said Kansas City Southern Railway Company and said Kansas City Suburban Belt Railroad Company under the statutes of the State of Missouri; or a consolidation de facto, and that said Kansas City Southern Company is estopped to deny such consolidation, or to claim that the same was not legally complete; and that said Kansas City Southern Railway Company thereby became and is liable for all the debts incurred by said Belt Railroad Company to the same extent as said last mentioned company, including the debts of this respondent heretofore mentioned and alleged in this answer.

Further answering this respondent shows that said re-organization committee, when working out said plant of re-organization expressly represented to this respondent that, in consideration of the debt due and owing from said Belt Company to this respondent,

said committee would provide for the payment of all debts and obligations due to this respondent from all of said corporations proposed to be included in said re-organization plan, and particularly said Belt Railroad Company, and expressly promised this respondent that said committee would pay or cause to be paid all debts of every character due to this respondent from said several corporations proposed to be consolidated, and particularly from said
568 Belt Railroad Company; and that the said new and reorganized company would pay such debts; that certain members of said reorganization committee constituting a so-called purchasing committee, purchased at the foreclosure sale of said Kansas City, Pittsburg and Gulf Railroad Company all its assets, right-of-way, rolling stock, etc., and thereafter assigned said bid to said Kansas City Southern Railway Company, which said company entered into a contract, with said reorganization committee, wherein and whereby it assumed and agreed to complete and carry out all the obligations undertaken and assumed by said re-organization committee; that under and by reason of said agreement and contract said Kansas City Southern became liable and agreed to pay all the obligations of said Belt Railroad Company to this respondent, and is still so liable.

That said Kansas City Southern was at the time of the foreclosure and sale of the Belt Company's assets the holder and owner of practically all the bonds and stock of said Belt Company; that, in order to obtain and control the stock of said Belt Company, said Kansas City Southern Railway Company exchanged its stock in the proportions and in the manner specified in said plan of re-organization, which is hereby referred to, for the stock of said Belt Company, and thereupon proceeded to secure a foreclosure of said bonds of said Belt Company; that said scheme of re-organization and exchange of stocks aforesaid resulted in the stockholders of the Belt Railroad Company securing a large amount of stock of said Kansas City Southern Railway Company, which was at that time and is yet very valuable, and was at that time and is yet of much greater market value than the total claims of this respondent against said Belt Railroad Company; that said scheme legally implied the payment by said Southern Company of all the claims of this respondent against said Belt Company.

This respondent therefore alleges and shows that if said scheme of re-organization and exchange of securities was intended by said re-organization committee and by said Kansas City Southern Railway Company and its officers to deprive this respondent of all security and opportunity of collecting its said claims against the Belt Railroad Company, while preserving and securing to the stockholders of said company said advantage and valuable interests through said scheme of transfer of stocks, that said foreclosure of said properties of said belt Company, would have been a fraudulent scheme, and in that case should be held void and invalid, so far as this relator is concerned, and the property thereby trans-
569 ferred to said Kansas City Southern Railway Company should be held subject to the debts and claims of this respondent and subjected to their payment, even if it should be held by the court that a legal consolidation, or actual or de facto consolidation, was

not brought about as hereinabove alleged, whereby said Kansas City Southern Railway Company became legally obligated to pay the claims of this respondent against said Belt Railroad Company.

The issues so made by said intervening petition and the answer thereto have long since been made up.

(*f*). The intervening petition, answer thereto and other orders and proceedings made are a part of the record of this cause and your orators pray that they may be referred to and considered of the same effect as though actually incorporated herein.

4. The issues made by the various pleadings above recited were, by order of this court, referred to Honorable Shannon C. Douglass, and in 1903 the taking of testimony before him began and was continued until 1906. Testimony was taken by complainants in the bill of the Cambria Company, by complainants in the amended and supplemental ancillary bill of the Belt Company and its receivers, by the intervening petitioner, The Kansas City Southern Railway Company and by the Guardian Trust Company. The testimony covering all of the manifold issues in the case, involving a thorough investigation and sifting of all the accounts between the Trust Company and the Belt Company and the other corporations mentioned extending over a period of, in some cases, as much as ten years. All of the accounts, vouchers and other records of the parties are in evidence, as well as the oral testimony of every witness able to throw any light upon the subject of the controversy; the record of this testimony so taken before the Special Master, contains over thirty-four thousand (34,000) pages. Your orators further state that, in taking said testimony and preparing this cause for trial, they have expended in counsel fees, witness fees and court costs, more than $50,000.00. In the summer of 1906 the case was finally submitted to the Master by all parties and argued at length for many days. The complainants in the amended and supplemental ancillary bill, referred to in the foregoing paragraph numbered "2," and complainant in the intervening petition referred to in paragraph "3," have filed with the Master carefully prepared abstracts of testimony and also a brief of the facts, taking up each allegation in the bills mentioned in the foregoing paragraphs "2" and "3", with reference to the pages of the record where the testimony in support of such allegations are to be found. Both parties have filed elaborate
570 briefs with the Master; even since the hearing, additional printed briefs have been filed by the parties including the Trust Company; but the Trust Company has thus far failed and refused to prepare and file with the Special Master any abstract whatever of the testimony, or to aid the Special Master in any way in reaching a conclusion upon the matters of fact involved in the litigation.

5. Your orators further state that the ancillary bill of complaint and the supplemental and ancillary bills and the subsequent amendments thereto referred to in paragraph "2" hereof, were filed by agreement with the Trust Company in accordance with written stipulation which provided that there should be an accounting between the Trust Company and the Belt Company in this cause. Said stipulation, omitting the caption, is as follows:

It is hereby stipulated and agreed by and between Stuart R. Knott and Edward F. Swinney, Receivers of the Kansas City Suburban Belt Railroad Company, complainants in the cross bill in the above entitled cause, and the defendants the Guardian Trust Company and Francis M. Black, its Receiver, Second Street Improvement Company and Cambria Steel Company, as follows:

First. That the said complainants shall withdraw or dismiss their cross bill heretofore filed herein and shall file an amended cross bill, in the nature of an ancillary bill in this cause, making The Kansas City Suburban Belt Railroad Company a co-plaintiff with them in said amended ancillary cross bill, and also making the Cambria Steel Company, the complainant in the original bill herein, a defendant in said amended ancillary cross bill, and that said amended ancillary cross bill shall be filed on or before the 15th day of November, 1901, and that the defendants, the Guardian Trust Company and its receiver, and the Second Street Improvement Company and the Cambria Steel Company, shall have leave to plead or answer to said amended ancillary cross-bill, on or before the first Monday in December, 1901.

Second. That the accounting between the Kansas City Suburban Belt Railroad Company and its receivers, and the Guardian Trust Company, and its receiver, sought by the said amended ancillary cross bill, shall be expedited by all of the parties hereto, and whatever balance, if any, that may be found due to the said Guardian Trust Company or its receiver, from the said Kansas City Suburban Belt Railroad Company or its receivers shall be entered up in this cause as a judgment in favor of the said Trust Company and
571 its receiver and against the Suburban Belt Railroad Company and its receivers, without the necessity of presenting any claim therefor by way of cross bill; or other affirmative pleading; and whatever balance, if any, that may be found due to the said Suburban Belt Railroad Company, or its receivers, from said Guardian Trust Company, or its receivers shall be entered up in this cause as a judgment in favor of the said Kansas City Suburban Belt Railroad Company and its receivers and against the Guardian Trust Company and its receiver.

Dated this — day of November, 1901.

STUART R. KNOTT AND
EDWARD F. SWINNEY,
Receivers of the Kansas City Suburban Belt Railroad Company.

By THOMAS R. MORROW AND
S. W. MOORE, *Their Solicitors.*

GUARDIAN TRUST COMPANY AND
FRANCIS M. BLACK, *Its Receiver.*

By F. M. BLACK AND
TRIMBLE & BRALEY, *Its Solicitors.*

SECOND STREET IMPROVEMENT COMPANY.

By TRIMBLE & BRALEY, *Its Solicitors.*

CAMBRIA STEEL COMPANY,

By —— ——, *Its Solicitors.*

I consent and agree to the foregoing stipulation with the *the* understanding that it shall in no wise prejudice the right, if any, which the Cambria Steel Company has to subject any property debt found to be due from the Guardian Trust Company or to subject any property or collateral or proceeds thereof heretofore or now in the hands of the Guardian Trust Company or its receiver, or its or his assigns; and all the testimony introduced by any party herein shall be with the understanding that the Cambria Steel Company can, if it so desires, use the same upon final hearing of its bill in the case above entitled.

FRANK HAGERMAN,
Solicitor for Cambria Steel Company.

The intervening petition of The Kansas City Southern Railway Company was filed pursuant to a stipulation between that company and the Trust Company in this cause, which is as follows:

572 It is agreed between the parties to the intervening petition of The Kansas City Southern Railway Company that it may file its amended intervening petition setting up, in addition to the matters now contained in its intervening petition on file, its claim against the Guardian Trust Company for alleged breach of trust as trustee in the mortgage made by the Union Terminal Railroad Company alleged to be accruing to it as the owner of all the bonds issued by the Union Terminal Railroad Company; and the Guardian Trust Company consents that the issues so made shall be referred to Shannon C. Douglass, Special Master, and waives any objection it might make to said intervening petition on the ground of multifariousness or other formal matters; and the Guardian Trust Company further agrees to answer the said intervening petition within fifteen days from filing petition.

6. Your orators further state that notwithstanding the issues made and testimony taken in this cause and its final argument and submission to the Special Master, the Trust Company is now insisting upon trial in the Circuit Court of Jackson County, Missouri, of certain actions which it has there pending against the Kansas City Southern Railway Company, which said actions it has caused to be set down for hearing on December 2, 1907; and the Trust Company, unless restrained by order of this court, is threatening to proceed and will proceed to force a hearing of said causes, which are as follows:

(*a*) The petition of the Guardian Trust Company — filed in the Circuit Court of Jackson County, Missouri, on March 15, 1905, containing thirty-three (33) counts, thirty-one (31) of which are insisted upon, the last two (2) having been abandoned. The petition purports to set forth several causes of action, each one of which is stated in three different forms or three (3) separate counts. The petition is hereto attached and made a part hereof as Exhibit "A." The action is one at law, triable by a jury; in it the Trust Company seeks to recover against the Kansas City Southern Railway Company upon the notes set forth and described in paragraph one (1) hereof and also upon an open account. Inasmuch as the Allegations in reference to each note and the account are substantially the

same, the allegations in reference to the first note, consisting of three counts, are herein set forth and *is* as follows:

First Count.

1. Plaintiff states that the Kansas City Suburban Belt Railroad Company, hereinafter called the Belt Company, is and was
573 at all times a railroad corporation organized under the laws of the State of Missouri; that the said Belt Company on the 25th day of January, 1900, by its negotiable promissory note of that date, by it duly executed, promised, for value received, to pay to plaintiff four months after said date, the sum of Twenty-five Thousand — ($25,000.00) a duly certified copy of which said note is herewith filed and marked Exhibit "A"; that said note has long since matured and no part thereof, except the interest thereon at the rate of six per cent per annum to September 1, 1901, has been paid, although payment of said note was demanded at the maturity thereof.

2. That on and prior to April 1, 1899, the Kansas City, Pittsburg & Gulf Railroad Company, hereinafter called the Gulf Company was a railroad corporation, organized under the laws of the state of Missouri; that the Gulf Company owned or controlled a line of railroad extending from Port Arthur, Texas, to Grandview, in Jackson County, Missouri, and had trackage rights over the St. Louis & San Francisco Railway from said Grandview to a point in Jackson County, Missouri, called Belt Junction; that the said Belt Company owned and operated a line of railroad in Jackson County, Missouri, extending from a point in Kansas City on the State Line between Missouri and Kansas near the confluence of the Missouri and Kansas Rivers, thence east along the south bank of the Missouri River about five miles, thence southwest to said Belt Junction, so that when connected, the line of the Belt Company and the line of the Gulf Company formed in the main one continuous line of railroad running in the same general direction from Port Arthur, Texas, to Kansas City, Missouri; that on April 1, 1899, said Gulf Company made default in the payment of interest due on that date on its funded debt, and upon complaint filed by the Trustee named in the mortgage securing said debt, such proceedings were had that the property and affairs of said Gulf Company on or about said date passed into the hands of receivers appointed by the Circuit Court of the United States for the Western Division of the Western District of Missouri, which receivers assumed for the time being, the operation and control of said Gulf Road under the orders of said court; that shortly thereafter a committee, styled a "Reorganization Committee", was formed for the purpose of readjusting the funded debt of said Gulf Company and for other purposes, fully set forth in a prospectus published by said Committee called a "Reorganization Plan"; that said Gulf Company had no terminal facilities in Kansas City except such as it had by contract with said Belt Company and it became evident to said committee that it would be advantageous for said Gulf Com-

pany, when reorganized, to acquire the property of said Belt Company by consolidation or otherwise; that the expressed ob-
574 ject of said reorganization plan, as set forth in said prospectus, was to consolidate and unify the property of said Gulf Company with the property of the said Belt Company and to manage and control the same as one; that with this end in view said committee, under date of November 7, 1899, put forth and published a certain prospectus called a "Reorganization Plan", and circulated the same among the creditors, bondholders, and stockholders of said Belt Company, including plaintiff; that attached to said prospectus was a certain agreement which all the stockholders of the Belt — were invited to execute in favor of said committee; that it was provided in said published plan that same should be deemed a part of said agreement to the same extent as if copied in full therein; that a copy of said plan and agreement is hereto attached and marked exhibit No. 1; that all of the originals thereof are in defendant's posse-sion or under its control; that in and by said published plan said committee made the following offer to all the stockholders of the Belt Company, that is to say, that it, the said Committee, would cause a new or successive corporation to be formed in which should be vested the title to all and singular the property and franchises of the Gulf Company, when acquired by said committee at such judicial sale thereof as might thereafter be had in said receivership proceedings; that to all such stockholders of the Belt Company as would deposit their stock with said committee under the terms of said written agreement, attached to and made a part of said prospectus, the said committee would cause to be issued a like amount of stock of equal par value by such new corporation to be formed as aforesaid, so that upon the consummation of said plan the stockholders would have the same amount of stock in such new corporation as they then held respectively in the Belt Company, and it was made a condition to participation in said scheme that all persons who should deposit their stock with said committee should enter into a binding agreement that said stock when issued should be vested irrevocably for a term of five years in certain trustees, who should have absolute power to vote the same and exercise all the prerogatives and franchises of the owners of said stock in the control and management of said new corporation to be formed as aforesaid; that all stockholders of said Gulf Company were required, as a condition to participation in said plan, to pay said committee the sum of $10.00 for each share of Gulf stock, deposited with said committee under said plan, which payment entitled them to one share of stock of the new company, but no such condition was imposed on stockholders of the Belt Company; that said prospectus was so contrived and framed as to lead, and did lead, plaintiff and such other corporations and per-
575 sons, who or which dealt with said committee on the faith thereof, to believe that the floating debt of the Belt Company, including said note, would be paid by said committee or by said successor corporation; that induced by the proposals made in said prospectus, the persons holding more than ninety-nine per cent of the total issue of the stock of the Belt Company then outstanding a

total of 47,500 shares, deposited the same with the said committee, to be held and used by said committee in the execution of said scheme as aforesaid; that afterwards such proceedings were had in the said Circuit Court of the United States that the said Gulf Road was on or about March 19, 1900, sold at foreclosure sale and was bid in by certain persons on behalf of said committee, and on March 19, 1900, said committee, pursuant to said scheme of reorganization caused defendant to be incorporated as a railroad corporation under the laws of the State of Missouri, and caused all the property and franchises of said Gulf Road to be conveyed to defendant and caused defendant to issue its shares of stock to said stockholders of the Belt Company, who then and there received in stock of defendant a like number of shares as they had before held in the Belt Company, respectively, and of equal par value as said Belt shares; that said scheme, as set forth in said prospectus, was carried into full force and effect and defendant then and there entered into possession and control and acquired unto itself all of the property and franchises of the Belt Company and still has the same; all with the result that after said scheme was carried out the said stockholders of the Belt Company had and still have the same interest in defendant, as they had before had in the Belt Company, and defendant has all of the property and assets of said Belt Company and is using the same for its own benefit and behoof; that pursuant to said plan the said stockholders of the Belt Company did enter into trust agreements with certain persons designated in said prospectus, as voting trustees, whereby the legal title to all of said new stock issued by defendant as aforesaid to the said stockholders of the Belt Company became and was vested in the said voting trustees for a period of five years, beginning on April 1, 1900, and ending April 1, 1905, and whereby the said voting trustees were vested with all and singular the rights, privileges and franchises of the owners of said stock, with full power to vote the same, and said stock has ever since been vested in the said voting trustees; and the said voting trustees have ever since elected the directors of defendant and of the said Belt Company, and have had sole control and management of the property and affairs of defendant; that it was provided in and by the terms of said Reorganization prospectus and the agreement
576 thereto attached, that the said committee should have the right to pay or obligate the said successor company to pay any debt in the nature of unsecured or floating debt, owing by the said Belt Company, or to settle or compromise such debt, and to negotiate with the creditors of said Belt Company for their assent to the carrying out of said plan, and also to make such contracts and arrangements with any and all persons and corporations, which in the judgment of said committee would tend to prevent or avoid opposition to or interference with the execution of said plan. It was further provided in and by said plan and agreement that of the new stocks and bonds to be issued by said successor company, three millions of dollars in bonds and three millions of dollars in preferred stock were to be sold by said committee, and that the said committee should have power to use the proceeds thereof in whole or in part in paying

the floating or unsecured debt of the said Belt Company, or in paying any other liabilities which the said committee might incur in and about the premises, and that said committee should have the right and power to liquidate and pay said floating debt; it was further thereby provided that said committee should cause defendant to issue its stocks and bonds to an extent greatly in excess of the amount needed for distribution among the stockholders of the old companies in conformity with this plan, all of which bonds were to be secured by defendant's mortgage on all the property of the Belt Company as well as other property, and that defendant should cause such excess of new securities to be sold to provide fresh capital for defendant and that as to all such securities as should not be distributed by said committee to depositors of old securities or as should not be sold by the committee as aforesaid, should be delivered by said committee to defendant to be held in its treasury and sold as and when defendant desired to use the same; that the said committee, pursuant to said plan, did sell bonds issued by defendant of the par value of $3,000,000, and its preferred stock of the par value of $3,000,000, and realized thereon over $3,000,000 in money; that out of the proceeds of said sale said committee paid such floating debt of the Belt Company as it chose to pay and made such disbursements as it saw fit to make, and paid over the balance to defendant, said balance amounting to several million dollars and being greatly in excess of the entire floating or unsecured debt of the Belt Company; and said committee did raise for defendant and pay over to it several millions of dollars of fresh capital through the sale of stocks and bonds issued by defendant under said plan not distributed among those who had deposited their securities with said committee,

577 and that several millions of dollars of stocks and bonds not distributed or sold by the committee were reserved in defendant's treasury for its future requirements; that all of said bonds issued by defendant and used by said committee and defendant as aforesaid, were and are secured by all the property and assets of the Belt Company; that said plan further provided that said committee should settle its accounts with the board of directors of said successor company within one year after the consummation of said plan and on the — day of October, 1900, this was done, said committee turning over to defendant the cash remaining on hand after making the disbursements aforesaid, the amount of which was greatly in excess of the entire floating or unsecured debt of the Belt Company, and defendant did then and there in writing ratify all the acts and doings of said committee in and about the premises and did in writing assume and agree to pay all obligations incurred by said committee in and about the promulgation and execution of said plan. Plaintiff states that the originals of all the writings herein above mentioned are in the defendant's possession and plaintiff is unable to more definitely plead the same.

3. Plaintiff states that by reason of the premises defendant became and is liable to pay the said note.

4. Wherefore, plaintiff prays judgment for the sum of Twenty-five Thousand Dollars ($25,000) with interest thereon at the rate

of six per cent per annum from September 1, 1901, together with its costs.

Second Count.

Plaintiff for a second and further cause of action states that to avoid unnecessary repetition it adopts as part of this count of its petition all of the averments by it made in the first count thereof to the same extent as if set out in full herein, and plaintiff states that said reorganization committee, both before and after defendant acquired the possession of the property and assets of the Belt Co-pany as aforesaid, expressly promised and agreed to and with plaintiff that it or defendant would pay any and all indebtedness owing to plaintiff by the Belt Company, which indebtedness included said note.

Wherefore, plaintiff prays judgment as in the first count of this petition.

Third Count.

1. Plaintiff for third and further cause of action states that to avoid repetition it adopts all the averments of paragraph 1 of the first count of this petition, as to the execution of the note therein mentioned by the Belt Company, to the same extent as if set out in full herein.

578 2. Plaintiff further states that on or about the 20th day of March, 1900, defendant was the owner of a line of railroad extending from Port Arthur, Texas, to Grandview, in Jackson County, Missouri, and had acquired lease hold rights from the St. Louis & San Francisco Railway from said Grandview to Belt Junction in said Jackson County, and that on said date the said Belt Company owned and operated a line of railroad in Jackson County, Missouri, beginning at a point in Kansas City, on the State Line between Kansas and Missouri, near the confluence of the Kaw and Missouri rivers, extending east along the south bank of the Missouri river to a point near the confluence of the Missouri and Blue rivers, thence south and west to a point about ten miles south, of Kansas City, called Belt Junction, where the said Belt Company connected with the said St. Louis & San Francisco Railroad Company; that the said line of railroad of the Belt Company and of defendant formed, when connected in the whole or in the main, one continuous line of railroad from Port Arthur, Texas, to Kansas City, Missouri; that defendant afterward, and the said Belt Company, with the written approval of the persons or parties holding and representing a majority of the stock of the said Belt Company, and of defendant, became consolidated under name of defendant, the Kansas City Southern Railway Company, and formed one company, and defendant acquired and took into possession all of the property of said Belt Company of every kind and description and has thereafter owned and controlled the same as one continuous line of railroad, running in the whole or in the main, in the same general direction, from Port Arthur, Texas, to Kansas City Missouri, as aforesaid; that the contracts and leases and agreements by which said consolidation

was effected, and under which defendant now operates and owns all of said railroad, are exclusively within the possession and control of defendant, and that plaintiff cannot more definitely prove the same; that by reason of such consolidation defendant became and is liable to pay the said note of said Belt Company.

3. Wherefore, plaintiff prays judgment as in its said first count.

(*b*) The Trust Company also, on March 15, 1905, filed its suit in the Circuit Court of Jackson County, Missouri, against The Kansas City Southern Railway Company, a copy of which is hereto attached, made a part hereof as Exhibit "B." In this action the Trust Company seeks to recover against the Kansas City Southern Railway Company the amount of a judgment obtained by the Trust Company against the Belt Company; the petition is in three
579 counts and, in its allegations is in substance the same as the three counts above set forth in the preceding sub paragraph.

(*c*) On the 2nd day of July, 1906, the Trust Company brought a third suit against The Kansas City Southern Railway Company in the Circuit Court of Jackson County, Missouri, a copy of which is hereto attached and made a part hereof as Exhibit "C." In this suit the Trust Company seeks to recover from The Kansas City Southern Railway Company on account of two notes, one for Ten Thousand Dollars ($10,000.00), the other for Twelve Thousand Five Hundred Dollars ($12,500.00) executed by the Kansas City Pittsburg & Gulf Railroad Company to the Missouri, Kansas & Texas Trust Company, the predecessor in name to the Guardian Trust Company, and also upon an alleged open account from the Kansas City, Pittsburg & Gulf Railroad Company to the said Missouri, Kansas & Texas Trust Company, showing an alleged balance of Seven Thousand Five Hundred and Forty Dollars ($7,548.00). The allegations with respect to the alleged liability of The Kansas City Southern Railway Company for the debts and obligations of the Kansas City, Pittsburg & Gulf Railroad Company are similar to the allegations above set forth in sub paragraph.

7. Your orators further state that by reason of the prior institution of this action and the filing of the various bills, answers and proceedings therein, and by the stipulation of counsel heretofore set forth, this court has acquired a prior and superior equitable jurisdiction over all the parties to the proceeding and of all the issues herein involved and its decree will be a final adjudication and determination of all the relations between the parties in accordance with the maxim of equity that where a court of equity has once acquired complete jurisdiction of the parties on the subject matter, it will retain the case and settle and adjust the rights of all parties before it. This court by its injunction heretofore issued, as well as by its subsequent proceedings, has taken possession of and impounded the notes set forth in paragraph one hereof, and has impliedly restrained and restricted the Trust Company to the assertion of any rights it may have under said notes to its proceedings in that behalf taken in this cause. This court has assumed possession and jurisdiction over the stocks, bonds, assigned account and other property heretofore enu-

merated held by the Trust Company as collateral security to its pretended indebtedness against the Belt Company, and such property is within the exclusive jurisdiction and control of this court. This court has also, by the appointment of a receiver and the continuance of such receivers assumed an exclusive jurisdiction
580 over the properties of the Central Improvement Company and of the Northern Townsite Company, the final disposition of whose properties are involved in this action. The said actions brought by the Trust Company in the state court are actions at law triable by a jury, to which The Kansas City Southern Railway Company is the sole defendant. Those actions involve an accounting between the Trust Company and the Belt Company and its allied corporations, which accounts are extremely complicated, difficult and intricate, and which in turn involve the disposition of the said collateral security consisting of bonds, stocks, notes, assigned account, etc., a disposition of the property and assets of the Central Improvement Company and a disposition of the property and assets of the Northern Townsite Company, as well (if your orator's claim is sustained) the cancellation of the said notes and account. In order that the suits in the state court may proceed, it is necessary that The Kansas City Southern Railway Company should file its answer or crossbill setting up substantially the same set of facts as are set up in the amended and supplemental ancillary bill of complaint referred to in paragraph two herein and the facts set forth in the supplemental petition of The Kansas City Southern Railway Company set forth in paragraph three hereof making parties to such answer and crossbill all of the parties to this proceeding, including the Cambria Steel Company, which is a non-resident of the State of Missouri and cannot be [*or*] served with process herein, and including the receivers appointed by this court for the Northern Townsite Company and Central Improvement Company, who cannot be sued except by the express consent of this court. Even if such an answer and crossbill could be filed and the parties thereto brought within the jurisdiction of this court, it would be necessary to retake at great expense the testimony already taken in this proceeding, and thus duplicate the vast and enormous amount of work that has already been done. Furthermore the Trust Company is now and has been for several years in process of liquidation and its assets have been almost entirely realized upon and distributed to its stockholders. If the charges of your orators against the Trust Company should be sustained to any substantial extent the Trust Company will be unable to respond to them and for such purposes it is to be regarded as insolvent. If the claims of the Belt Company and its receiver as set forth in paragraph two are sustained, then they are entitled to an order cancelling the notes and accounts sued upon and to a return of the collateral, neither of which can be done by the state court inasmuch as this court has assumed jurisdiction and control over them. If their claims or the claims of The Kansas City Southern Railway Company are sustained as to the Central Improve-
581 ment Company property or as to the Townsite property the state court is powerless to afford relief because those properties

are under the jurisdiction and control of this court. The state court is likewise powerless to apply said collateral or its proceeds to a reduction of the account of the Trust Company against the Belt Company or The Kansas City Southern Railway Company if that account should be sustained in whole or in part. The only issues raised in the state court in these proceedings are: first, the liability of the Belt Company to the Trust Company upon the notes, account and the judgment, the liability of the Gulf Company to the Trust Company; and, secondly, the question whether The Kansas City Southern Railway Company is responsible for the floating debt of the mortgagor companies. These issues are all raised in the proceedings in this case except the question of the liability of the Gulf Company to the Trust Company and that question the Trust Company can raise if it so desires.

8. In consideration whereof, and for as much as your orators are remediless in the premises at and by the strict rules of the common law, and are only relievable in a court of equity, where matters of this kind are properly cognizable, your orators therefore pray the aid of this Honorable Court that the said Guardian Trust Company may be restrained and enjoined from further prosecuting its said actions above named and that it may be directed to dismiss said actions; and that, pending a determination of this case, a temporary injunction may issue against the said Guardian Trust Company restraining and enjoining it, its agents and attorneys from prosecuting or continuing the said actions, and each of them, and that upon final hearing the said injunction be made perpetual.

And may it please your Honors a writ of subpœna to issue directed to the said Guardian Trust Company requiring and commanding it on a day certain therein to be named and under a certain penalty to appear herein and answer, but not under oath (an answer under oath being hereby expressly waived) to the several allegations in this supplemental bill; and to stand to, perform and abide by such orders, direction or decree as may be made against them in the premises and as shall seem meet and agreeable in equity and good conscience. And your orators as in duty bound will ever pray.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
EDWARD F. SWINNEY,
Receiver, and
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY.
By S. W. MOORE,
Their Solicitors.

582 STATE OF MISSOURI,
County of Jackson, ss:

S. W. Moore, of lawful age, being duly sworn, upon his oath states, that he is attorney for the complainants in the foregoing supplemental bill of complaint; that he has read the said bill and knows the contents thereof, and the matters and facts therein stated are true as he verily believes.

S. W. MOORE.

Subscribed and sworn to before me this 16th day of November, A. D. 1907.

[L. S.] CLARENCE R. HALL,
Notary Public in and for Jackson County, Missouri.

My commission expires October 10, 1908.

EXHIBIT "A."

In the Circuit Court of Jackson County, Missouri, at Kansas City, for the April Term, 1905.

No. —.

GUARDIAN TRUST COMPANY, Plaintiff,
vs.
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Petition.

Plaintiff, Guardian Trust Company, which is and was at all times herein mentioned a corporation organized under the laws of the State of Missouri, brings this action against the Kansas City Southern Railway Company, organized on March 19, 1900, as a railroad corporation under the laws of the State of Missouri and still existing as such, and for its causes of action against said defendant states:

First Count.

1. Plaintiff states that the Kansas City Suburban Belt Railroad Company, hereinafter called the Belt Company, is and was at all times a railroad corporation organized under the laws of the State of Missouri; that the said Belt Company on the 25th day of January, 1900, by its negotiable promissory note of that date, by it duly executed, promised, for value received, to pay to plaintiff four months after said date, the sum of Twenty-five Thousand ($25,000.00) a duly certified copy of which said note is herewith filed and marked Exhibit "A"; that said note has long since matured and no part thereof, except the interest thereon at the rate of six per cent per annum to September 1, 1901, has been paid, although payment of said note was demanded at the maturity thereof.

583 2. That on and prior to April 1, 1899, the Kansas City, Pittsburg & Gulf Railroad Company, hereinafter called the Gulf Company, was a railroad corporation, organized under the laws of the State of Missouri; that the Gulf Company owned and controlled a line of railroad extending from Port Arthur, Texas, to Grandview, in Jackson County, Missouri, and had trackage rights over the St. Louis & San Francisco Railway from said Grandview to a point in Jackson County, Missouri, called Belt Junction; that the said Belt Company owned and operated a line of railroad in Jackson County, Missouri, extending from a point in Kansas City on the State

Line between Missouri and Kansas near the confluence of the Missouri and Kansas Rivers, thence east along the south bank of the Missouri River about five miles, thence southwest to said Belt Junction, so that when connected, the line of the Belt Company and the line of the Gulf Company formed in the main one continuous line of railroad running in the same general direction from Port Arthur, Texas, to Kansas City, Missouri; that on April 1, 1889, said Gulf Company made default in the payment of interest due on that date on its funded debt, and upon complaint filed by the Trustee named in the mortgage securing said debt, such proceedings were had that the property and affairs of said Gulf Company on or about said date passed into the hands of receivers appointed by the Circuit Court of the United States for the Western Division of the Western District of Missouri, which receivers assumed for the time being, the operation and control of said Gulf Road under the orders of said court; that shortly thereafter a committee, styled a "Reorganization Committee", was formed for the purpose of readjusting the funded debt of said Gulf Company and for other purposes, fully set forth in a prospectus published by said committee called a "Reorganization Plan"; that said Gulf Company had no terminal facilities in Kansas City except such as it had by contract with said Belt Company and it became evident to said committee that it would be advantageous for said Gulf Company, when reorganized, to acquire the property of said Belt Company by consolidation or otherwise, that the expressed object of said reorganization plan, as set forth in said prospectus, was to consolidate and unify the property of said Gulf Company, with the property of the said Belt Company and to manage and control the same as one; that with this end in view said committee, under date of November 7, 1899, put forth and published a certain prospectus called a "Reorganization Plan" and circulated the same among the
584 creditors, bondholders and stockholders of said Belt Company, including plaintiff; that attached to said prospectus was a certain agreement which all the stockholders of the Belt were invited to execute in favor of said committee; that it was provided in said published plan that same should be deemed a part of said agreement to the same extent as if copied in full therein; that a copy of said plan and agreement is hereto attached and marked Exhibit No. 1; that all of the originals thereof are in defendant's possession or under its control; that in and by said published plan said committee made the following offer to all the stockholders of the Belt Company, that is to say, that it, the said Committee would cause a new or successive corporation to be formed in which should be vested the title to all and singular the property and franchises of the Gulf Company, when acquired by said committee at such judicial sale thereof as might thereafter be had in said receivership proceedings; that to all such stockholders of the Belt Company as would deposit their stock with said committee under the terms of said written agreement, attached to and made a part of said prospectus, the said committee would cause to be issued a like amount of stock of equal par value by such new corporation to be formed as aforesaid, so that upon the consummation of said plan the stockholders would have the same amount of stock in such

new corporation as they then held respectively in the Belt Company and it was made a condition to participation in said scheme that all persons who should deposit their stock with said committee should enter into a binding agreement that said stock when issued should be vested irrevocably for a term of five years in certain trustees, who should have absolute power to vote the same and exercise all the prerogatives and franchises of the owners of said stock in the control and management of said new corporation to be formed as aforesaid; that all stockholders of said Gulf Company were required, as a condition to participation in said plan, to pay said committee the sum of $10.00 for each share of Gulf Stock, deposited with said committee under said plan, which payment entitled them to one share of stock of the new company, but no such condition was imposed on stockholders of the Belt Company; that said prospectus was so contrived and framed as to lead, and did lead, plaintiff and such other corporations and persons, who or which dealt with said committee on the faith thereof, to believe that the floating debt of the Belt Company, including said note, would be paid by said committee or by said successor corporation; that induced by the proposals made in said prospectus, the persons holding more than ninety-nine per cent of the total issue of the stock of the Belt Company then outstanding, a total of 47,500 shares, deposited the same with the said committee, to be held and used by said committee in the execution of said
585 scheme as aforesaid; that afterwards such proceedings were had in the said Circuit Court of the United States that the said Gulf Road was on or about March 19, 1900, sold at foreclosure sale and was bid in by certain persons on behalf of said committee, and on March 19, 1900, said committee pursuant to said scheme of reorganization caused defendant to be incorporated as a railroad corporation under the laws of the State of Missouri, and caused all the property and franchises of said Gulf Road to be conveyed to defendant and caused defendant to issue its shares of stock to said stockholders of the Belt Company who then and there received in stock of defendant a like number of shares as they had before held in the Belt Company, respectively and of equal par value as said Belt shares; that said scheme as set forth in said prospectus, was carried into full force and effect and defendant then and there entered into possession and control and acquired unto itself all of the property and franchises of the Belt Company and still has the same; all with the result that after said scheme was carried out the said stockholders of the Belt Company had and still have the same interest in defendant, as they had before had in the Belt Company, and defendant has all of the property and assets of said Belt Company and is using the same for its own benefit and behoof; that pursuant to said plan the said stockholders of the Belt Company did enter into trust agreements with certain persons designated in said prospectus, as voting trustees, whereby the legal title to all of said new stock issued by defendant as aforesaid to the said stockholders of the Belt Company became and was vested in the said voting trustees for a period of five years, beginning on April 1, 1900, and ending April 1, 1905, and whereby the said voting trustees were vested with all and singular the rights,

privileges and franchises of the owners of said stock, with full power to vote the same, and said stock has ever since been vested in the said voting trustees; and the said voting trustees have ever since elected the directors of defendant and of the said Belt Company, and have had sole control and management of the property and affairs of defendant; that it was provided in and by the terms of said Reorganization prospectus and the agreement thereto attached, that the said committee should have the right to pay or obligate the said successor company to pay any debt in the nature of unsecured or floating debt, owing by the said Belt Company, or to settle or compromise such debt, and to negotiate with the creditors of said Belt Company for their assent to the carrying out of said plan, and also to make such contracts and arrangements with any and all persons and corporations which in the judgment of said committee would tend to prevent or avoid opposition to or interference with the execution of said plan.

586 It was further provided in and by said plan and agreement that of the new stocks and bonds to be issued by said successor company, three millions of dollars in bonds and three millions of dollars in preferred stock were to be sold by said committee, and that the said committee should have power to use the proceeds thereof in whole or in part in paying the floating or unsecured debt of the said Belt Company, or in paying any other liabilities which the said committee might incur in and about the premises, and that said committee should have the right and power to liquidate and pay said floating debt; it was further thereby provided that said committee should cause defendant to issue its stocks and bonds to an extent greatly in excess of the amount needed for distribution among the stockholders of the old companies in conformity with this plan, all of which bonds were to be secured by defendant's mortgage on all the property of the Belt Company as well as other property and that defendant should cause such excess of new securities to be sold to provide fresh capital for defendant and that as to all such securities as should not be distributed by said committee to depositors of old securities or as should not be sold by the committee as aforesaid, should be delivered by said committee to defendant to be held in its treasury and sold as and when defendant desired to use the same; that the said committee, pursuant to said plan, did sell bonds issued by defendant of the par value of $3,000,000 and its preferred stock of the par value of $3,000,000 and realize thereon over $3,000,000 in money; that out of the proceeds of said sale said committee paid such floating debt of the Belt Company as it chose to pay and made such disbursements as it saw fit to make, and paid over the balance to defendant said balance amounting to several million dollars and being greatly in excess of the entire floating or unsecured debt of the Belt Company; and said committee did raise for defendant and pay over to it several millions of dollars of fresh capital through the sale of stocks and bonds issued by defendant under said plan not distributed among those who had deposited their securities with said committee, and that several millions of dollars of stocks and bonds not distributed or sold by the committee were reserved in defendant's treasury for its future requirements; that all of said bonds issued by defendant and used

by said committee and defendant as aforesaid, were and are secured by all the property and assets of the Belt Company; that said plan further provided that said committee should settle its accounts with the Board of Directors of said successor company within one year after the consummation of said plan and on the — day of October, 1900, this was done, said commitee turning over to defendant
587 the cash remaining on hand after making the disbursements aforesaid, the amount of which was greatly in excess of the entire floating or unsecured debt of the Belt Company, and defendant did then and there in writing ratify all the acts and doings of said committee in and about the premises and did in writing assume and agree to pay all obligations incurred by said committee in and about the promulgation and execution of said plan. Plaintiff states that the originals of all the writings herein above mentioned are in the defendant's possession and plaintiff is unable to more definitely plead the same.

3. Plaintiff states that by reason of the premises defendant became and is liable to pay the said note.

4. Wherefore, plaintiff prays judgment for the sum of Twenty-five Thousand Dollars ($25,000) with interest thereon at the rate of six per cent per annum from September 1, 1901, together with its costs.

Second Count.

Plaintiff for a second and further cause of action states that to avoid unnecessary repetition it adopts as part of this count of its petition all the averments by it made in the first count thereof to the same extent as if set out in full herein, and plaintiff states that said Reorganization Committee, both before and after defendant acquired the possession of the property and assets of the Belt Company as aforesaid, expressly promised and agreed to and with plaintiff that it or defendant would pay any and all indebtedness owing to plaintiff by the Belt Company, which indebtedness included said note.

Wherefore, plaintiff prays judgment as in the first count of this petition.

Third Count.

1. Plaintiff for third and further cause of action states that to avoid repetition it adopts all the averments of paragraph 1 of the first count of this petition, as to the execution of the note therein mentioned by the Belt Company, to the same extent as if set out in full herein.

2. Plaintiff further states that on or about the 20th day of March, 1900, defendant was the owner of a line of railroad extending from Port Arthur, Texas, to Grandview, in Jackson County, Missouri, and had acquired lease hold rights from the St. Louis & San Francisco Railway from said Grandview to Belt Junction in said Jackson County, and that on said date the said Belt Company owned and operated a line of railroad in Jackson County, Missouri,
588 beginning at a point in Kansas City, on the State Line between Kansas and Missouri, near the confluence of the Kaw

and Missouri Rivers, extending east along the south bank of the Missouri River to a point near the confluence of the Missouri and Blue Rivers, thence south and west to a point about ten miles south of Kansas City, called Belt Junction, where the said Belt Company connected with the said St. Louis & San Francisco Railroad Company; that the said line of railroad of the Belt Company and of defendant formed when connected in the whole or in the main, one continuous line of railroad from Port Arthur, Texas, to Kansas City, Missouri; that defendant afterward, and the said Belt Company, with the written approval of the persons or parties holding and representing a majority of the stock of the said Belt Company and of defendant, became consolidated under the name of defendant, the Kansas City Southern Railway Company, and formed one company, and defendant acquired and took into possession all of the property of said Belt Company of every kind and description, and has thereafter owned and controlled the same as one continuous line of railroad, running in the whole or in the main, in the same general direction, from Port Arthur, Texas, to Kansas City, Missouri, as aforesaid; that the contracts and leases and agreements by which said consolidation was effected, and under which defendant now operates and owns all of said railroad, are exclusively within the possession and control of defendant, and that plaintiff cannot more definitely prove the same; that by reason of such consolidation defendant became and is liable to pay the said note of said Belt Company.

3. Wherefore, plaintiff prays judgment as in its said first count.

Fourth Count.

1. Plaintiff states that the Kansas City Suburban Belt Railroad Company, hereinafter called the Belt Company, is and was at all times herein mentioned, a railroad corporation organized under the laws of the State of Missouri; that the said Belt Company on the 21st day of September, 1899, by its negotiable promissory note of that date by it duly executed, promised for value received to pay to plaintiff on demand, the sum of Twenty-three Thousand and Fifty-six Dollars and forty-eight cents ($23,056.48) with interest at the rate of eight per cent (8%) per annum; a duly verified copy of said note is herewith filed and marked Exhibit "B" Payment of said note has long since been demanded and no part thereof, principal or interest has been paid.

2. Plaintiff states that to avoid repetition, it adopts as part of this count of its petition, all the averments by it made in para-
589 graph number 2 of the first count hereof, to the same extent as if set out in full herein.

3. Plaintiff states that by reason of the premises defendant became and is liable to pay the said note.

4. Wherefore, plaintiff prays judgment against the defendant for the sum of Twenty-three Thousand and Fifty-six Dollars and forty-eight cents ($23,056.48) with interest thereon at the rate of eight per cent per annum after date from September 21, 1899, together with its costs in this behalf expended.

Fifth Count.

Plaintiff for its fifth and further cause of action states that to avoid repetition it adopts as a part of this count of its petition all the averments by it made in the fourth count thereof, and all the averments made a part of the fourth count by reference, to the same extent as if said averments were set out in full herein; and plaintiff states that said Reorganization Committee, both before and after defendant acquired the possession of the property and assets of the Belt Company as aforesaid, expressly promised and agreed to and with plaintiff that it or defendant would pay any and all indebtedness owing to the plaintiff by the Belt Company, which indebtedness included said note.

Wherefore, plaintiff prays judgment as in the fourth count of this petition.

Sixth Count.

1. Plaintiff for its sixth and further cause of action states that to avoid repetition it adopts all the averments in paragraph 1 of the fourth count of this petition as to the execution of the note therein mentioned, by the Belt Company, to the same extent as if said averments were set out in full herein.

2. Plaintiff also adopts as part of this count of its petition all the averments made in paragraph 2 of the third count of this petition, wherein plaintiff avers that defendant and said Belt Company became and are consolidated and said averments are adopted to the same extent as if set out in full herein.

3. Wherefore, plaintiff prays judgment as in the fourth count of its petition.

Seventh Count.

1. Plaintiff states that the Kansas City Suburban Belt Railroad Company, hereinafter called the Belt Company, is and was
590 at all times herein mentioned, a railroad corporation organized under the laws of the States of Missouri; that on the 9th day of February, 1900, the said Belt Company, by its negotiable promissory note of that date by it duly executed, promised for value received to pay to plaintiff four months after date, the sum of Ten Thousand Four Hundred Dollars ($10,400) with interest thereon at the rate of six per cent (6%) per annum after maturity of said note, a duly verified copy of which said note is herewith filed and marked Exhibit "C;" that said note has long since matured and no part thereof, principal or interest, had been paid.

2. Plaintiff states that to avoid repetition it adopts as part of this count of its petition all the averments by it made in paragraph 2 of the first count hereof, to the same extent as if said averments were set out in full herein.

3. Plaintiff states that by reason of the premises defendant became and is liable to pay the said note.

4. Wherefore, plaintiff prays judgment for the sum of Ten Thousand Four Hundred Dollars ($10,400) with interest thereon at the

rate of six per cent (6%) per annum from the maturity of said note, together with its costs in this behalf expended.

Eighth Count.

1. Plaintiff for its eighth and further cause of action states that to avoid repetition it adopts as part of this count of its petition all the averments by it made in paragraph 1 of the seventh count thereof, to the same extent as if said averments were set out in full herein.

2. Plaintiff also adopts as part of this count of its petition all of the averments by it made in paragraph 2 of the first count thereof, to the same extent as if said averments were set out in full herein, and plaintiff states that said Reorganization Committee therein mentioned expressly promised and agreed to and with plaintiff both before and after defendant acquired the possession of the property and assets of the Belt Company as aforesaid, that it or defendant would pay any and all indebtedness owing to plaintiff by the said Belt Company, which indebtedness included said note.

3. Wherefore, plaintiff prays judgment as in the 7th count of this petition.

Ninth Count.

1. Plaintiff for a ninth and further cause of action states that to avoid repetition it adopts all the averments of paragraph 1 of the seventh count of this petition, to the same extent as if said averments were set out in full herein.

591 2. Plaintiff also adopts as part of this count of its petition, all the averments made by it in paragraph 2 of the third count of this petition, to the same extent as if said averments were set out in full herein.

3. Wherefore, plaintiff prays judgment as in its said seventh count of this petition.

Tenth Count.

Plaintiff for a tenth and further cause of action states that the Kansas City Suburban Belt Railroad Company, hereinafter called the Belt Company, is and was at all times herein mentioned, a railroad corporation organized under the laws of the State of Missouri; that the said Belt Company on the 23rd day of October, 1899, by its negotiable promissory note of that date by it duly executed, promised, for value received to pay to plaintiff on demand the sum of Seventy-one Hundred and Sixty-two dollars and forty cents ($7,162.40) with interest thereon after date thereof at the rate of eight per cent (8%) per annum, a duly verified copy of which said note is herewith filed and marked Exhibit "D;" that payment of said note has long since been demanded and no part thereof, principal or interest, has been paid.

2. Plaintiff states that to avoid repetition it adopts as part of this count of its petition, all the averments by it made in paragraph 2 of the first count thereof, to the same extent as if said averments were set out in full herein.

3. Plaintiff states that by reason of the premises, defendant became and is liable to pay said note.

4. Wherefore, plaintiff prays judgment in the sum of Seventy-one Hundred and Sixty-two Dollars and forty cents ($7,162.40) with interest thereon at the rate of eight per cent (8%) per annum from October 23, 1899, and for its costs in this behalf expended.

Eleventh Count.

1. Plaintiff for its eleventh and further cause of action states that to avoid repetition it adopts as part of this count of its petition, all the averments by it made in paragraph 1 of the tenth count thereof, to the same extent as if said averments were set out in full herein.

2. Plaintiff also adopts as part of this count of its petition all the averments by it made in paragraph 2 of the first count of this petition, to the same extent as if said averments were set out in full herein; and plaintiff states that said Reorganization Com-
592 mittee therein mentioned expressly promised and agreed to and with plaintiff, both before and after defendant acquired possession of the property and assets of the Belt Company aforesaid, that it or defendant would pay any and all indebtedness owing to plaintiff by the Belt Company, which indebtedness included said note.

3. Wherefore, plaintiff prays judgment as to the tenth count of this petition.

Twelfth Count.

1. Plaintiff for a twelfth and further cause of action states that to avoid repetition it adopts all the averments of paragraph 1 of the tenth count of this petition, to the same extent as if said averments were set out in full herein.

2. Plaintiff also adopts all the averments by it made in paragraph 2 of the third count of this petition, to the same extent as if said averments were set out in full herein.

3. Wherefore, plaintiff prays judgment as in the tenth count of this petition.

Thirteenth Count.

1. Plaintiff for its thirteenth cause of action states that the Kansas City Suburban Belt Railroad Company, hereinafter called the Belt Company is and was at all times herein mentioned, a railroad corporation, organized under the laws of the State of Missouri; that said Belt Company on the 26th day of July, 1899, by its promissory note of that date by its duly executed, promised for value received, to pay to plaintiff on demand, the sum of Two Hundred and Three Thousand Nine Hundred Dollars ($203,900) with interest thereon after date thereof, at the rate of six per cent (6%) per annum, a duly verified copy of which said note is herewith filed and marked Exhibit "E"; that payment of said note has long since been demanded; that on June 11th, 1900, there was paid on said note the sum of Ninety-nine Hundred and Ninety-six Dollars and sixty-

five cents ($9,996.65) but the balance of said note has not been paid in whole or in part and said balance still remains due and unpaid.

2. Plaintiff states that to avoid repetition it adopts as a part of this count of its petition, all the averments by it made in paragraph 2 of the first count of this petition, to the same extent as if said averments were set out in full herein.

3. Plaintiff states that by reason of the premises defendant became and is liable to pay the balance due on said note.

4. Wherefore, plaintiff prays judgment for the sum of Two Hundred Four Thousand, Six Hundred Eight Dollars and ten
593 cents ($204,608.10) with interest thereon at the rate of six per cent (6%) per annum from June 11th, 1900, together with its costs.

Fourteenth Count.

1. Plaintiff for a fourteenth and further cause of action states that to avoid repetition it adopts as part of this count of its petition, all the averments made by it in paragraph 1 of the thirteenth count thereof, to the same extent as if set out in full herein.

2. Plaintiff also adopts as part of this count of its petition, all the averments by it made in paragraph 2 of the first count of this petition, to the same extent as if said averments were set out in full herein; and plaintiff states that said Reorganization Committee therein mentioned expressly promised and agreed to and with plaintiff, both before and after defendant acquired possession of the property and assets of the Belt Company as aforesaid, that it or defendant would pay any and all indebtedness owing to the plaintiff by the Belt Company, which indebtedness included said note.

3. Wherefore, plaintiff prays judgment as in the said thirteenth count of this petition.

Fifteenth Count.

1. Plaintiff for a fifteenth and further cause of action states that to avoid repetition it adopts all the averments of paragraph 1 of the thirteenth count of this petition, to the same extent as if said averments were set out in full herein.

2. Plaintiff also adopts as part of this count of its petition all the averments made by it in paragraph 2 of the third count of this petition, as fully — to the same extent as if said averments were set out in full herein.

3. Wherefore, plaintiff prays judgment against defendant as in its said thirteenth count of this petition.

Sixteenth Count.

1. Plaintiff for its sixteenth and further cause of action states that the Kansas City Suburban Belt Railroad Company, hereinafter called the Belt Company, is and was at all times herein mentioned, a railroad corporation organized under the laws of the State of Missouri; that the said Belt Company on the eighth day of February, 1900, by its negotiable promissory note of that date, by it duly

executed, promised for value received to pay plaintiff ninety
594 days after date, the sum of One Hundred Nine Thousand Five Hundred Dollars ($109,500) with interest thereon from maturity of said note at the rate of eight per cent (8%) per annum until paid, a duly verified copy of which said note is herewith filed and marked Exhibit "F;" that said note has long since matured; that there was paid on said note on the 23rd day of October, 1900, the sum of One Hundred Ten Thousand Two Hundred Fifty Dollars ($110,250) leaving a balance due thereon on said date amounting to Thirty-one hundred Ninety one dollars and ninety cents ($3,191.90) and that no part of said balance has since been paid.

2. Plaintiff states that to avoid repetition it adopts as part of this count of its petition, all of the averments made by it in paragraph 2 of the first count of this petition, to the same extent as if said averments were set out in full herein.

3. That by reason of the premises defendant became and is liable to pay the said note.

4. Wherefore plaintiff prays judgment in the sum of Thirty-one Hundred Ninety-one Dollars and ninety cents, ($3,191.90) with interest thereon at the rate of eight per cent per annum from October, 23rd, 1900, and for its costs in this behalf expended.

Seventeenth Count.

1. Plaintiff for its seventeenth and further cause of action states that to avoid repetition it adopts as a part of this count of its petition, all the averments made by it in paragraph 1 of the sixteenth count of this petition, to the same extent as if said averments were set out in full herein.

2. Plaintiff also adopts as part of this count of its petition, all of the averments by it made in paragraph 2 of the first count of this petition, to the same extent as if said averments were set out in full herein; and plaintiff states that said Reorganization Committee therein mentioned expressly promised and agreed to and with plaintiff, both before and after defendant acquired possession of the property and assets of the Belt Company, as aforesaid, that it or defendant would pay any and all indebtedness owing to the plaintiff by the Belt Company, which indebtedness included said note.

3. Wherefore, plaintiff prays judgment as in the sixteenth count of this petition.

Eighteenth Count.

1. Plaintiff states for its eighteenth cause of action that to avoid repetition it adopts all the averments of paragraph 1 of the
595 sixteenth count of this petition, to the same extent as if said averments were set out in full herein.

2. Plaintiff also adopts as part of this petition, all of the averments by it made in paragraph 2 of the third count of this petition to the same extent as if said averments were set out in full herein.

3. Wherefore, plaintiff prays judgment as in the sixteenth count of this petition.

Nineteenth Count.

1. Plaintiff for its nineteenth cause of action states that the Suburban Belt Railroad Company, hereinafter called the Belt Company is and was at all times herein mentioned a railroad corporation organized under the laws of the State of Missouri; that the said Belt Company on the 31st day of March, 1899, by its promissory note of that date by it duly executed, promised for value received, to pay to plaintiff ninety days after date thereof, the sum of Fifty Thousand Dollars ($50,000) with interest thereon after date thereof at the rate of six per cent (6%) per annum, a duly verified copy of which said note is herewith filed and marked Exhibit "G" that said note has long since matured; that there was paid on said note on the 14th day of June, 1900, the sum of Twelve Thousand Five Hundred Dollars ($12,500) leaving a balance due thereon on said date amounting to the sum of Forty-one Thousand One Hundred Eight Dollars and thirty cents ($41,108.30) no part of which said balance has since been paid and said balance still remains due and unpaid.

2. Plaintiff states that it adopts as part of this count of this petition, all of the averments by it made in paragraph 2 of the first count of this petition, to the same extent as if said averments were set out in full herein.

3. That by reason of the premises defendant became and is liable to pay the said balance due on said note.

4. Wherefore, plaintiff prays judgment against defendant for the sum of Forty one Thousand One Hundred Eight Dollars and thirty cents (-41,108.30) with interest thereon at the rate of six per cent (6%) per annum from June 14, 1900 and for its costs in this behalf expended.

Twentieth Count.

1. For its twentieth and further cause of action plaintiff states that it adopts as part of this count of its petition, all of the averments made by it in paragraph 1 of the nineteenth count of this petition, to the same extent as if said averments were set out in full herein.

596 2. That plaintiff also adopts all of the averments by it made in paragraph 2 of the first count of this petition, to the same extent as if said averments were set out in full herein and plaintiff states that the said Reorganization Committee therein mentioned expressly promised and agreed to and with plaintiff, both before and after defendant acquired possession of the property and assets of the Belt Company as aforesaid, that it or defendant would pay any and all indebtedness owing to plaintiff by the Belt Company which indebtedness included said note.

3. Wherefore, plaintiff prays judgment as in the nineteenth count of this petition.

Twenty first Count.

1. Plaintiff for its twenty-first cause of action states that it adopts and makes a part hereof all the averments by it made in paragraph

1 of the nineteenth count of this petition, to the same extent as if said averments were set out in full herein.

2. That it also adopts and makes a part of this count of its petition all of the averments by it made in paragraph 2 of the third count of this petition, to the same extent as if said averments were set out in full herein.

3. Wherefore, plaintiff prays judgment as in the said nineteenth count of the petition.

Twenty second Count.

1. Plaintiff for its twenty second cause of action states that the Kansas City Suburban Belt Railroad Company, hereinafter called the Belt Company, is and was at all times herein mentioned, a railroad corporation organized under the laws of the State of Missouri; that the Belt Company on the 7th day of November, 1899, by its negotiable promissory note of that date by it duly executed promised for value received to pay to plaintiff sixty days after date thereof the sum of Fifty Thousand Dollars ($50,000) with interest thereon after maturity at the rate of eight per cent (8%) per annum, a duly verified copy of which said note is herewith filed and marked Exhibit "H"; that said note has long since matured; that there was paid on said note on the 14th day of June, 1900, the sum of Twelve Thousand Five Hundred Dollars ($12,500) leaving a balance due thereon on said date amounting to $38,783.30; that no part of said balance has since been paid and same remains due and unpaid.

2. Plainiff also adopts and makes a part hereof all the averments by it made in paragraph 2 of the first count of this petition,
597 to the same extent as if said averments were set out in full herein.

3. That by reason of the premises defendant became and is liable to pay said note.

4. Wherefore, plaintiff prays judgment for the sum of Thirty-eight Thousand Seven Hundred Eighty-three Dollars and thirty cents, the balance due on said note, with interest thereon from June 14th, 1900, at the rate of eight (8) per cent per annum together with its costs in this behalf expended.

Twenty third Count.

1. Plaintiff for its twenty-third cause of action states that it adopts and makes a part hereof all of the averments made by it in paragraph 1 of the twenty-second count of this petition to the same extent as if said averments were set out in full herein.

2. Plaintiff also adopts and makes a part hereof all the averments by it made in paragraph 2 of the first count of this petition, to the same extent as if said averments were set out in full herein; and plaintiff states that the said Reorganization Committee therein referred to expressly promised and agreed to and with plaintiff both before and after defendant acquired the possession of the property and assets of the Belt Company as aforesaid, that it or defendant

would pay any and all indebtedness owing to plaintiff by the Belt Company, which indebtedness included said note.

3. Wherefore, plaintiff prays judgment as in the twenty-second count of this petition.

Twenty-fourth Count.

Plaintiff for its twenty fourth cause of action states that it adopts and makes a part hereof all of the averments by it made in paragraph 1 of the twenty second count of this petition, to the same extent as if said averments were set out in full herein.

2. That it also adopts and makes a part hereof all the averments made by it in paragraph 2 of the third count of this petition, to the same extent as if said averments were set out in full herein.

3. Wherefore, plaintiff prays judgment as in the twenty-second count of this petition.

Twenty-fifth Count.

1. Plaintiff for a twenty-fifth and further cause of action states that the Kansas City Suburban Belt Railroad Company, hereinafter called the Belt Company, is and was at all times herein men-
598 tioned a railroad corporation, organized under the laws of the State of Missouri; that at the special instance and request of said Belt Company plaintiff advanced certain moneys to said Belt Company and rendered certain services to said Belt Company and made certain other charges against said Belt Company, all on open account, the items of which charges as well as the dates when the same were made and all the particulars thereof appear on the bill of items hereto annexed and marked Exhibit "I"; that the aggregate amount of said charges is the sum of One Hundred Two Thousand Seven Hundred Forty-four and thirty four cents $102,744.34 that there were paid on the said account at diverse and sundry times, various sums of money, the said credits aggregating the sum of Seventy Thousand Nine Hundred and Thirty-four Dollars and eighty-five cents ($70,934.85); said credits and the dates when entered and the particulars thereof being set out on the said bill of items hereto annexed; that the balance due on said open account after allowing said Belt Company and defendant all just credits and offsets in the sum of Thirty-one Thousand Eight Hundred Nine Dollars and forty-nine cents ($31,809.49) which balance remains wholly due and unpaid; that the said charges appearing on said bill of items are true and correct and said Belt Company has frequently promised and agreed to pay the said balance but though often requested it and [*and*] defendant have refused and still fail and refuse to pay the said balance and every part thereof.

Plaintiff says that it made demand for payment of said account of said Belt Company on the 25th day of September, 1899, and on each date on which any charge appearing on said bill of items was entered.

2. Plaintiff states that it adopts as a part of this count of its petition all of the averments by it made in paragraph 2 of the first count

of this petition, to the same extent as if said averments were set out in full herein.

3. That by reason of the premises defendant became and is liable to pay the said balance due on said account.

4. Wherefore, plaintiff prays judgment against defendant for the sum of Thirty-one Thousand Eight Hundred Nine Dollars and forty-nine cents ($31,809.49) with interest thereon at the rate of six per cent (6%) per annum from September 25th, 1899, and for its costs in this behalf expended.

Twenty-sixth Count.

1. For a twenty-sixth and further cause of action plaintiff states that it adopts as a part of this count of its petition, all of the averments by it made in paragraph 1 of the twenty-fifth count of
599 this petition, to the same extent as if said averments were set out in full herein.

2. Plaintiff also adopts and makes a part hereof all the averments by it made in paragraph 2 of the first count of this petition, to the same extent as if said averments were set out in full herein; and plaintiff states that the said Reorganization Committee therein referred to expressly promised and agreed to and with plaintiff, both before and after defendant acquired the possession of the property and assets of the Belt Company as aforesaid, that it or defendant would pay any and all indebtedness owing to plaintiff by the Belt Company, which indebtedness included said account.

3. Wherefore, plaintiff prays judgment as in the twenty-fifth count of this petition.

Twenty-Seventh Count.

1. Plaintiff for a twenty-seventh and further cause of action states that it adopts and makes a part hereof all of the averments by it made in paragraph 1 of the twenty-fifth count of this petition to the same extent as if said averments were set out in full herein.

2. That it also adopts and makes a part hereof all the averments by it made in paragraph 2 of the third count of this petition, to the same extent as if said averments were set out in full herein.

3. Wherefore, plaintiff prays judgment as in the twenty-fifth count of this petition.

Twenty-Eighth Count.

1. Plaintiff states for its twenty-eighth cause of action that the Kansas City Suburban Belt Railroad Company, hereinafter called the Belt Company, is and was at all times herein mentioned, a railroad corporation organized and existing under the laws of the State of Missouri; that on the 2nd day of February, 1900, an account was stated between plaintiff and the said Belt Company and upon said statement it was found and agreed by and between plaintiff and said Belt Company that there was due from said Belt Company to plaintiff a balance of Forty-two Thousand One Hundred Forty-three

Dollars and fifty-eight cents ($42,143.58), which said balance said Belt Company then and there promised and agreed to pay; that afterward, to-wit, on September 26th, 1900, plaintiff received on said stated account the sum of Eleven Thousand One Hundred Thirty-three Dollars and six cents ($11,133.06) leaving a
600 balance due on said September 26th, 1900, including interest from February 2, 1900, amounting to the sum of Thirty-two Thousand Six Hundred *Forty*-four Dollars and ten cents ($32,-654.10) no part of which said balance has been paid.

2. Plaintiff states that it adopts and makes a part hereof all of the averments made by it in paragraph 2 of the first count of this petition, to the same extent as if said averments were set out in full herein.

3. That by reason of the premises defendant became and is liable to pay said stated account.

4. Wherefore. plaintiff prays judgment in the sum of Thirty-two Thousand Six Hundred Fifty-four Dollars and ten cents ($32,-654.10) the balance due on said stated account with interest thereon from September 26th, 1900, at the rate of six per cent (6%) per annum, together with its costs in this behalf expended.

Twenty-ninth Count.

1. Plaintiff for its twenty-ninth cause of action states that it adopts and makes a part hereof all of the averments by it made in paragraph 1 of the 28th count of this petition, to the same extent as if said averments were set out in full herein.

2. Plaintiff adopts and makes a part hereof all of the averments by it made in paragraph 2 of the first count of this petition to the same extent as if said averments were set out in full herein and plaintiff states that the said Reorganization Committee therein referred to expressly promised and agreed to and with plaintiff, both before and after defendant acquired the possession of the property and assets of the Belt Company as aforesaid, that it or defendant would pay any and all indebtedness owing to plaintiff by the said Belt Company, which indebtedness included said stated account.

3. Wherefore, plaintiff prays judgment as in said twenty-eighth count of this petition.

Thirtieth Count.

1. Plaintiff for its thirtieth cause of action states that it adopts and makes a part hereof all of the averments by it made in paragraph 1 of the twenty-eighth count of this petition to the same extent as if said averments were set out in full herein.

2. That it also adopts and makes a part hereof all the averments by it made in paragraph 2 of the third count of this petition
601 to the same extent as if said averments were set out in full herein, and that by reason of the premises defendant became and is liable to pay the said stated account.

3. Wherefore, plaintiff prays judgment as in the twenty-eighth count of this petition.

Thirty-first Count.

1. Plaintiff for its thirty-first and further cause of action states that it hereby adopts and makes part hereof all of the averments by it made in paragraph 2 of the first count of this petition to the same extent as if said averments were set out in full herein.

2. Plaintiff further states that on or about the 2nd day of February, 1900, an account was stated between the plaintiff and the said Reorganization Committee, and upon said statement it was found and agreed by and between the plaintiff and the said committee that there was due from said Belt Company to plaintiff, a balance of Forty-two Thousand One Hundred and Forty-three Dollars and fifty-eight cents ($42,143.58) which said balance said committee then and there promised and agreed to pay; that afterward, to-wit, on September 26, 1900, plaintiff received on said stated account the sum of Eleven Thousand One Hundred Thirty-three Dollars and six cents ($11,133.06), leaving a balance due on said September 26th, 1900, including interest from February 2nd, 1900, amounting to the sum of Thirty-two Thousand Six Hundred and Fifty-four Dollars and ten cents ($32,654.10) no part of which said balance has been paid.

3. Plaintiff states that by reason of the premises defendant became and is liable to pay said stated account.

4. Wherefore, plaintiff prays judgment for the sum of Thirty-two Thousand Six hundred Fifty-four Dollars and ten cents ($32,654.10) the balance due on said stated account with interest thereon from September 26th, 1900, at the rate of six per cent (6%) per annum, together with its costs in this behalf expended.

Thirty Second Count.

1. For a thirty second and further cause of action plaintiff states that the Port Arthur Channel & Dock Company, herein after called the Dock Company, is and was at all times herein mentioned, a corporation organized under the laws of the State of Texas; that the said Dock Company on the 21st day of September, 1899, by its negotiable promissory note of that date, duly executed, promised for value received to pay to plaintiff sixty days after date
602 thereof, the sum of Fifty Thousand Five Hundred Seventy-five Dollars and eighty cents ($50,575.80) with interest thereon at the rate of eight per cent (8%) per annum from date thereof, a duly verified copy of which said note is herewith filed and marked Exhibit "J"; that said note has long since matured; that there was paid on said note on August 11th, 1900, the sum of Twenty-five Thousand Nine Hundred Seventy-five Dollars and forty-five cents ($25,975.45), leaving a balance due on said note on the date of said payment amounting to the sum of Twenty-eight Thousand One Hundred Ninety-six Dollars and seventy-six cents ($28,196.76); that there was paid on said note on August 13th, 1900, the sum of Three Hundred and Three Dollars and forty-eight cents ($303.48), leaving a balance due on said note on the date of said

payment amounting to the sum of Twenty-seven Thousand Nine Hundred Fifteen Dollars and eighty-three cents ($27,915.83); that there was paid on said note on September 26th, 1900, the sum of Thirty-three Hundred and Eighty Dollars and forty-three cents ($3380.43), leaving a balance due on the date of said last payment amounting to the sum of Twenty-five Thousand Eight Hundred Two Dollars and sixteen cents ($25,802.16) which balance still remains due and unpaid.

2. That on and prior to April 1, 1899, the Kansas City, Pittsburg & Gulf Railroad Company hereinafter called the Gulf Company was a railroad corporation, organized under the laws of the State of Missouri; that the Gulf Company owned or controlled a line of railroad extending from Port Arthur, Texas, to Grandview, in Jackson County, Missouri, and had trackage rights over the St. Louis & San Francisco Railway from said Grandview to a point in Jackson County, Missouri, called Belt Junction; that the Kansas City Suburban Belt Railroad Company, hereinafter called the Belt Company, owned and operated a line of railroad in Jackson County, Missouri, extending from a point in Kansas City on the State line between Missouri and Kansas near the confluence of the Missouri and Kansas Rivers, thence East along the South bank of the Missouri River about five miles, thence Southwest to said Belt Junction, so that when connected the line of the Belt Company and the line of the Gulf Company formed in the main one continuous line of railroad running in the same general direction from Port Arthur, Texas, to Kansas City, Missouri; that the Dock Company at all times herein mentioned owned and operated docks, wharves and warehouses at Port Arthur, Texas, and a certain ship canal leading from Port Arthur, via Sabine pass, to the tidewater of the Gulf of Mexico; that at said Port Arthur the tracks of the Gulf Company connected with the railroad tracks owned by the Dock Company and leading to said wharves
603 and elevators so that when connected said ship canal and the line of the Gulf Company formed one continuous transportation line running from Kansas City, Missouri, to the sea; that on April 1, 1889, said Gulf Company made default in the payment of interest due on that date on its funded debt, and upon complaint filed by the Trustee named in the mortgage securing said debt, such proceedings were had that the property and affairs of said Gulf Company on said date passed into the hands of receivers appointed by the Circuit Court of the United States for the Western Division of the Western District of Missouri; which receivers assumed for the time being the operation and control of said Gulf road under the orders of said court; that shortly thereafter a committee, styled a "Reorganization Committee" was formed for the purpose of readjusting the funded debt of said Gulf Company and for other purposes, fully set forth in a prospectus published by said committee called a "Reorganization Plan"; that the said Gulf Company had no terminal facilities in Kansas City, except such as it had by contract with the said Belt Company and it became evident to said committee that it would be advantageous for said Gulf Company when reorganized to acquire the property of said Belt and said Dock

Companies by consolidation or otherwise; that the Gulf Company had no means of reaching tidewater except by means of said ship canal under such contract rights as it had acquired from the Dock Company; that the expressed object of said reorganization plan, as set forth in said prospectus was to consolidate and unify the property of the said Gulf Company with the property of said Belt Company and said Dock Company and to manage, own and control the same as one; that with this end in view said committee under date November 7, 1899, put forth and published a certain prospectus called a "Reorganization Plan" and circulated the same among the creditors, bondholders and stockholders of the said Belt Company, and of said Dock Company, including plaintiff; that attached to said prospectus was a certain agreement which all the stockholders of the Belt were invited to execute in favor of said committee; that it was provided in said published plan that same should be deemed a part of said agreement to the same extent as if copied in full herein; that a copy of said plan and agreement is hereto attached and marked Exhibit No. 1; that all of the originals thereof are in defendant's possession or under its control; that in and by said published plan said committee made the following offer to all the stockholders of the Dock Company, that is to say, that it, the said Committee, would cause a new or successor corporation to be formed in which should be vested the title to all and singular the property and franchises of the Gulf Company, when acquired by said Committee at such judicial sale thereof as might thereafter be had in said receivership proceedings, that to all such stockholders of the Dock Company as would deposit their stock with said committee under the terms of said written agreement attached to and made a part of said prospectus the said committee for each One Hundred Dollars ($100) share of Dock stock deposited with it would cause to be issued three-fourths (¾) of a share of new stock of equal par value to be used by such new corporation to be formed as aforesaid, so that upon the consummation of said plan the Dock Company's stockholders would have three-fourths (¾) as much stock in said new corporation as they then held respectively in the Dock Company, and it was made a condition to participation in said scheme that all persons who should deposit their stock with said committee should enter into a binding agreement that said new stock when issued should be vested irrevocably for a term of five years in certain trustees, who should have absolute power to vote the same and exercise all the prerogatives and franchises of the owners of said stock in the control and management of said new corporation to be formed as aforesaid; that all stockholders of said Gulf Company were required as a condition to participation in said plan, to *any* said committee the sum of $10.00 for each share of Gulf stock, deposited with said committee under said plan, which payment entitled them to one share of stock of the new company, but no such condition was imposed on stockholders of the Dock Company; that said prospectus was so contrived and framed as to lead, and did lead, plaintiff and such other corporations and persons, who or which dealt with said committee on the faith thereof to believe that the floating debt of

604 US.

the Dock Company, including said note, would be paid by said committee or by said successor corporation; that induced by the proposals made in said prospectus the persons holding substantially all of the total issue of the stock of the Dock Company then outstanding, a total of sixteen thousand (16,000) shares of the par value of One Hundred Dollars ($100.00) each, deposited the same with said committee, to be held and used by said committee in the execution of said scheme as aforesaid; that afterward such proceedings were had in the said Circuit Court of the United States that the said Gulf Road was on or about March 19, 1900, sold at foreclosure sale and was bid in by certain persons on behalf of said committee, and on March 19,1900, said committee, pursuant to said scheme of reorganization, caused defendant to be incorporated as a railroad corporation under the laws of the State of Missouri, and caused all the property and franchises of said Gulf Road to be conveyed to defendant and caused defendant to issue its shares of stock to said stockholders of the Dock Company who then and there received in exchange therefor respectively, stock of defendant in accordance with said plan as
605 above set forth; that said scheme, as set forth in said prospectus, was carried into full force and effect and defendant then and there entered into possession and control, and acquired unto itself all of the property and franchises of the Dock Company and still has the same; all with the result that after said scheme was carried out the said stockholders of the Dock Company had and still have a large and substantial interest in defendant and defendant has all of the property and assets of said Dock Company and is using the same for its own benefit and behoof; that pursuant to said plan the said stockholders of the Dock Company did enter into a trust agreement with certain persons designated in said prospectus, as voting trustees, whereby the legal title to all of said new stock issued by defendant as aforesaid to the said stockholders of the Dock Company became and was vested in the said voting trustees for a period of five years, beginning on April 1, 1905, and whereby the said voting trustees were vested with all and singular, the rights privileges and franchises of the owners of said stock, with full power to vote the same, and said stock has ever since been vested in the said voting trustees; and the said voting trustees have ever since elected the directors of defendant and of the said Dock Company, and have had sole control and management of the property and affairs of defendant; that as part and parcel of the same scheme by which defendant acquired the property and assets of the Dock Company, defendant also in substantially the same manner acquired the property and assets of the Belt Company as set out in paragraph 2 of the first count of this petition; that it was provided in and by the terms of said Reorganization prospectus and the agreement thereto attached, that the said committee should have the right to pay or obligate the said successor company to pay any debt in the nature of unsecured or floating debt, owing by the said Belt Company, or the Dock Company, or to settle or compromise such debt, and to negotiate with the creditors of said Belt and Dock Companies for their assent to the carrying out of said plan, and also to make such contracts and

arrangements with any and all persons and corporations, which in the judgment of said committee would tend to prevent or avoid opposition to or interfere with the execution of said plan. It was further provided in and by said plan and agreement that of the new stock and bonds to be issued by said successor company, three millions of dollars in bonds and three millions of dollars in preferred stock were to be sold by said committee, and that the said committee should have power to use the proceeds thereof in whole or in part in paying the floating or unsecured debt of the said Belt and Dock Companies or in paying any other liabilities which the said
606 committee might incur in and about the premises, and that said committee should have the right and power to liquidate and pay said floating debt; it was further thereby provided that said committee should cause defendant to issue its stocks and bonds to an extent greatly in excess of the amount needed for distribution among the stockholders of the old companies in conformity with said plan, all of which bonds were to be secured by defendant's mortgage on all the property of the Belt and Dock Companies as well as other property, and that defendant should cause such excess of new securities to be sold to provide fresh capital for defendant and that as to all such securities as should not be distributed by said committee to depositors of old securities or as should not be sold by the committee as aforesaid should be delivered by said committee to defendant to be held in its treasury and sold as and when defendant desired to use the same; that the said committee, pursuant to said plan did sell bonds issued by defendant of the par value of $3,000,000, and its preferred stock of the par value of $3,000,000, and realized thereon over $3,000,000 in money; that out of the proceeds of said sales said committee paid such floating debt of the Belt and Dock Companies as it chose to pay and made such disbursements as it saw fit to make and paid over the balance to defendant, said balance amounting to several million dollars and being greatly in excess of the entire floating and unsecured debt of the Belt and Dock Companies; and said committee did raise for defendant and pay over to it several millions of dollars of fresh capital through the sale of stocks and bonds issued by defendant under said plan not distributed among those who had deposited their securities with said committee, and that several millions of dollars of stocks and bonds not distributed or sold by the committee were reserved in defendant's treasury for its future requirements; that all of said bonds issued by defendant and used by said committee and defendant as aforesaid, were and are secured by all the property and assets of the Belt and Dock Companies; that said plan further provided that said committee should settle its accounts with the Board of Directors of said successor company within one year after the consummation of said plan and on the — day of October, 1900, this was done, said committee turning over to defendant the cash remaining on hand after making the disbursements aforesaid, the amount of which was greatly in excess of the entire floating or unsecured debt of the Belt and Dock Companies and defendant did then and there in writing ratify all the acts and doings of said committee in and

about the premises and did in writing assume and agree to pay all obligations incurred by said committee in and about the promulgation and execution of said plan. Plaintiff states that the origi-
607 nals of all the writings hereinabove mentioned are in defendant's possession and plaintiff is unable to more definitely plead the same.

3. Plaintiff states that by reason of the premises defendant became and is liable to pay the said note.

4. Wherefore, plaintiff prays judgment for the sum of Twenty-five Thousand Eight Hundred and Two Dollars and sixteen cents ($25,802.16) the balance due on said note with interest thereon at the rate of eight (8) per cent per annum from September 26th, 1900, and for its costs.

Thirty-third Count.

Plaintiff for a thirty-third and further cause of action states that it adopts as part of this count all of the averments made by it in the thirty second count of this petition to the same extent as if said averments were set out in full herein, and states that the said Reorganization Committee expressly promised and agreed to and with plaintiff before and after settling its account with defendant as aforesaid, that it or defendant would pay any and all indebtedness owing to plaintiff by said Dock Company which indebtedness included said note.

Wherefore plaintiff prays judgment as in the thirty second count of this petition.

HARRY S. MECARTNEY,
J. C. ROSENBERGER,
Attorneys for Plaintiff.

STATE OF MISSOURI,
County of Jackson, ss:

Clarence W. Hastings, being duly sworn on oath states that he is the Treasurer of the Guardian Trust Company, plaintiff herein; that exhibits "A" to "H" inclusive, hereto attached and Exhibit "J" hereto attached are full, true and correct copies of the promissory notes mentioned in the foregoing petition and that Exhibit "I" hereto attached is a full, true and correct statement of the account mentioned in the 25th count of said petition and that the balance due from defendant as shown by said statement is justly due after allowing defendant all just credits and offsets.

CLARENCE W. HASTINGS.

Subscribed and sworn to before me this 15th day of March, 1905. My commission expires October 21st, 1906.

ALBERT F. DRAKE,
Notary Public within and for Jackson County, Missouri.

608 EXHIBIT I.

Kansas City Suburban Belt Railroad Company, Debtor, to Guardian Trust Company.

1899.		
Sept. 25.	To payment of draft of W. S. Taylor dated Sept. 23, 1899, for payment of 20 coupons Union Term'l Ry., due Aug., 1899	$500.00
26.	To payment draft of W. S. Taylor dated Sept. 26, 1899, for payment of 40 coupons Union Terminal Ry., due Aug. 1/99.....	1,000.00
	To expressage on 65 coupons Union Term'l Ry. from New York to Philadelphia.....	.50
	To proportion of Philadelphia office expense for month of August, 1899	4.50
27.	To interest on note for $25,000, dated Sept. 25, 1899, from that date to Jan. 25, 1900, 122 days at 6%.....	508.33
	To revenue stamps on note of $23,058.48 given by them to Trust Co., dated Sept. 21, 1899	4.62
	To telegrams.....	2.38
	To telegrams.....	.59
29.	To revenue stamps on note of $25,000, given to Trust Co., dated 9/25/99.....	5.00
	To revenue stamps on note for $25,000., given First National Bank, K. C.....	5.00
	To payment of semi-annual interest due Oct. 4, 1899, to the Provident Life & Trust Co., on 2 notes of $5,000 each at 6% held by them, dated Ap. 4, 1890.....	300.00
30.	To payment to Nat. Bank of Commerce for draft on New York remitted for coupon interest	40,000.00
	By proceeds of sale of draft by K. C. Suburban Belt R. R. Co. at 30 days on J. de	

		Goeijen, Jr., for florins 100,000 draft endorsed by Trust Co. amount to apply as credit to above charge of $40,000	.....	$39,437.50
Oct.	3.	To revenue stamps on draft on J. de Goeijen, Jr., and Telegrams regarding draft..	19.58	
	3.	By collection from J. de Goeijen, Jr. acct. interest on $89,333.33 for the month of September	.....	521.10
	4.	To payment of 20 coupons Union Term'l Railway, due Aug. 1, 1899	500.00	
1899.				
Oct.	10.	To revenue stamps on 13,920 shares stock K. C. & N. C. R. R. Co. transferred	279.40	
	11.	To clerical services, October, 1899	17.00	
		To funds deposited with Drexel & Co. for payment of coupons of Union Term'l Railroad and Consolidated Term'l Railway Co.	1,000.00	
	14.	To telegrams	5.76	
	19.	To expressage N. Y. to Philadelphia, on 20 coupons Union Term'l r'y	.13	
Nov.	7.	To interest on note of $50,000, dated March 31, 1899, renewed by note maturing Jan. 9, 1900—		
		Interest Mar. 31, 1899, to Jan. 9, 1900, and 6%	2,366.67	
609				
	8.	By collection from J. de Goeijen, Jr. of interest on $89,333.33 month of October, 1899	.....	538.48
	29.	To interest on daily balances, September, 1899	22.72	
		To interest on daily balances, October, 1899	22.74	
Dec.	1.	To interest on daily balances, November, 1899	33.35	
	6.	By collection from J. de Goeijen, Jr., of interest on $89,333.33 for month of November, 1899	.....	521.10

1900.				
Jan. 2.	By proceeds of sale of draft by K. C. Suburban Belt R. R. Co. on J. de Goeijen, Jr., bearing endorsement of Trust Co. draft for florins 37,735.84, sold at 39¾		.....	15,000.00
2.	To drafts of Kuhn & Co. of London, dated Dec. 20, 1899, on Trust Co., as endorser, to take up drafts on de Goeijen, Jr., Sept. 30, 1899, for $39,437.50 not paid by him. Less allowance by Kuhn & Co., acc't excess in exchange, $667.40		40,332.60	
Jan. 4.	By collection of interest from J. de Goeijen, Jr. on $89,333.33, month of December, 1899		.....	538.48
25.	To draft of Kuhn & Co., London, dated Jan. 12, 1900, on Trust Co. as endorser to take up draft on J. de Goeijen, Jr., Jan. 2, 1900, not paid by him		15,000.00	
Feb. 2.	By cash on hand account.....		.....	3,245.13
May 17.	To clerical services, months of November and December, 1899, January, February and March, 1900 five months at $17.00		85.00	
June 4.	To interest on daily balances:			
	Month of Dec., 1899	$34.95		
	Month of Jan., 1900	200.65		
	Month of Feb., 1900	224.36		
	Month of Mar., 1900	254.01		
			713.97	
Sept. 26.	By net proceeds of sale of rails and fastenings turned over to Trust Co. under bill of sale:			
	343 1940 / 2240 tons rails at $33.00	11,347.58		
	16 1712 / 2000 tons fastenings at $33.00	556.25		
		11,903.83		

Less expenses:			
Premium paid on bond given in replevin suit ..	$300.00		
Commission paid A. G. Hay—			
343 1940 / 2240 tons rails at 25c	85.06		
16 1712 / 2000 tons fastenings at 25c.....	4.21		
Loading cars ...	17.85		
Demurrage on cars	194.00		
Switching	81.25		
Expenses of A. J. Singer from Chicago to St. Louis acc't sale	87.50		
		770.77	11,133.06
		102,744.34	$70,934.85
Balance due Trust Co.....		.....	$31,809.49

610 EXHIBIT J.

"C #45.

Missouri, Kansas & Texas Trust Co.

No. 6.

$50,575.80. KANSAS CITY, Mo., Sept. 21, 1899.

"Sixty days after date, we promise to pay to the order of Guardian Trust Company, Fifty Thousand five hundred & seventy five & 80/100 Dollars without defalcation, for value received, with interest after date at the rate of 8 per cent per annum, and have delivered as collateral security 99 1st Mtge. 30 yr. $1,000 5% Gold Bonds Port Arthur Channel & Dock Co. and do agree upon demand, to deposit with the holders such additional security as they may from time to time require, and in default thereof this note shall instantly become due and payable as though it had actually matured, and upon default of payment at maturity, whether such maturity occurs by expiration of time or default in depositing additional security as above agreed, do hereby authorize and empower the holders thereof for the purpose of liquidation of this note, and of all interest and costs thereon, to sell, transfer and deliver the whole or any part of such security or any additions thereto, or substitute therefor without any previous demand, advertisement or notice, either at brokers' board or public or private sale, at any time or times there-

after, with the right upon the part of such holders to become the purchaser and absolute owner thereof, free of all trusts and claims, and it is further agreed that the securities hereby pledged, together with any that may be pledged hereafter, shall be applicable in like manner to secure the payment or any part or for any future obligations of the undersigned held by the holders of this obligation, and all such securities in their hands shall stand as one general continuing collateral security for the whole of said obligations so that the deficiency on any one shall be made good from the collaterals for the rest, hereby remaining responsible for any deficiency in payment and waiving any benefit, exemption or privilege under any law now or hereafter to be in force.

"PORT ARTHUR CHANNEL & DOCK CO.
"By F. B. WILCOX, *Ass't Treas.*"

"Payable at Guardian Trust Company.

Due 11/22/99 Reg. No. 185 #2138.

(Endorsed on back as follows:)

"U. S. I. R. Stamps to the amount of $10.12 duly affixed and cancelled. 11/4/99 Only 54 bonds held under this note. Wm. S. Taylor, Treas. Aug. 11/1900 Received on the within note Twenty-five Thousand nine hundred seventy-five and 45/100 611 — being proceeds of sale of part collateral on within note. $25,975.45.

Aug. 13, 1900.—Received on the within note Three hundred three & 48/100 — being interest received from Reorganization Committee under terms their circular. $303.48.

9/26/1900.—Received on the within note thirty-three hundred and eighty 43/100 Dolls., proceeds sale of 270 shrs. Comm. sk. K. C. S. B. R. R. Co. collateral to this note. $2,380.40."

EXHIBIT B.

In the Circuit Court of Jackson County, Missouri, at Kansas City, for the April, 1905, Term.

No. —.

GUARDIAN TRUST COMPANY, Plaintiff,
vs.
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Defendant.

Petition.

Plaintiff, Guardian Trust Company, which is and was at all times herein mentioned a corporation, organized under the laws of the State of Missouri, brings this action against The Kansas City Southern Railway Company, organized on March 19, 1900, as a railroad

corporation under the laws of the State of Missouri, and still existing as such, and for its causes of action against this defendant states:

First Count.

1. Plaintiff states that The Kansas City Suburban Belt Railroad Company, hereinafter called the Belt Company, is and was at all times herein mentioned a railroad corporation, organized under the laws of the State of Missouri; that on September 22, 1899, plaintiff and said Belt Company made and delivered to First National Bank of Kansas City Missouri, hereinafter called the Bank, their promissory note in writing, whereby they promised to pay to said Bank or to its order Ninety days after the date of said note Twenty-five Thousand Dollars ($25,000.00), together with interest thereon from the maturity thereof at the rate of eight (8) per cent per annum; that thereafter and on December 23, 1899, for the purpose of renewing said last named note, plaintiff and said Belt Company made and delivered to said Bank their certain other promissory note in writing, whereby they promised to pay to said Bank or to its order Ninety days after
the date of said last named note Twenty-five Thousand Dol-
612 lars ($25,000), together with interest thereon from the maturity thereof at the rate of eight (8) per cent per annum; that thereafter and on the 26th day of March, 1900, for the purpose of renewing said last named note, plaintiff and said Belt Company made and delivered to said Bank their certain other promissory note in writing, whereby they promised to pay to said Bank or to its order Ninety days after the date of said last named note Twenty-five Thousand Dollars ($25,000), together with interest thereon from the maturity thereof at the rate of seven (7) per cent per annum; that at the time said first above note was made as aforesaid, to-wit, on September 22, 1889, said Belt Company received from the Bank in consideration therefor a valuable consideration, to-wit, the sum of Twenty-five Thousand Dollars ($25,000); that plaintiff made said notes and each of them at the special instance and request, and for the sole benefit of said Belt Company, and plaintiff received no consideration for making said notes or any of them; that by reason of the premises said Belt Company was in law bound to pay said notes and each of them as and when they became due respectively, but to pay the same or any part thereof the said Belt Company failed and refused to do; that thereafter, to-wit, on September 19, 1900, an action on said note, dated March 26, 1900, was brought by said Bank against plaintiff in the Circuit Court in and for Jackson County, Missouri; that thereafter such proceedings were had and taken in said action that on the 23rd day of November, 1901, a judgment was rendered in said Circuit Court in favor of said Bank and against Plaintiff for the sum of Twenty-seven Thousand Six Hundred Dollars ($27,600), together with interest thereon from the date of said judgment at the rate of seven (7) per cent per annum, and also for the costs of said suit; that on the 27th day of March, 1905, plaintiff was compelled to pay and did pay the sum of Thirty-four Thousand

and Eighty-nine 66/100 Dollars ($34,089. 66/100) in satisfaction of any judgment, interest and costs as aforesaid.

2. That on and prior to April 1, 1899, the Kansas City, Pittsburg and Gulf Railroad Company, hereinafter called the Gulf Company, was a railroad corporation, organized under the laws of the State of Missouri; that the Gulf Company owned or controlled a line of railroad extending from Port Arthur, Texas, to Grandview, in Jackson County, Missouri, and had trackage rights over the St. Louis & San Francisco Railway from said Grandview to a point in Jackson County, Missouri, called Belt Junction; that the said Belt Company owned and operated a railroad in Jackson County, Missouri, extending from a point in Kansas City on the State line between
613 Missouri and Kansas near the confluence of the Missouri and Kansas Rivers, thence east along the south bank of the Missouri River about five miles, thence southwest to said Belt Junction, so that when connected with the line of the Belt Company and the line of the Gulf Company formed in the main one continuous line of railroad running in the same general direction from Port Arthur, to Kansas City, Missouri; that on April 1, 1899, said Gulf Company made default in the payment of interest due on that date on its funded debt, and upon complaint filed by the Trustee named in the mortgage securing said debt, such proceedings were had that the property and affairs of said Gulf Company on or about said date passed into the hands of receivers appointed by the Circuit Court of the United States for the Western Division of the Western District of Missouri, Which receivers assumed for the time being the operation and control of said Gulf Road under the orders of said court; that shortly thereafter a committee, styled a "Reorganization Committee", was formed for the purpose of readjusting the funded debt of said Gulf Company and for other purposes, fully set forth in a prospectus published by said committee called a "Reorganization Plan"; that said Gulf Company had no terminal facilities in Kansas City, except such as it had by contract with the said Belt Company and it became evident to said committee that it would be advantageous for said Gulf Company, when reorganized to acquire the property of said Belt Company by consolidation or otherwise; that the expressed object of said reorganization plan, as set forth in said prospectus, was to consolidate and unify the property of said Gulf Company with the property of the said Belt Company and to manage and control the same as one; that with this end in view said committee, under date of November 7, 1889, jut forth and published a certain prospectus called a "Reorganization Plan", and circulated the same among the creditors, bondholders and stockholders of said Belt Company, including plaintiff; that attached to said prospectus was a certain agreement which all the stockholders of the Belt were invited to execute in favor of said committee; that it was provided in said published plan that same should be deemed a part of said agreement to the same extent as if copied in full therein; that a copy of said plan and agreement is hereto attached and marked Exhibit No. 1; that all of the originals thereof are in defendant's possession or under its control; that in and by said published plan said committee made the follow-

ing offer to all the stockholders of the Belt Company, that is to say, that it, the said Committee, would cause a new or successor corporation to be formed in which should be vested the title to all and singular the property and franchises of the Gulf Company, when
614 acquired by said committee at such judicial sale thereof as might thereafter be had in said receivership proceedings; that to all such stockholders of the Belt Company as would deposit their stock with said committee under the terms of said written agreement, attached to and made a part of said prospectus, the said committee would cause to be issued a like amount of stock of equal par value by such new corporation to be formed as aforesaid, so that upon the consummation of said plan the stockholders would have the same amount of stock in such new corporation as they then held respectively in the Belt Company, and it was made a condition to participation in said scheme that all persons who should deposit their stock with said committee should enter into a binding contract that said stock when issued should be vested irrevocably for a term of five years in certain trustees, who should have absolute power to vote the same and exercise all the prerogatives and franchises of the owners of said stock in the control and management of said new corporation to be formed as aforesaid; that all stockholders of said Gulf Company were required, as a condition to participation in said plan, to pay said committee the sum of $10.00 for each share of Gulf stock, deposited with said committee under said plan, which payment entitled them to one share of stock of the new company, but no such condition was imposed on stockholders of the Belt Company; that said prospectus was so contrived and framed as to lead, and did lead, plaintiff and such other corporations and persons, who or which dealt with said committee on the faith thereof, to believe that the floating debt of the Belt Company including said note, dated September 26, 1899, as well as any renewal thereof and judgment thereon, would be paid by said committee or by said successor corporation; that induced by the proposals made in said prospectus, the persons holding more than ninety-nine per cent of the total issue of stock of the Belt Company then outstanding, a total of 47,500 shares, deposited the same with the said committee to be held and used by said committee in the execution of said scheme as aforesaid; that afterward such proceedings were had in the said Circuit Court of the United States that the said Gulf Road was on or about March 19, 1900, sold at foreclosure sale and was bid in by certain persons on behalf of said committee, and on March 19, 1900, said committee, pursuant to said scheme of reorganization, caused defendant to be incorporated as a railroad corporation under the laws of the State of Missouri, and caused all the property and franchises of said Gulf Road to be conveyed to defendant and caused defendant to issue its shares of stock to said stockholders of the Belt Company, who then and there received in
615 stock of defendant a like number of shares as they had before held in the Belt Company, respectively, and of equal par value as said Belt shares; that said scheme, as set forth in said prospectus, was carried into full force and effect and defendant then and there entered into possession and control, and acquired unto itself all of the

property and franchises of the Belt Company and still has the same, all with the result that after said scheme was carried out the said stockholders of the Belt Company had and still have the same interest in defendant, as they had before had in the Belt Company, and defendant has all of the property and assets of said Belt Company and is using the same for its own benefit and behoof; that pursuant to said plan the said stockholders of the Belt Company did enter into trust agreements with certain persons designated in said prospectus, as voting trustees, whereby the legal title to all of said new stock issued by defendant as aforesaid to the said stockholders of the Belt Company became and was vested in the said voting trustees for a period of five years, beginning on April 1, 1900, and ending on April 1, 1905, and whereby the said voting trustees were vested with all and singular the rights, privileges and franchises of the owners of said stock, with full power to vote the same, and said stock has ever since been vested in the said voting trustees; and the said voting trustees have ever since elected the directors of defendant and of the said Belt Company, and have had sole control and management of the property and affairs of defendant; that it was provided in and by the terms of said Reorganization prospectus and the agreement thereto attached, that the said committee should have the right to pay or obligate the said successor company to pay any debt in the nature of unsecured or floating debt, owing by the said Belt Company, or to settle or compromise such debt, and to negotiate with the creditors of said Belt Company for their assent to the carrying out of said plan, and also to make such contracts and arrangements with any and all persons and corporations, which in the judgment of said committee would tend to prevent or avoid opposition to or interference with the execution of said plan. It was further provided in and by said plan and agreement that of the new stocks and bonds to be issued by said successor company, three millions of dollars in bonds and three millions of dollars in preferred stock were to be sold by said committee, and that the said committee should have power to use the proceeds thereof in whole or in part in paying the floating or unsecured debt of the said Belt Company, or in paying any other liabilities which the
616 said committee might incur in and about the premises, and that said committee should have the right and power to liquidate and pay said floating debt; it was further thereby provided that said committee should cause defendant to issue its stocks and bonds to an extent greatly in excess of the amount needed for distribution among the stockholders of the old companies in conformity with said plan, all of which bonds were to be secured by defendant's mortgage on all the property of the Belt Company as well as other property, and that defendant should cause such excess of new securities to be sold to provide fresh capital for defendant and that as to all such securities as should not be distributed by said committee to depositors of old securities or as should not be sold by the committee as aforesaid, should be delivered by said committee to defendant to be held in its treasury and sold as and when defendant desired to use the same; that the said committee, pursuant to said plan, did sell bonds issued by defendant of the par value of $3,000,000, and its preferred

stock of the par value of $3,000,000, and realized thereon over $3,000,000 in money; that out of the proceeds of said sales said committee paid such floating debt of the Belt Company as it chose to pay and made such disbursements as it saw fit to make, and paid over the balance to defendant, said balance amounting to several million dollars and being greatly in excess of the entire floating or unsecured debt of the Belt Company, and said committee did raise for defendant and pay over to it several millions of dollars of fresh capital through the sale of stocks and bonds issued by defendant under said plan not distributed among those who had deposited their securities with said committee, and that several millions of dollars of stocks and bonds not distributed or sold by the committee were reserved in defendant's treasury for its future requirements; that all of said bonds issued by defendant and used by said committee and defendant as aforesaid, were and are secured by all the property and assets of the Belt Company; that said plan further provided that said committee should settle its account with the Board of Directors of said successor within one year after the consummation of said plan and on the — day of October, 1900, this was done, said committee turning over to defendant the cash remaining on hand after making the disbursements aforesaid, the amount of which was greatly in excess of the entire floating or unsecured debt of the Belt Company, and defendant did then and there in writing ratify all the acts and doings of said committee in and about the premises and did in writing assume and agree to pay all obligations incurred by said committee in and about the promulgation and execution of said plan.

617 Plaintiff states that the originals of all the writings herein above mentioned are in defendant's possession and plaintiff is unable to more definitely plead the same.

3. Plaintiff states that by reason of the premises defendant became and is liable to pay said sum of Thirty-four Thousand and Eighty-nine 66-100 Dollars ($34,089 66-100), paid by plaintiff as aforesaid to satisfy said judgment, and that although plaintiff has requested defendant to pay said sum so due, defendant refuses to pay the same or any part thereof.

4. Wherefore plaintiff prays judgment for the sum of Thirty--our Thousand and Eighty-nine 66-100 Dollars ($34,089 66-100), with interest thereon at the rate of six per cent per annum from March 27th 1905, together with its costs.

Second Count.

Plaintiff for a second and further cause of action states that to avoid unnecessary repetition it adopts as part of this count of its petition all the averments made by it, in the first count thereof, to the same extent as if set out in full herein, and plaintiff states that said Reorganization Committee, both before and after defendant acquired the possession of the property and assets of the Belt Company as aforesaid, expressly promised and agreed to and with plaintiff that either said Reorganization Committee or defendant would pay any and all indebtedness owing by the Belt Company, and which as between plaintiff and any third person plaintiff was bound to pay,

which indebtedness included the debt evidenced successively by said notes and judgment.

Wherefore plaintiff prays judgment as in the first count of this petition.

Third Count.

1. Plaintiff for a third and further cause of action states that to avoid repetition it adopts all the averments of paragraph 1 of the first count of this petition, to the same extent as if set out in full herein.

2. Plaintiff further states that on or about the 20th day of March, 1900, defendant was the owner of a line of railroad extending from Port Arthur, Texas, to Grandview, in Jackson County, Missouri, and had acquired lease hold rights from the St. Louis and San Francisco Railway from said Grandview to Belt Junction, in said Jackson County, and that on said date the said Belt Company owned and operated a line of railroad in Jackson County, Missouri, beginning at a point in Kansas City on the State line between Kansas and Missouri, near the confluence of the Kaw and Missouri Rivers, extending east along the south bank of the Missouri river to
618 a point near the confluence of the Missouri and Blue Rivers, thence south and west to a point about ten miles south of Kansas City, called Belt Junction, where the said Belt Company connected with the said St. Louis and San Francisco Railroad Company; that the said line of railroad of the Belt Company and of defendant formed, when connected in the whole or in the main, one continuous line of railroad from Port Arthur, Texas, to Kansas City, Missouri; that defendant afterward, and the said Belt Company, with the written approval of the persons or parties holding and representing a majority of the stock of the said Belt Company and of defendant, became consolidated under the name of defendant, The Kansas City Southern Railway Company, and formed one company, and defendant acquired and took into possession all of the property of said Belt Company of every kind and description and has thereafter owned and controlled the same as one continuous line of railroad, running in the whole or in the main, in the same general direction, from Port Arthur, Texas, to Kansas City, Missouri, as aforesaid; that the contracts and leases and agreements by which said consolidation was effected, and under which defendant now operates and owns all of said railroad, are exclusively within the possession and control of defendant; and that plaintiff cannot more definitely prove the same; that by reason of such consolidation defendant became and is liable to pay the said sum of Thirty-four Thousand and Eighty-nine 66-100 Dollars ($34,089 66-100), paid by plaintiff as aforesaid to satisfy said judgment, and that although plaintiff has requested defendant to pay said sum so due, defendant refuses to pay the same or any part thereof.

3. Wherefore, plaintiff prays judgment as in its first count aforesaid.

H. S. MECARTNEY AND
J. C. ROSENBERGER,
Attorneys for Plaintiff.

Exhibit C.

In the Circuit Court of Jackson County, Missouri, at Kansas City, for the October, 1906, Term.

Guardian Trust Company, Plaintiff,
vs.
The Kansas City Southern Railway Company, Defendant.

Petition.

Plaintiff, Guardian Trust Company, which is and was at all times herein mentioned, a corporation organized under the laws of the State of Missouri, brings this action against The Kansas City Southern Railway Company, organized on March 19th, 1900, as a
619 railroad corporation under the laws of the State of Missouri, and still existing as such, and for its causes of action against said defendant, states:

First Count.

1. Plaintiff states that the Kansas City, Pittsburg and Gulf Railroad Company, hereinafter called the Gulf Company a corporation organized under the laws of the State of Missouri, did, on the 14th day of January, 1899, by its negotiable, promissory note of that date, by it duly executed, promise, for value received, to pay to plaintiff, or to its order, on demand, the sum of Ten Thousand Dollars ($10,000.00), with interest after date of said note at the rate of eight per cent (8%) per annum, until paid, a duly verified copy of which said note is herewith filed and marked "Exhibit 1." That payment of said note has long since been demanded and no part thereof has been paid. On the date of said note the name of plaintiff was Missouri, Kansas and Texas Trust Company, and said note is made payable to plaintiff, or its order, by the latter name. Afterward, the name of plaintiff was changed, in accordance with law to Guardian Trust Company.

2. For several years prior and up to March, 1900, the Gulf Company owned and operated a railroad from Grand View, in Jackson County, Missouri, to Mena, Arkansas, and by means of the ownership of the stock and bonds thereof, controlled and operated the Texarkana and Ft. Smith Railroad, and the Shreveport and Gulf Railroad, which, in connection with the said line of road owned by the said Gulf Company, formed a continuous line of railroad from the said town of Grand View, in Jackson County, Missouri, to Port Arthur, in Jefferson County, Texas. The Gulf Company had outstanding Twenty-three million dollars ($23,000,000) of stock, divided into shares of the par value of One hundred dollars ($100) each, and Twenty-three million dollars, ($23,000,000) of its first mortgage bonds, bearing interest at the rate of five per cent (5%) per annum, which bonds were of the d-omination of One thousand dollars ($1,000) each, and which interest was payable semi-annu-

ally on the first day of April, and the first day of October, in each year.

3. For several years prior and up to March, 1900, the Kansas City Suburban Belt Railroad Company, a Missouri corporation, hereinafter called the Belt Company, owned and operated a belt and terminal railroad from a point called Belt Junction, Southeast of Kansas City, Jackson County, Missouri, to its depots and terminal yards at Second and Wyandotte Streets, in said Kansas City, and on to a point on the State Line between Kansas and Missouri, in what is known as the West Bottoms of Kansas City, near the Mis-
620 souri River, and by virtue of leases and stock ownership, operated and controlled the Union Terminal Railroad, which extended from said point on the State Line to Argentine, Kansas, and also another line called the Kansas City and Independence Air Line, running from a point in what is known as the East Bottoms in Kansas City, to the City of Independence, Missouri, which said lines so owned, leased, controlled and operated by the Belt Company, are, for the sake of brevity, hereinafter referred to and called the Kansas City Terminals.

4. The Belt Company, prior to March, 1900, had outstanding, capital stock to the amount of Four Million seven hundred and fifty-thousand dollars ($4,750,000), divided into shares of the par value of One hundred Dollars ($100) each, and the said Kansas City Terminals had outstanding, prior to March, 1900, first mortgage bonds to the aggregate principal amount of Four million and Fifty thousand dollars ($4,050,000).

5. The said town of Port Arthur, in Jefferson County, Texas, which was the Southern terminus of the line of road owned and controlled by the Gulf Company, prior to March, 1900, as aforesaid, was a small village of, say, eight hundred or a thousand inhabitants, and was of no commercial importance, situated inland about ten miles from the deep waters of the Gulf of Mexico.

6. For several years prior and up to March, 1900, the Port Arthur Channel and Dock Company, hereinafter called the Dock Company, a Texas corporation, owned and operated a large, deep-water, ship canal, extending from the town of Port Arthur to the deep waters of the Gulf of Mexico, through which canal, ocean steamers and other sea-going vessels passed to and fro from Port Arthur to the open sea, and also owned and operated wharves, docks, and warehouses, and a grain elevator at the Northern end of its said canal at Port Arthur, and also owned and operated railroad tracks and yards which extended from its said wharves, docks, warehouses and grain elevator, to and connected with the tracks of the railroad so operated by the Gulf Company at Port Arthur, as aforesaid.

7. The said Dock Company, prior to March, 1900, had outstanding, one million five hundred seventy-five thousand dollars ($1,575,000) of its capital stock, divided into shares of the par value of One hundred dollars ($100) each, and its first mortgage five per cent (5%) bonds to the amount of One million six hundred and fifty-five thousand dollars ($1,655,000).

8. The Gulf Company did not own or have the control of any

terminal facilities in or near Kansas City, Missouri, its
621 Northern terminus being at Grand View, Missouri, as aforesaid, some twenty miles away, and from said Grand View, Missouri, it had trackage rights over a part of the line of the St. Louis and San Francisco Railroad Company to said Belt Junction, at which point it connected with the tracks of said Belt Company. Neither did said Gulf Company own or control any tracks or other facilities for getting nearer to the waters of the Gulf of Mexico, than the town of Port Arthur, which was some ten miles away, but by virtue of certain contracts and traffic arrangements, it had the right to use the Kansas City Terminals as a means of entering into Kansas City, together with their yards, depots and repair shops, and the right to use the said ship canal of the Dock Company, as a means of receiving and sending its passengers and freight from and to the sea, for all of which the Gulf Company was obliged to pay such rentals, charges and tolls as were found to be burdensome and beyond its ability to earn and pay.

9. The persons who owned and held the bulk of the stocks and bonds of the Belt Company and the Dock Company, were, in the main, persons who also owned nearly all of the capital stock and bonds of the Gulf Company.

10. In the latter part of 1898, and in the fore part of 1899, it was shown and became known to the said stockholders and bondholders of the various companies hereinbefore referred to, that by reason of the excessive expenses of operation and the heavy interest charges of the Gulf Company, it, the said Gulf Company, would not be able to further pay the interest on its said bonds and that it would necessarily make default in the payment of the installment of interest which would mature on April 1st, 1899, and that the ownership of said Gulf Company would consequently pass into other hands, unless some steps should be taken to reorganize the property and reduce the oprating expenses and interest, and other fixed charges. And it was recognized that on account of the said Gulf Company owning no terminal facilities at Kansas City, or at Port Arthur, its northern and southern termini, the success of any reorganization of the Gulf Company would be impossible, or at least, doubtful, unless said Dock Company and said Kansas City Terminals could be included in such reorganization. Afterward, in the year 1899, a committee, styled a "Reorganization Committee" was formed for the purpose of unifying and consolidating all of the said companies and their properties, namely: The companies owning the Kansas City Terminals, the Gulf Company and the Dock Company, into one new company or
622 corporation, so that said new company would own, control and operate, under its sole corporate management, the whole system from Kansas City to the shipside at Port Arthur, and to readjust the capital and fixed charges of all of said companies, so that, when said properties were so consolidated and unified, the fixed expenses for rentals, terminal charges, and other expenses, incident to the separate management of the various properties, would be avoided, and the interest charges so diminished that the operating

expenses and the interest would be brought clearly within and below the earning capacity of the system when so consolidated, unified and placed under one corporate management and control.

11. With this end in view, said Committee, under date of November 7th, 1899, put forth and published a certain document or prospectus, called a "Reorganization Plan," and circulated the same among the creditors, bondholders and stockholders of said Companies, including plaintiff; attached to said prospectus and made a part thereof was a ce-tain "Reorganization Agreement" which each of the holders of stocks and bonds of said companies were invited to execute. In and by said published plan of reorganization said Committee made the following offer to all the stockholders of said Companies, that is to say, that it, the said Committee, would cause a new or successor corporation to be formed in which should be vested the title to all and singular of the property and franchises of said Companies when acquired by said Committee, and that to all such stockholders of said Companies, as would deposit their stock with said Committee under the terms of said written agreement and plan, said plan being a part of the agreement, the said Committee would cause the stock of such new or successor corporation to be issued in the proportions and to the amounts specified in said plan and agreement.

12. Said plan was so drawn and contrived as to lead the stockholders, bondholders and creditors of said companies, including plaintiff, to believe that the floating debt of the said Companies, including said note, would be paid by the said Committee or by said successor corporation and that such payment would result from the consummation of said scheme and was one of the purposes thereof; and plaintiff, so believing and relying thereon, did assist and cooperate with said Committee in carrying said plan into effect. Induced by the proposals made in said plan, the holders of substantially all of the stock and all of the bonds issued by said Companies, became parties to said scheme of reorganization and severally executed said reorganization agreement of which said plan was expressly made a part thereof, and pursuant to said agreement deposited with the said Committee, substantially all of the stocks and bonds
623 issued by the said Companies, to be held and used by said Committee in the execution of said scheme aforesaid.

13. The stockholders and bondholders of all of the said Companies, acting by and through their agents, the said Committee, for the purpose of carrying out the said agreement for consolidation and reorganization, did, on the 19th day of March, 1900, cause the said new company to be incorporated under the laws of the state of Missouri, under the name of The Kansas City Southern Railway Company, which is the defendant in this suit. The persons who were so incorporated as the Kansas City Southern Railway Company were either members of the said Companies, their attorneys, or employees.

14. Pursuant to said plan and agreement, the stockholders and bondholders of said old companies, through their agents, the said Committee, caused the defendant, as soon as it was incorporated, to authorize the issuance of its fifty year, three per cent. gold bonds, to

the aggregate amount of Thirty Million dollars ($30,000,000), divided into Thirty thousand bonds of the denomination of One Thousand Dollars ($1,000) each, and to secure said bonds, to execute and deliver a deed of trust in the nature of a mortgage conveying, and intended to convey, and which is now a first lien upon all of the property and assets of all of the said old or constituent companies.

15. Afterwards to-wit: On the — day of March, 1900, said stockholders and bondholders of the said old companies, acting by and through their agents, the said Committee, in the further execution of said Reorganization Plan, caused all of the railroad, property, assets and franchises of the Gulf Company to be duly conveyed by deed or deeds to defendant, who has ever since held, and still holds, the title thereto, and afterward caused the railroads, property, assets and franchises of all of the other old or constituent companies to be duly conveyed to defendant, who now holds, and for a long time has held, title to all of the property of all the said old companies, and their constituent companies, subject to the lien of the said mortgage of defendant, and has been and still is in possession thereof and operating the same as one consolidated line or system of railroad, and the defendant, in part payment for the said property, did issue to the holders of the bonds of said old companies, new bonds of defendant to the amount specified in said plan, and did issue and deliver to the stockholders of the said old companies, in exchange for their said stock, new stock of the new company of the defendant to the amounts and in the proportions specified in said plan.

624 The stock of defendant delivered to the stockholders of the Gulf Company in exchange for their stock of the Gulf Company was of great value and of value in excess of the amount of the entire floating or unsecured debt of the Gulf Company, all with the result that after the said scheme was carried out, the said stockholders of the Gulf Company had new stock of the defendant, and the defendant had all of the property and assets of the Gulf Company and still has the same and is using the same for its own benefit and behoof.

16. It was provided in and by the terms of said Reorganization Plan and the agreements aforesaid, of which it formed a part, that the said Committee should have the right to pay or obligate the defendant to pay any debt in the nature of unsecured or floating debt, owing by the said old Companies, and that said Committee should have the right and power to liquidate and pay said floating debt. On or about the — day of October, 1900, said Committee settled its accounts with defendant and defendant did then and there, in writing, ratify all the acts and doings of said Committee in and about the premises, and did, then and there, for and in consideration of the delivery by said Committee to defendant of substantially all of the stocks and bonds issued by the old companies aforesaid, and which had been acquired by said Committee pursuant to and under the terms and conditions of said Plan, and in consideration of the delivery by said Committee to defendant of all the monies, securities and property then in the hands of the Committee, except certain

sums reserved by said Committee for certain purposes therein specified, and for other good and valuable considerations received by defendant it (defendant) did agree in writing that it did and would assume and agree to pay all obligations incurred by said Committee in the performance and execution of the powers upon it conferred by said stockholders and bondholders, and in and about the premises. The originals of said Agreement and the Originals of all the said Reorganization Agreements are in the possession or under the control of defendant, and plaintiff is unable to more specifically plead the same.

17. The Gulf Company is wholly insolvent and has no property subject to execution out of which the debt arising from the promissory note aforesaid, or any part thereof, could be collected.

18. By reason of the premises defendant became and is liable to pay the said note.

19. Wherefore, plaintiff prays judgment in the sum of Ten Thousand Dollars ($10,000) with interest thereon at the rate of eight per cent (8%), per annum, from January 4th, 1899, together with its costs.

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Second Count.

1. For a second and further cause of action against defendant, plaintiff states that to avoid unnecessary repetition and for the sake of brevity it adopts, as a part of this count of its petition, all the averments made by it in the first count thereof, to the same extent as if the same were set out in full herein.

2. That it was expressly provided and promised, in and by the said Reorganization Plan and Agreement that the floating debt of the Gulf Company would be paid.

3. Wherefore, plaintiff prays judgment as in the first count of this petition.

Third Count.

1. For a third and further cause of action against defendant, plaintiff states that it adopts, as a part of this count of its petition, all of the averments made by it in the first count thereof, to the same extent as if the same were set out in full herein.

2. Said Committee, in and about the execution of its said Plan of consolidation and unification of said properties, at various times expressly promised to pay the said note, and that it, the said Committee, or defendant, would pay said notes.

At the request of said Committee plaintiff furnished the said Committee with a statement of all the indebtedness due plaintiff from the Gulf Company, including said note, and said Committee, then and there, and from time to time thereafter, promised and agreed to pay the same, or that defendant would pay the same. By arrangement with plaintiff the Committee appointed a special expert or auditor, to go over all the accounts and transactions between plaintiff and the Gulf Company and examine the entire book accounts existing between them. Plaintiff placed at the disposal of the said auditor or expert, its books and correspondence, and files and data

in connection with said transactions. The same were thoroughly examined by said auditor or expert and a report was made by him to said Committee; that said report was to the effect that the book accounts between the said Companies were correct and that the amount due plaintiff as shown by said note was in fact due the plaintiff. The Committee thereupon fixed a day for the payment of said note to plaintiff, but a few days before the time fixed for said payment, to-wit: On the — day of July, 1900, the said Committee repudiated said promise and refused to pay said note.

3. Wherefore, plaintiff prays judgment as in its first count.

626 **Fourth Count.**

1. Plaintiff, for a third and further cause of action states that, to avoid repetition, it adopts all of the averments of paragraph No. 1 of the first count of this petition, to the same extent as if set out in full herein.

2. Plaintiff further states that prior to the 20th day of March, 1900, the Gulf Company was the owner of a line of railroad extending from Port Arthur, Texas, to Grandview, in Jackson County, Missouri, and had acquired leasehold rights over the St. Louis and San Francisco Railway from said Grandview to Belt Junction, in said Jackson County, and that prior to the 20th day of March, 1900, the Kansas City Suburban Belt Railroad Company, a Missouri corporation, hereinafter called the Belt Company, owned and operated a line of railroad in Jackson County, Missouri, beginning at a point in Kansas City, on the State line between Kansas and Missouri, near the confluence of the Kaw and Missouri Rivers, extending East along the South bank of the Missouri River, to a point near the confluence of the Missouri and Blue Rivers, thence South and West to a point about ten miles South of Kansas City, called Belt Junction, where the Belt Company connected with the said St. Louis and San Francisco Railway Company. That prior to March 20th, 1900, the said Dock Company owned and operated a line of railroad in Jefferson County, Texas, at Port Arthur, in said County, to a connection with the line of said Gulf Company. That said line of railroad of the Belt Company and of the Dock Company and of the Gulf Company, aforesaid, when connected, formed, in the whole or in the main, one continuous line of railroad from Port Arthur, Texas, to Kansas City, Missouri. That on or about March 20th, 1900, the said Gulf, Dock and Belt Companies, with the written approval of the persons or parties holding and representing a majority of the stock of all of the said companies, and of defendant, became consolidated under the name of defendant, The Kansas City Southern Railway Company, and formed one company, and defendant acquired and took into its possession, all of the railroads, properties and assets of the said Belt, Gulf and Dock Companies, of every kind and description, and has owned and controlled the same as one continuous line of railroad, running, in the whole or in the main, in the same general direction, from Port Arthur, Texas, to Kansas City, Missouri, as aforesaid. That the contracts and leases and agreements by which said consoli-

dation was effected and under which defendant now operates, and owns, all of said railroads, are exclusively within the possession and control of defendant and plaintiff cannot more definitely plead the same. That by reason of such consolidation, defendant became and is liable to pay unto plaintiff the said note of the said Gulf Company.

627 3. Wherefore, plaintiff prays judgment as in its said first count.

Fifth Count.

1. For a fifth and further cause of action against defendant, plaintiff states that the Kansas City Pittsburg and Gulf Railway Company, hereinafter called the Gulf Company, a corporation organized under the laws of the State of Missouri, did, on the 16th day of January, 1899, by its negotiable promissory note of that date, by it duly executed, promise for value received, to pay to plaintiff, or to its order, on demand, the sum of Twelve Thousand, five hundred dollars ($12,500) with interest after date of said note at the rate of eight per cent (8%) per annum, until paid, a duly verified copy of which said note is herewith attached and marked "Exhibit 2." Said Gulf Company paid on said note on the 20th day of February, 1899, the sum of Eleven Thousand dollars ($11,000), leaving a balance due on said note on the date of said payment of the sum of One thousand five hundred and ninety-five dollars and eighty-nine cents ($1,595.89), no part of which said balance has since been paid. Said note was made payable to plaintiff under its then corporate name, Missouri, Kansas and Texas Trust Comp-ny. Afterward the corporate name of plaintiff was changed, in accordance with law, to its present name of Guardian Trust Company.

2. Plaintiff, for the sake of brevity, adopts as part of this count of its petition, all of the averments by it made in paragraphs numbered 2 to 18, inclusive, of the first count of this petition, as fully and to the same extent as if set out in full herein.

3. Wherefore, plaintiff prays judgment against defendant in the sum of One thousand five hundred and ninety-five dollars and eighty-nine cents ($1,595.89), with interest thereon at the rate of eight per cent (8%) per annum from February 20th, 1899, together with its costs.

Sixth Count.

1. For a sixth and further cause of action against defendant, plaintiff, for the sake of brevity, adopts as a part of this count of its petition, all the averments made by it in paragraph No. 1 of the Fifth count hereof, to the same extent as if copied in full herein.

2. Plaintiff adopts as part of this count of its petition, all of the averments made by it in paragraph- 2 to 18 inclusive of the first count of this petition.

628 3. That it was expressly provided and promised, in and by the said Reorganization Plan and Agreement that the floating debt of the Gulf Company would be paid.

4. Wherefore, plaintiff prays judgment as in the Fifth Count of this petition.

Seventh Count.

1. For a seventh and further cause of action against defendant, plaintiff, for the sake of brevity, adopts as a part of this count of its petition, all the averments made by it in paragraph No. 1 of the Fifth count hereof, to the same extent as if copied in full herein.

2. Plaintiff adopts as part of this count of its petition, all of the averments made by it in paragraph 2 to 18 inclusive of the first count of this petition.

3. Plaintiff adopts paragraph No. 2 of the Third count of this petition as fully and to the same extent as if set out in full herein.

4. Wherefore, plaintiff prays judgment as in the Fifth Count of this petition.

Eighth Count.

1. Plaintiff for an eighth and further cause of action states that to avoid repetition it adopts all of the averments of paragraph No. 1 of the Fifth Count of this petition, to the same extent as if set out in full herein.

2. Plaintiff further adopts as part of this count of its petition, all of the averments made by it in paragraph No. 2 of the Fourth Count of this petition, to the same extent as if copied in full herein.

3. Wherefore, plaintiff prays judgment as in its said Fifth Count of this petition.

Ninth Count.

1. Plaintiff for a ninth and further cause of action against defendant states that at the special instance and request of the Kansas City, Pittsburg and Gulf Railroad Company, a Missouri corporation, hereinafter called the Gulf Company, plaintiff advanced certain monies to said Gulf Company and rendered certain services to said Gulf Company and made certain other charges against said Gulf Company, all in open account, the items of which charges, as well as the date when the same were made and all the particulars thereof, appear on the Bill of Items hereto attached and marked "Exhibit 3."

That the aggregate amount of said charges is the sum of
629 Forty-three thousand six dollars and twelve cents ($43,006.12). That there were paid on the said account at divers and sundry times by said Gulf Company various sums of money, the said credits aggregating Thirty-five thousand four hundred and fifty-eight dollars and four cents ($35,458.04). Said credits and the dates when entered and the particulars thereof being set out on the said Bill of Items hereinabove mentioned. That the balance due on said open account unto plaintiff, after allowing said Gulf Company and defendant, all just credits and setoffs, is the sum of Seven Thousand five hundred and forty-eight dollars and eight cents ($7,548.08), which balance remains wholly due and unpaid. That the said charges appearing on said Bill of Items are true and correct and said Gulf Company has frequently promised and agreed to pay the said balance, but though often requested, it and defendant have refused and still fail and refuse to pay the said balance or any part thereof. Plaintiff states that it made demand for payment of said

account of said Gulf Company on the 19th day of April, 1899, and on each date on which any charge appearing on said Bill of Items was entered.

2. Plaintiff states that it adopts as a part of this count of its petition all of the averments made by it in paragraphs numbered 2 to 18, inclusive, of the First count of this petition, to the same extent as if said averments were set out in full herein.

3. That by reason of the premises defendant became and is liable to pay the said balance due on said account.

4. Wherefore, plaintiff prays judgment against defendant for the sum of Seven Thousand Five hundred and forty-eight dollars and eight cents ($7,548.08), with interest thereon at the rate of six per cent (6%) per annum from April 19th, 1899, and for its costs in this behalf expended.

Tenth Count.

1. For a Tenth and further cause of action against defendant, plaintiff states that it adopts as part of this count of its petition, all of the averments by it made in paragraph No. 1 of the Ninth Count of this petition, and all of the averments of paragraphs numbered 2 to 18 inclusive, of the First Count of its petition, to the same extent as if the said averments were set out in full herein.

2. That it was expressly provided and promised, in and by the said Reorganization Plan and Agreement that the floating debt of the Gulf Company would be paid.

3. Wherefore, plaintiff prays judgment as in the Ninth Count of this petition.

630 Eleventh Count.

1. For an Eleventh and further cause of action against defendant, plaintiff states that it adopts as part of this count of its petition, all of the averments by it made in paragraph No. 1 of the Ninth Count of this petition, and all of the averments of paragraphs numbered 2 to 18 inclusive, of the First Count of its petition, to the same extent as if the said averments were set out in full herein.

2. Said Committee, in and about the execution of its said Plan of consolidation and unification of said properties at various times expressly promised to pay the said account, and that it, the said Committee, or defendant, would pay said account. At the request of said Committee, plaintiff furnished the said Committee with a statement of all the indebtedness due plaintiff from the Gulf Company, including said account, and said Committee, then and there, and from time to time thereafter, promised and agreed to pay the same, or that defendant would pay the same. By arrangement with plaintiff the Committee appointed a special expert or auditor to go over all the accounts and transactions between plaintiff and the Gulf Company and examine the entire book accounts existing between them. Plaintiff placed at the disposal of the said auditor or expert, its books and correspondence, and files and data, in connection with said transactions. The same were thoroughly examined by said auditor or expert and a report was made by him to said Committee;

that said report was to the effect that the book accounts between the said Companies were correct and that the amount due plaintiff as shown by said account was in fact due the plaintiff. The Committee thereupon fixed a day for the payment of said note to plaintiff, but a few days before the time fixed for said payment, to-wit: On the — day of July, 1900, the said Committee repudiated said promise and refused to pay said account.

3. Wherefore, plaintiff prays judgment as in its Ninth Count of this petition.

Twelfth Count.

1. Plaintiff for a Twelfth and further cause of action states that it adopts all of the averments of paragraph No. 1 of the Ninth Count of this petition, to the same extent as if the same were set out in full herein.

2. Plaintiff further adopts as part of this count of its petition, all of the averments made by it in paragraph No. 2 of the Fourth count of this petition, to the same extent as if copied in full herein.

631 3. Wherefore, plaintiff prays judgment as in its said Ninth Count of this petition.

GUARDIAN TRUST COMPANY,
By HARRY S. MECARTNEY AND
J. C. ROSENBERGER,
Its Attorneys.

STATE OF MISSOURI,
County of Jackson, ss:

John A. Prescott, being duly sworn, on oath states that he is the Treasurer of the Guardian Trust Company, the plaintiff herein; that Exhibits No. 1 and No. 2, hereto attached are full, true and correct copies of the promissory notes mentioned in the foregoing petition, and that Exhibit No. 3, hereto attached, is a full, true and correct statement of the account mentioned in the seventh Count of said petition, and that the balance due from The Kansas City, Pittsburg and Gulf Railroad Company, as shown by said statement, is justly due, after allowing said Company all just credits and offsets.

(Sig.) JOHN PRESCOTT.

Subscribed and sworn to before me this 2nd day of July, 1906.
My Commission expires, Oct. 7, 1907.

[L. S.] EDWARD C. WRIGHT,
Notary Public, Jackson County, Missouri.

"EXHIBIT 1."

$10,000. KANSAS CITY, MO., Jan. 14", 1899.

On demand after date for value received, we promise to pay to Missouri, Kansas & Texas Trust Company, or order, Ten Thousand and

no/100 dollars, at the office of said Trust Co., at Kansas City, Mo., with interest after date at 8 per cent per annum, until paid.

KANSAS CITY, PITTSBURG & GULF R. R.
A. L. HOWE, *Ass't Treas.*

No. 1950. C #1.
Due. Demand.

Attached to the back of above are two (2) one dollar revenue stamps cancelled as follows in ink—"A. L. H. 1/14/99."
(No indorsements.)

632 "EXHIBIT 2."

$12,500. KANSAS CITY, Mo., Jan. "16", 1899.

On demand after date, for value received we promise to pay to Missouri, Kansas & Texas Trust Company, or order, Twelve thousand five hundred & no/100 dollars, at the office of said Trust Co., at Kansas City, Mo., with interest after date at 8 per cent per annum, until paid.

KANSAS CITY, PITTSBURG & GULF R. R.,
By A. L. HOWE, *Ass't Treas.*

No. 1951. C #2.
Due. Demand.

Attached to the back of above are two (2) one dollar revenue stamps and one (1) fifty cent revenue stamp, cancelled as follows: "A. L. H. 1/16/99."
Also bearing the following endorsement: "Paid $11,000. Feb. 20/1899."

"EXHIBIT 3."

KANSAS CITY, Mo., May 4th, 1899.

Kansas City, Pittsburg & Gulf R. R. Co., in Account with Missouri, Kansas & Texas Trust Company.

Dr.			Cr.		
1898.			1898.		
July 15.	To salary and commission on sundry ticket sales per bills rendered by land department, as follows:		Nov. 22.	By proceeds sale of 50 Gulf bonds..	$35,450.00
	Oct. 1897	$179.02	1899.		
	Nov. 1897	174.77	Apr. 10.	By amount overcharged 2-10-'99 acct. Feb. rent M. K. & T. building, $45. 5 days at $45.00 per month....	8.04
Oct. 11.	To building dept. bill No. 2238 acct. railway men's Restaurant	1,898.37			
Oct. 29.	To Coates House Co. bill 10-28-98 against W. S. Taylor and party	27.37			
Nov. 5.	To balance due on 2 cars of wood from Janssen Fruit Farm.....	19.20			
Nov. 22.	To draft Wm. S. Taylor Tr. 11-22 98 acct. P. & G. coupon acct. No. 3, due 10-1-98...	3,000.00			
Nov. 22.	To payment of note at Am. Ex. Nat. Bank N. Y. for $30,000 due 1-9-99, less unearned interest, $127.00.	29,873.00			
633					
Nov. 30.	To 3 pcs. 24 sewer pipe at 80 cts. ft. shipped 11-28-98 from Mena, Ark., to F. F. Robertson, Pickering, La., per order of I. C. Hubbell purchasing agent	6.00			
Dec. 1.	To sundry telegrams paid	3.28			
Dec. 1.	To trustees fees for Dec. 98.....	17.00			
Dec. 8	To postage used at Phil. office from March, '98 to Nov. 98.....	9.93			

1898.					
Dec.	14.	To sundry telegrams paid	15.91		
Dec.	15.	To pay roll 1st 1-2 Dec. '98	12.50		
Dec.	15.	To proportion salary of land dept. for Nov. 1898...	150.00		
Dec.	15.	To proportion commission on ticket sales land dept. for Nov. 1898...	27.01		
Dec.	20.	To payment for cablegram to Amsterdam, 2-9-98	3.28		
Dec.	21.	To amount paid John Scott for services, 12-19-98	200.00		
Dec.	22.	To John Scott, July, '98, salary.	200.00		
Dec.	22.	To John Scott, Aug. '98, salary.	200.00		
			36,016.64		35,458.04

Dr.				Cr.	
1898.					
Dec.	22.	Forward	36,016.64	Forward	$35,458.04
Dec.	22.	To John Scott, Sept. 98, salary.	200.00		
Dec.	22.	To John Scott Oct. 98, salary	200.00		
Dec.	23.	To sundry telegrams, paid	2.87		
Dec.	31.	To pay roll last 1-2 Dec. '98	12.50		
Dec.	31.	To sundry amounts paid out by Phila. office, as as follows: Adv. Gulf coupons, notice in 3 papers, $8.40, $18.00 and $6.00	32.40		
		Express charges, 50c; lunches, overtime and carfare, $5.16...	5.66		
		Wm. F. Murphy Sons sundry office supplies	26.00		
1899.					
Jan.	4.	To sundry telegrams paid	16.11		
Jan.	4.	To Jan. '99, rent, 106 W. 9th St...	150.00		
Jan.	4.	To Jan. '99 rent, 200 and 201 Lyceum Bldg.....	40.00		

Jan.	4.	To cable expense on message to Robt. Gillham, Genl. Mgr., by Kuhn & Co., London	11.34
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Jan.	4.	To trustees' fees, Jan. '99.....	17.00
Jan.	4.	To Jan. '99 rent long back room M. K. & T. Bldg.	30.00
Jan.	4.	To. Jan. '99 rent skylight room, M. K. & T. Bldg.	25.00
Jan.	4.	To Jan. '99 rent claim dept. M. K. & T. Bldg..	10.00
Jan.	4.	To Jan. '99 rent Howe's room, M. K. & T. Bldg...	15.00
Jan.	4.	To Jan. '99 rent Phila. office....	35.00
Jan.	4.	To Jan. '99 rent, Syndicate Bldg.	320.00
Jan.	4.	To following amounts paid out by N. Y. office: L. Lombard, R. R. fare, $8.50; entertaining Mr. Flory, $4.75	13.25
Jan.	4.	To Subn. to "Railway Economica" 12-10-98 to 12-10-99	5.00
Jan.	4.	To following amounts paid out by Phila. office; Express charges for Dec. 98, Revenue ...	.25
		Stamps on draft $25,000, Amsterdam	10.24
Jan.	6.	To following amounts paid out by N. Y. office; Revenue stamps on $25,000 draft on Kuhn & Co. acct. J. de Goeljen's payments to K. C. P. & G. R. R. Co.	10.08
		Expenditures, acct. P. & G. statements, sent them P. & G Voucher No. 588, Dec....	12.00

Jan.	12.	To sundry telegrams paid.....	15.58		
Jan.	14.	To pay roll 1st ½ Jan. 99.....	12.50		
		Forward, ...	37,244.51		35,458.04

Dr. Cr.

1899.					
Jan.	14.	Forward	37,244.51	Forward	35,458.04
Jan.	14.	To amount sent "U. S. Investor" by N. Norton, Mgr., 1-11-99....	285.00		
Jan.	16.	To John Scott, Dec. 99, salary..	200.00		
Jan.	18.	To payment of telegrams	3.28		
Jan.	31.	To pay roll last ½ Jan. 99.....	12.50		
Feb.	1.	To Feb. 99, rent long back room, M. K. & T. Bldg.	30.00		
Feb.	1.	To Feb. 99, rent Skylight room, M. K. & T. Bldg.	25.00		
Feb.	1.	To Feb. 99, rent, claim dept. room, M. K & T. Bldg.	10.00		
635					
Feb.	1.	To Feb. 99, rent Asst. Treas. room, M. K. & T. Bldg.	30.00		
Feb.	1.	To Feb. 99, rent Phila. Office, M. K. & T. Bldg....	35.00		
Feb.	1.	To trustees' fees, Feb. 99	17.00		
Feb.	1.	To Feb. 99, rent Syndicate Bldg.	320.00		
Feb.	2.	To Feb. 99 rent 106 W. 9th St. Lyceum	150.00		
Feb.	2.	To Feb. 99 rent, 200 and 201 Lyceum	40.00		
Feb.	3.	To 67 13-16 cords of wood at $1.20 per cord from Janssen Fruit farm	81.37		
Feb.	6.	To postage used at Phila. office Dec. 98, and Jan. 99.	.54		
Feb.	6.	To express charges for Jan. 99 paid out by Phila. Office	.25		
Feb.	7.	To draft Wm. S. Taylor, Tr. 2-6-99, acct. of coupon, acct. No. 3, due 10-1-98	1,000.00		

Feb. 8.	To amount paid Burnham, Williams & Co. by Wm. S. Taylor, Tr. for revenue nue stamps on Gulf notes, under contract lease, 11-26-98, 35 notes, at 96c each	33.60	
Feb. 10.	To rent 3 rooms M. K. & T. Bldg., for Feb., 99.....	45.00	
Feb. 14.	To pay roll, 1st ½ Feb.	12.50	
Feb. 20.	To sundry cablegrams paid by N. Norton, Mgr., N. Y. office, acct. reorganization of P. & G. securities	326.28	
Feb. 20.	To interest on bills rec. 1946, 10,000.00, 1-12 to 1-30-99, 18d. at 8 per cent.....	40.00	
Feb. 20.	To interest on bal. bills rec. 1946, $4,000.00 1-30 to to 2-20-99, 21 ds. 8 per cent.....	18.66	
Feb. 20.	To interest on bills rec.. 1979, $5,000 from 2-10 to 2-20, 99, 10 ds. at 8 per cent....	11.11	
	Forward	39,971.60	Forward 35,458.04

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Dr. 1899.

Cr.

Feb. 23.	To Forward.....	39,971.60	Forward 35,458.04
Feb. 23.	To John Scott, Jan. salary.....	200.00	
Feb. 23.	To funds advanced by Wm. S. Taylor, Tr. to pay Gulf coupons due 10-1-98	1,000.00	
Feb. 28.	To pay roll last ½ Feb.	12.50	
Feb. 28.	To proportion salary Land dept. Dec. 1898.....	150.00	
Feb. 28.	To commission on on ticket sales land dept. Dec. 1898	19.00	
Feb. 28.	To proportion salary land dept. Jan. 1899.....	150.00	

Feb. 28.	To commission on ticket sales, land dept. Jan. 99...	33.65
Mch. 1.	To Trustee's fees March, 99.....	17.00
Mch. 1.	To Mch. 99 rent 106 W. 9th St., Lyceum	150.00
Mch. 1.	To Mch. 99 rent, 200 and 201 Lyceum	40.00
Mch. 1.	To Mch. 99 rent, Phila. office....	35.00
Mch. 1.	To Mch. 11 rent Syndicate Bldg.	320.00
Mch. 1.	To Mch. 99, rent, long back room, M. K. & T. Bldg.	30.00
Mch. 1.	To Mch. 99 rent, skylight room, M. K. & T. Bldg.	25.00
Mch. 1.	To Mch. 99 rent, claim dept. room, M. K & T. Bldg.	10.00
Mch. 1.	To Mch. 99 rent, Asst. Treas. room, M. K. & T. Bldg.	30.00
Mch. 1.	To Mch. 99 rent, 3 rooms M. K. & T. Bldg.....	45.00
Mch. 6.	To amount paid by N. Norton, to French Consulate for certification of sundry papers in reorganization of P. & G.	8.19
Mch. 10.	To draft Wm. S. Taylor, Tr. 3-8-99, for P. & G. R. R. Coupon acct. due 10-1-98	75.00
Mch. 11.	To express charges for Feb. 99 paid by Phila office..	.50
Mch. 13.	To Feb. 99 cable and telegraph bills paid by N. Norton, Mgr., N. Y. Office	179.97
Mch. 15.	To pay roll 1st ½ March	12.50
Mch. 16.	To proportion salary land dept. Feb. 1899.....	150.00
Mch. 16.	To commission ticket sales Land Dept. Feb. 1899.	24.38

Mch. 18.	To draft Wm. S. Taylor 3-16-99 for K. C. P. & G. R. R. coupons due 10-1-98.....	100.00		
Mch. 31.	To pay roll last ½ Mch. 99.....	12.50		
	Forward, ...	42,801.79	Forward	35,458.04

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Dr. Cr.

1899.			1899.	
April 19.	Forward, ...	42,801.79	Forward	35,458.04
April 19.	To following amounts paid out by Phila. office: Rev. stamps on $10,000 draft J. De Goeijen, Jr.	4.08	May 4, By balance.....	7,548.08
	Express charges for Mch.....	.25		
	May 1, to Jno. Scott, March, salary	200.00		
		$43,006.12		$43,006.12
	May 4, To balance	7,548.08		

(Filed May 20, 1889)

Afterwards, to-wit, on the 16th day of November, 1907, the following Order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERminal Railroad Company, Kansas City and Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company, and T. T. Crittenden, Its Receiver; Nohthern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company; The Kansas City Suburban Belt Railroad Company, The Kansas City Southern Railway Company, Complainants,

vs.

GUARDIAN TRUST COMPANY, Defendant.

Supplemental Bill.

Upon reading the verified bill of Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company, the Kansas City Suburban Belt Railroad Company and The Kansas
638 City Southern Railway Company, it is ordered that until the further order of this court the defendant in said bill, the Guardian Trust Company, its agents and attorneys be and the same are hereby restrained from further prosecuting or attempting to prosecute or try the three actions and each of them filed by the Guardian Trust Company and now pending in the Circuit Court of Jackson County, Missouri, two of said actions having been filed in the said court on March 15, 1905, and the other of said actions having been filed on July 2, 1906. Each of said three actions being in the name of the Guardian Trust Company, plaintiff and against the The Kansas City Southern Railway Company. And that the de-

fendant Guardian Trust Company be and appear before the Judge of this Court at Chambers at ten o'clock A. M. on the 16th day of December, 1907, to show cause, if any there be, why a temporary injunction should not issue against it.

(Signed) SMITH McPHERSON, *Judge.*

Afterwards, to-wit, on the 16th day of December, 1907, an Answer of the Guardian Trust Company on Rule to Show Cause was filed. Said Answer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of Western District of Missouri.

In Equity.

CAMBRIA STEEL CO.
vs.
KANSAS CITY SUBURBAN BELT R. R. CO., GUARDIAN TRUST CO., et al.

Bill.

KANSAS CITY SUBURBAN BELT R. R. CO.
vs.
GUARDIAN TRUST COMPANY et al.; KANSAS CITY SOUTHERN RAILWAY CO., Intervenor.

Ancillary Bill.

KANSAS CITY SUBURBAN BELT RAILWAY CO. and KANSAS CITY SOUTHERN RAILWAY CO.
vs.
GUARDIAN TRUST CO.

Supplemental Bill.

Answer of Guardian Trust Co. on Rule to Show Cause.

And now comes the Guardian Trust Company and protesting against the jurisdiction of this court in the premises, in answer to the rule to show cause why a temporary injunction should not issue against it, restraining it from prosecuting three certain suits at law now pending in the Circuit Court of Jackson County, Missouri, and without prejudice to its demurrer on file herein and in response only to said rule to show cause hereby showeth cause and avers as follows:

639 1. This court is without jurisdiction to entertain the supplemental bill and to issue the said restraining order or to issue the said temporary injunction prayed for.

1. (*a*) Leave was improvidently granted by this court to file said supplemental bill without any notice whatsoever to this defendant

and contrary to the rules and practice of this court, as prescribed by Equity Rule #57, and said Bill should be dismissed for this reason alone.

1. (*b*) Leave to file said supplemental bill was improvidently given by this court because on its face said bill discloses that the matters therein complained of are not in any case the proper subject of a supplemental bill, but are matters which were necessarily within the knowledge of the complainants at the time they filed their last amended intervening petition and their amended ancillary bill, respectively, in this cause, and were necessarily known to them before this cause was finally submitted to the Master, and hence said matter should have been introduced into this cause, if at all, before that time, and it is too late to do so now.

2. No notice of the application for the restraining order entered herein was given by the said complainants to this defendant and no sufficient reason given for not doing so; although it is a local company and the office of one of its counsel is but a block or two distant from the office of the counsel for the complainants. The court should therefore, for this reason alone, restore the status quo, dissolve the restraining order and discharge the rule to show cause.

3. It appears from the face of the supplemental bill that no case is stated entitling the said complainants therein to any such relief as is thereby sought or prayed for from or against this defendant.

4. As to the third and last of the three cases pending in the said Circuit Court of Jackson County, commenced July 2, 1906, the subject-matter of said suit is not only personal in its nature, but is not even in anywise involved in this cause or causes, but the same is entirely foreign to and independent of the issues herein; and in addition thereto the Belt Company, a joint complainant here, can have no interest of any kind therein.

5. The Belt Company and the Southern Company claim to be independent corporations and such as cannot join in a bill for an injunction of the nature of said supplemental bill. If they are independent corporations, their alleged rights are distinct; while
640 if the Southern Company is a consolidation of the Belt Company, the state suits are of necessity well brought. The interests of each of said joint complainants in the said ancillary cause are each hostile and adverse to the other.

6. The Belt Company is no party to the said state court cases, and therefore cannot validly join in such a supplemental bill, and hence such bill by reason alone of the Belt Company being a joint complainant is bad. While,

7. As to the Southern Company, the other joint complainant, it is barred and estopped from maintaining any such supplemental bill upon the following grounds and for the following reasons, viz:

(*a*) Because it obtained a prior injunction against this defendant in the month of August, 1905, restraining the prosecution of the first two of said suits, which injunctionary order was upon appeal by this defendant reversed by the United States Court of Appeals in and for this district in June, 1906, and the said order was set aside, the said Court of Appeals finding that there was no right upon the part

of the said Southern Company to enjoin the prosecution of said suits at law. Said subject-matter is now res adjudicata and the Southern Company is now estopped and precluded from obtaining any further injunction to the same end. Said decision of said Court of Appeals is reported in 146 Federal Reporter, page 337, to which defendant hereby refers.

(*b*) The said Southern Company filed a demurrer and tendered an issue in said state court suits.

(*c*) After the reversal of the said injunctionary order the said Southern Company withdrew its demurrer in said state court suits, and filed answers therein, to which answers replications were filed by this defendant about June 1, 1907.

(*d*) Afterwards and in June, 1906, said Southern Company filed in said three causes in said state court a motion for a stay of proceedings therein, which motion the court heard in each instance, and the said motions were on or about June —, 1907, formally denied by that court.

(*e*) After the said motions were denied this defendant gave formal notice to the said Southern Company that it would move the said state court for an early setting of said causes for trial before the summer vacation, and said motion was made and heard and denied; the said court, however giving notice to the counsel for the Southern Company that the said causes should be tried early in the fall of the present year.

641 In September this defendant gave notice to the said Southern Company to have the court set said causes for an early date, and upon the protest of the said Southern Company against an earlier trial the said causes were set for trial as late as December 2, 1907.

The said Southern Company has therefore not sought its relief at the earliest, or even an early opportunity, and has also waived any alleged right to enjoin the due prosecution of said state court suits.

8. Between this cause or causes and the said state court cases there is

(*a*) No identity of parties.

(*b*) No identity of the cause of action.

(*c*) No identity in the relief sought.

(*d*) No identity of the jurisdiction in which said causes are pending.

9. The said state court actions are each and all actions in personam, and do not involve any tangible property, or the title thereto, which is under the control or in the custody of this court; nor do said suits or the due prosecution thereof constitute any interference with the present suits in this court or the due prosecution thereof.

Nor has this court the possession of the said notes and open account held by the Trust Company against the Belt Company; nor has it impounded the same or any part thereof; and this appears also upon the face of said supplemental bill.

10. Complainants have been guilty of laches in applying for relief from the prosecution of said state court cases.

11. The said stocks, bonds and other property which defendant holds as collateral to said notes and open accounts were on September 6, 1900, of the reasonable value of over $300,000, and are now of the reasonable value of over $400,000; while the bond given by said Cambria Company, being the only bond given therefor, was in the penal sum of but $10,000. The said complainants have already unjustly interfered with defendant's prosecution of its claims and a realization thereon. And the issuance of said injunction order being, as defendant asserts, unwarranted in law, cannot validly be made the basis or excuse for a further interference with the Trust Company's legal right.

12. As to the original cause herein, in which the Cambria Steel Company is complainant,

642 (*a*) It is a bill to wind up the said Belt Company, and various other Missouri companies, each of which is independent of the other. The bill is not merely multifarious, but it and the proceedings taken under it, amount to an attempt to join in one cause a series of administration of estates, and such estates being those of independent corporations. The court is without jurisdiction in the premises, and the said proceedings ought not only be stayed, they ought not be and cannot validly be the basis for any further appeals for equity interference.

(*b*) Said Cambria bill is bad also for want of any equitable cause of action or right to relief appearing on the face thereof, against any of the defendants thereto, and particularly as against this defendant.

13. There is no valid cause of action against this defendant set up in the said ancillary bill of complaint; no actual fraud is charged therein and said bill presents a legally meaningless theory and an impossible case.

14. There is no valid cause of action or basis of complaint set forth in said intervening petition of the Southern Company; and the same has nothing whatever to do with the personal liability of the Southern Company on which said state court suits are based.

15. It appears from the face of each of said pleadings, viz., the Cambria Company's bill of complaint, the ancillary bill and said intervening petition, that the alleged causes of action are and each of them is barred by limitations and laches appearing on the face thereof, and the same are in fact so barred.

16. If the said original bill, ancillary bill and intervening petition are each without equity and show no cause of action, as defendant avers is the fact, there can be no valid ground for injunction revealed by an attempt to join all three of said causes in such supplemental bill and said application for injunction.

17. As to the said alleged stipulation set out in said bill of complaint,—

(*a*) The same was not a consent to an accounting; in it there is expressly reserved the right to plead or answer said bill and thus to deny the right of complainants to any accounting in respect to the subject-matter of said ancillary bill;

(*b*) The answer filed subsequent thereto contained express denials

of the right of complainants to any accounting in the way of pleas of accounts stated and settled, laches and limitations, and said pleas have never been withdrawn;

643 (*c*) Even if said stipulation could be treated as any consent to an accounting, it could only have supported the filing of a bill which set forth a legal and practical basis for an accounting; there is no intelligent basis of account tendered by the ancillary bill and the stipulation so far as it pertains to an account is functus officio and useless.

(*d*) This defendant has repeatedly and formally protested against the making of the abnormal record in the above causes, and denied and repudiated any such construction of said stipulation by its motions to have the testimony closed and to have the ancillary bill and intervening petition held to be without equity and dismissed.

(*e*) The said stipulation even if treated as a consent to an accounting, has been grossly abused by the complainants creating the abnormal record in said cause or causes, and the same cannot equitably be made the basis for any appeal upon the part of Complainants for further attacks upon this Trust Company.

(*f*) Said stipulation could not in any event be treated as extending beyond the scope of said accounting case, or as giving any pretense for enjoining the prosecution of defendant's legal rights which were outside of the scope of said accounting case.

18. There is no sufficient showing that the Trust Company is insolvent; and the reverse is true, as it has over $600,000 of net assets, exclusive of its claims against the Southern and Belt Companies and the collateral thereto.

19. On the other hand the Belt Company appears from the record in said cause to be totally insolvent, and to have lost all its tangible property upon foreclosure sale to the Southern Company as purchaser thereof.

19. It appears from the record in this cause that the complainants have oppressed, annoyed and heavily damaged this defendant by making the abnormal record in this case, and in its dilatory steps taken therein and in soliciting and obtaining the former injunction against the prosecution of two of said State Court suits; and complainants do not come into court with their present application with clean hands.

Wherefore defendant Guardian Trust Company prays that the restraining order heretofore issued herein be dissolved forthwith; that the rule to show cause why a temporary injunction should not issue herein be discharged, and the application for the same denied, and that the said supplemental bill shall be dismissed; and

644 that the costs, expenses, outlays and attorney's fees incurred by this defendant in resisting such application shall be adjudicated upon the final hearing of said cause or causes.

GUARDIAN TRUST COMPANY,
By HARRY S. MECARTNEY AND
JULES C. ROSENBERGER,
Solicitors and of Counsel.

STATE OF ILLINOIS,
County of Cook, ss:

Harry S. Mecartney, being duly sworn, deposes and says that he is one of the solicitors of the Guardian Trust Company in the foregoing and above entitled causes; that he has read the answer of the Guardian Trust Company to the rule to show cause above, and that the same, and the facts set forth therein, are true, as he verily believes.

HARRY S. MECARTNEY.

Subscribed and sworn to before me this 18th day of December, A. D. 1907.

[SEAL.] JAMES H. CLARK,
Notary Public.

Afterwards, to-wit, on the 22nd day of February, 1908, an Order granting temporary injunction against Guardian Trust Company *against The Guardian Trust Company* was filed and entered of record. Said Order is in words and figures as follows, to-wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUBURBAN RAILROAD COMPANY, UNION TERMINAL Railroad Company, Kansas City and Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company, and T. T. Crittendon, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

645 EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company; The Kansas City Suburban Belt Railroad Company; The Kansas City Southern Railway Company, Complainants,

vs.

GUARDIAN TRUST COMPANY, Defendant.

Supplemental Bill.

Supplemental Bill of Edward F. Swinney, Kansas City Suburban Belt Railroad Company, and The Kansas City Southern Railway Company Against The Guardian Trust Company.

Order.

The supplemental bill of Edward F. Swinney, Kansas City Suburban Belt Railroad Company and the Kansas City Southern Railway Company in the above entitled case, coming on for hearing on the application for a temporary injunction, Edward F. Swinney, Kansas City Suburban Belt Railroad Company and the Kansas City Southern Railway Company appearing by their counsel and solicitors, S. W. Moore, Fred H. Wood and S. W. Sawyer, and the Guardian Trust Company appearing by its counsel and solicitors

H. S. Mecartney and J. C. Rosenberger, and after hearing the same on argument and briefs of the respective counsels, the cause was taken under advisement by the court, and the court now being fully advised in the premises; it is ordered that the prayer of the supplemental bill for temporary injunction be and the same is hereby granted, and that the said Guardian Trust Company, its agents, attorneys and counsel, until the further order of this court, be and they are hereby restrained and enjoined from the further prosecution in the Circuit Court of Jackson County, Missouri, of their three certain suits pending in said court against The Kansas City Southern Railway Company, two of which suits were filed in said court on or about the 15th day of March, 1905, and the third of which suits was filed in said court on or about the 2nd day of July, 1906.

This order to take effect on the filing herein of a sufficient injunction bond by the said Edward F. Swinney, Kansas City Suburban Belt Railroad Company and the Kansas City Southern Railway Company, with surety to be approved by the Clerk of this Court in the sum of Ten Thousand Dollars ($10,000.00) on or before the 24th day of February, 1908.

(Signed) SMITH McPHERSON, *Judge.*

Afterwards, to-wit, on the 24th day of February, 1908, an Injunction Bond was filed. Said Bond is in words and figures as follows:

646 **In the Circuit Court of the United States for the Western Division of the Western District of Missouri.**

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERminal Railroad Company, Kansas City and Independent Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittendon, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Railroad Company; The Kansas City Suburban Belt Railroad Company; The Kansas City Southern Railway Company, Complainants,

vs.

GUARDIAN TRUST COMPANY, Defendant,

Supplemental Bill.

Supplemental Bill of Edward F. Swinney, Kansas City Suburban Belt Railroad Company, and The Kansas City Southern Railway Company against The Guardian Trust —.

Bond.

Whereas, the above named plaintiffs, Edward F. Swinney, as receiver of the Kansas City Suburban Belt Railroad Company, the Kansas City Suburban Belt Railroad Company and The Kansas City Southern Railway Company have filed their supplemental bill in the Circuit Court of the United States for the Western Division of the Western District of Missouri, against the above named defendant, Guardian Trust Company, and applied for an injunction against the said defendant enjoining and restraining it, its agents

and attorneys, and each of them, from the commission of certain acts as in the supplemental bill filed in said action in the manner particularly set forth and described; and,

Whereas, the Honorable Smith McPherson, Judge of the Court above named, has on the 22nd day of February, 1908, made
647 an order granting the temporary injunction prayed for in said supplemental bill, and restraining and enjoining said defendant from the further prosecution of its three certain suits against The Kansas City Southern Railway Company pending in the Circuit Court of Jackson County, Missouri, two of which suits were filed in said court on or about the 15th day of March, 1905, and the third of which suits was filed in said court on or about the second day of July, 1906.

Now, Therefore, we, the undersigned Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company, the Kansas City Suburban Belt Railroad Company and The Kansas City Southern Railway Company, as principals, and The United States Fidelity & Guaranty Company, as Surety, in consideration of the premises, and of the said order, do jointly and severally undertake in the sum of Ten Thousand ($10,000.00) Dollars and promise to the effect that in case it shall finally be determined that plaintiffs in said supplemental bill, Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company, the Kansas City Suburban Belt Railroad Company and The Kansas City Southern Railway Company, are not entitled to the relief granted by the said order, then the said plaintiffs will pay to the defendant, Guardian Trust Company any and all damages which may [*may*] be awarded to it by reason of the said order, and by reason of any action taken by the plaintiffs in the premises, not exceeding the said sum of Ten Thousand ($10,000.00) Dollars.

Dated this 24th day of February, 1908.

[SEAL.] EDWARD F. SWINNEY,
As Receiver of the Kansas City Suburban Belt Railroad Company,

[SEAL.] KANSAS CITY SUBURBAN BELT RAILROAD COMPANY,
By H. VISSCHER, *Its Treasurer.*
THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
By H. VISSCHER, *Its Treasurer, Principals.*

[SEAL.] THE UNITED STATES FIDELITY & GUARANTY COMPANY,
By GEO. O. BACON,
J. L. CROSS,
Its Attorney- in Fact, Surety.

648 Approved, Feb'y 24, 1908.
ADELAIDE UTTER, *Clerk.*

Afterwards, to-wit, on the 29th day of February, 1908, a Motion of Guardian Trust Co. to dissolve Restraining Order of September 6, 1900, was filed. Said Motion is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERminal Railroad Company, Kansas City and Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company, and T. T. Crittenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Railroad Company; The Kansas City Suburban Belt Railroad Company; The Kansas City Southern Railway Company, Complainants,

vs.

GUARDIAN TRUST COMPANY, Defendant.

Supplemental Bill.

Motion of Guardian Trust Company to Dissolve Restraining Order of September 6th, 1900, Issued on the Original Bill of the Cambria Steel Company.

And now comes the defendant, Guardian Trust Company, by its counsel, and moves the court to dissolve the restraining order issued in this cause on September 6th, 1900, on the prayer of the original bill of complaint of the Cambria Steel Company, on the ground that

649 it appears by the complainant's own showing by the said bill that it is not entitled to the relief prayed by the said bill against this defendant, and because the said bill of complaint is wholly without equity.

J. C. ROSENBERGER,
H. S. MECARTNEY,
Solicitors for Guardian Trust Co.

Notice.

To the above-named Cambria Steel Company, Kansas City Suburban Belt Railroad Company, Edward F. Swinney, Receiver for the Kansas City Suburban Belt Railroad Company, and Kansas City Southern Railway Company, or their Solicitors of Record:

You are hereby notified that on Saturday the 29th day of February, 1908, at 10:00 o'clock A. M., or as soon thereafter as counsel can be heard at his Chambers in the City of Kansas City, Mo., the undersigned will present the foregoing motion to the Honorable John F. Philips, Judge of the aforesaid Circuit Court of the United States.

J. C. ROSENBERGER,
H. S. MECARTNEY,
Solicitors for Guardian Trust Co.

Received copy of the foregoing notice and motion this 27 day of Feb., 1908.

FRANK HAGERMAN,
Solicitor for Cambria Steel Co.
S. W. MOORE,
Solicitor for K. C. Suburban Belt Railroad Company and Edward F. Swinney, Its Receiver, and for Kansas City Southern Railway Co.

Afterwards, towit, on the 29th day of February, 1908, the following Order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERMINAL Railroad Company, Kansas City and Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

650

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company, and T. T. Crittenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

EDWARD F. SWINNEY, as Receiver of The Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company; The Kansas City Southern Railway Company, Complainants,

vs.

GUARDIAN TRUST COMPANY, Defendant.

Supplemental Bill.

Now on this day the motion of the Guardian Trust Company to dissolve the restraining order issued herein on the 6th day of September, 1900, coming on for hearing the same is submitted to the court and is by the court denied.

(Signed) JNO. F. PHILLIPS, *Judge*.

Afterward, to-wit, on the 10th day of March, 1908, a Petition for Appeal and Order allowing Appeal were filed.

Said Petition and Order are in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERMINAL Railroad Company, Kansas City and Independence Air Line; Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of The Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

651 EDWARD F. SWINNEY, as Receiver of The Kansas City Suburban Belt Railroad Company; The Kansas City Suburban Belt Railroad Company, The Kansas City Southern Railway Company, Complainants,

vs.

GUARDIAN TRUST COMPANY, Defendant.

Supplemental Bill.

The above named defendant, Guardian Trust Company, conceiving itself aggrieved by the order and decree made and entered in the above entitled cause on the 22nd day of February, 1908, granting the prayer of the supplemental bill of complaint of the Kansas City Southern Railway Company, the Kansas City Suburban Belt Railroad Company and Edward F. Swinney, Receiver of the Kansas City Suburban Belt Railroad Company for a temporary injunction, enjoining and restraining the said Guardian Trust Company from the further prosecution in the Circuit Court of Jackson County, Missouri, of the three actions at law in said order of temporary injunction and in said supplemental bill mentioned, does hereby appeal from the said order and decree to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the Assignment of Errors, which is filed herein, and said Guardian Trust Company prays that this appeal may be allowed and that a transcript

of the record, proceedings and papers upon which said order or decree was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Eighth Circuit.

Dated this 10th day of March, 1908.

H. S. MECARTNEY,
J. C. ROSENBERGER,
Solicitors for Defendant, Guardian Trust Company.

The foregoing petition for an appeal is allowed, and it is ordered that the cost bond to be filed by said appellant is hereby fixed in the sum of one thousand dollars.

Dated this 10th day of March, 1908.

(Signed) JNO. F. PHILIPS, *Judge.*

Afterwards, to-wit, on the 10th day of March, 1908, the Bond for Appeal of the Guardian Trust Company was approved and filed. Said Bond is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

652 CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION TERminal Railroad Company, Kansas City and Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of The Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company, and T. T. Crittenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

EDWARD F. SWINNEY, as Receiver of The Kansas City Suburban Belt Railroad Company; The Kansas City Suburban Belt Railroad Company, The Kansas City Southern Railway Company, Complainants,

vs.

GUARDIAN TRUST COMPANY, Defendant.

Supplemental Bill.

Supplemental Bill of the Kansas City Southern Railway Company, the Kansas City Suburban Belt Railroad Company, and Edward F. Swinney, its Receiver, in the matter of the actions at law of the Guardian Trust Company vs. the Kansas City Southern Railway Company in the Circuit Court of Jackson County, Missouri.

Bond.

Know all men by These Presents: That we, the Guardian Trust Company as principal, and the United States Fidelity & Guaranty Company, of Baltimore, Md., as surety, are held and firmly bound unto the Kansas City Southern Railway Company, the Kansas City Suburban Belt Railroad Company and Edward F. Swinney, its Receiver, in the full and just sum of One Thousand ($1000.00)

Dollars, to be paid to them, their successors or assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns jointly and severally by these presents, sealed with our seals, dated at Kansas City, Mo., the 10th day of March, 1908.

Whereas, lately on the 22nd day of February, 1908, in the above entitled cause, an order was made granting the prayer of the supplemental bill of the said Kansas City Southern Railway Com-
653 pany, the Kansas City Suburban Belt Railroad Company and Edward F. Swinney, its Receiver, for a temporary injunction against the Guardian Trust Company, restraining and enjoining it from prosecuting certain actions at law against the Kansas City Southern Railway Company in the Circuit Court of Jackson County, Missouri, and the said Guardian Trust Company has obtained an order allowing an appeal from the said order granting said temporary injunction, and has obtained a citation, directed to the said complainants in the said supplemental bill, citing and admonishing them to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Paul, Minnesota, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such that if the said Guardian Trust Company shall prosecute said appeal to effect and answer all costs if it fail to make good its plea, then the above obligation to be void; otherwise, to remain in full force and virtue.

In Witness Whereof, the said Guardian Trust Company and the said The United States Fidelity and Guaranty Company have caused these presents to be signed by their proper officers, and their corporate seals to be hereunto affixed.

GUARDIAN TRUST COMPANY,
By J. C. ROSENBERGER, *Its Attorney.*
THE UNITED STATES FIDELITY & GUARANTY COMPANY,
[SEAL.] By THOMAS S. RIDGE,
By J. L. CROSS, *Its Attorney in Fact.*

Approved:
JNO. F. PHILIPS, *Judge.*

Afterwards, to-wit, on the 14th day of March, 1908, a copy of a letter to Guardian Trust Co. was filed. Said copy of letter and the Affidavit of Thomas J. Bales attached thereto is in words and figures as follows:

March 5, 1908.

Guardian Trust Company, First National Bank Building, City.

GENTLEMEN: Referring to what is known as the Guardian Trust litigation, there are, as you know, three suits pending in
654 the State Court at Kansas City, in which the Guardian Trust Company is plaintiff and The Kansas City Southern Railway Company is defendant, and one equity case pending in the Federal Court here, which involves an accounting between the Suburban Belt Railroad Company and the Trust Company, and also

involves the disposition of certain collateral security held by the Trust Company.

It seems to me that it is a waste of substance and energy to have this litigation pending in both courts. Inasmuch as all of the testimony has been taken in the case in the Federal Court upon every issue that can possible arise between the parties, and inasmuch as no testimony has yet been taken in the cases in the State Court, it seems to me that it is to the interest of all parties concerned to have all matters of difference determined in the Federal Court case. All that will be necessary would be for you to file your cross-bill in the Federal Court setting up against the Kansas City Southern your claim that it is liable to you for the debts of the Suburban Belt and of the Kansas City, Pittsburg & Gulf. As before stated, all of the evidence upon this issue has been taken, and I do not apprehend that any further testimony will be required, altho- if you should look at the matter differently, I should be willing to cover that by stipulation.

This is to notify you, therefore, that if you desire to affirmatively set up your claims against the Kansas City Southern in the equity suit now pending in the Federal Court at Kansas City, I will agree that you may do so, and give you a stipulation to that effect, so that every matter of difference between your Company and those that I represent may be settled by one comprehensive decree.

One of your suits pending in the State Court is against the Kansas City Southern on account of [and] alleged indebtedness of the Kansas City, Pittsburg & Gulf. If this arrangement above outlined is satisfactory to you, I think we can stipulate as to the amount of the indebtedness from the Kansas City, Pittsburg & Gulf to you, so that it will not be necessary to take any testimony upon that point.

I have made suggestions along this line to your attorneys heretofore, but have thought it proper to make this formal offer to you, so that there may hereafter be no misunderstanding upon the subject.

Yours truly,

S.W.—M. S. W. MOORE.

STATE OF MISSOURI,
Coutny of Jackson, ss:

Thomas J. Bales, of lawful age, being first duly sworn upon his oath states that he enclosed the original of this letter in
655 an envelope addressed to John A. Prescott, First National Bank Building, Kansas City, Missouri, and deposited the same with the necessary postage in the United States mail on March 5th, 1908.

THOMAS J. BALES.

Subscribed and sworn to before me this 5th day of March, 1908. My commission expires October 10, 1908.

[SEAL.] CLARENCE R. HALL,
Notary Public in and for Jackson County, Missouri.

Afterwards, to-wit, on the 21st day of June, 1909, a Mandate from the United States Circuit Court of Appeals Eighth Circuit, was filed. Said Mandate is in words and figures as follows:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Circuit Court of the United States for the Western District of Missouri, Greeting:

[SEAL.]

Whereas, lately in the Circuit Court of the United States for the Western District of Missouri, before you, or some of you, in a cause between Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company; The Kansas City Suburban Belt Railroad Company; the Kansas City Southern Railroad Company, Complainants, and the Guardian Trust Company, Defendant, wherein the decree of the said Circuit Court in said cause, entered on the 22nd day of February, A. D. 1908, is in the following words, viz:

"The supplemental bill of Edward F. Swinney, Kansas City Suburban Belt Railroad Company and The Kansas City Southern Railway Company in the above entitled case, coming on for hearing on the application for a temporary injunction. Edward F. Swinney, Kansas City Suburban Belt Railroad Company and The Kansas City Southern Railway Company appearing by their counsel and solicitors, S. W. Moore, Fred H. Wood and S. W. Sawyer, and the Guardian Trust Company appearing by its counsel and solicitors H. S. Mecartney and J. C. Rosenberger and after hearing the same on argument and briefs of the respective counsels, the cause was taken under advisement by the court, and the court now being fully advised in the premises; it is ordered that the prayer of the supplemental bill for temporary injunction be and the same is hereby granted, and that the said Guardian Trust Company, its
656 agents, attorneys and counsel, until the further order of this court, be and they are hereby restrained and enjoined from the further prosecution in the Circuit Court of Jackson County, Missouri, of their three certain suits pending in said court against The Kansas City Southern Railway Company, two of which suits were filed in said court on or about the 15th day of March, 1905, and the third of which suits was filed in said court on or about the 2nd day of July, 1906.

This order to take effect on the filing herein of a sufficient injunction bond by the said Edward F. Swinney, Kansas City Suburban Belt Railroad Company and The Kansas City Southern Railway Company, with surety to be approved by the Clerk of this Court in the sum of Ten Thousand Dollars ($10,000.00) on or before the 24th day of February, 1908.

(Signed) SMITH McPHERSON, *Judge.*"

Filed Feb'y 22, '08.

as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the United States Circuit Court of Appeals for the Eighth Circuit, by virtue of an appeal agreeably to the Act of Congress in such case made and provided, fully and at large appears:

And Whereas, at the December term, in the year of our Lord, one thousand nine hundred and eight, the said cause came on to be heard before the said United States Circuit Court of Appeals, on the transcript of record from the said Circuit Court, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, reversed with costs; and that the Guardian Trust Company, have and recover against the Kansas City Southern Railway Company, Kansas City Suburban Belt Railroad Company, and Edward F. Swinney, Receiver of Kansas City Suburban Belt Railroad Company, the sum of One Thousand and Forty Six and 45/100 Dollars for its costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby remanded to the said Circuit Court with directions to dismiss the supplemental bill of complaint for want of equity.

It is further ordered that a mandate be issued in this cause to the said Circuit Court in ten days from and after this date.

April 2, 1909.

657 You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the Twelfth day of June, in the year of our Lord one thousand nine hundred and nine.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

Costs of Appellant.

Clerk	$33.10
Printing Record	979.50
Do. Addl	13.85
Attorney	20.00
	$1046.45

Afterwards, to-wit, on the 19th day of June, 1909, the following Order was filed and entered of record:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2468.

CAMBRIA STEEL COMPANY
vs.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY et al.

Order.

This cause came on for hearing this 19th day of June, 1909. Complainants suggested the death of Thomas T. Crittenden, Receiver of the Central Improvement Company. The court being fully advised in the premises, orders and adjudges that Henry Huston Crittenden be, and he is hereby appointed receiver of the Central Improvement Company as the successor to and with all the powers heretofore vested in Thomas T. Crittenden. He shall cause to be transferred to his account as such receiver, in the First National Bank, the balance there deposited in the name of his predecessor, Thomas T. Crittenden, this order being the authority for said bank to make said transfer. Said receiver shall make and execute a bond in the sum of five thousand dollars, with surety to be approved by a judge or clerk of this court, conditioned for the faithful performance of his duties.

(Signed) JNO. F. PHILIPS, *Judge.*

658 Afterwards, to-wit, on the 21st day of May, 1910, the Report of Shannon C. Douglas, Special Master, was filed. Said Report is in words and figures as follows, to-wit:—

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In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company, and T. T. Crittenden, its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants; Kansas City Southern Railway Company, Intervenor.

662

Ancillary Bill.

Report of Shannon C. Douglass, Special Master, on the Second Amended and Supplemental Ancillary Bill of Complaint, and Intervening Petition of the Kansas City Southern Railway Company.

Comes now Shannon C. Douglass, heretofore appointed Special Master in the above entitled causes, and respectfully represents to the Court that, pursuant to the various orders of reference herein made at different times, during the pendency of this hearing before him, in respect to the original and ancillary bills of complaint, and the intervening petition of the Kansas City Southern Railway Company, he took, from time to time, as requested by counsel for the parties interested, all the testimony offered by them as to the large number of issues involved under the pleadings and stipulations in these causes, and which taking of testimony in shorthand continued through several years, and when transcribed into typewritten pages, resulted in the accumulation of the phenomenal record of approximately 36,000 pages.

There have been numerous ocurrences, all more or less unavoidable, during the progress of this hearing, which have operated to materially delay the conclusion and filing of the Master's report. There was an entire change of counsel for complainants and respondents in January, 1905, when hardly one-fourth of the record had

been made, and thereby properly necessitating additional time for the new counsel to familiarize themselves with the pleadings and complicated state of facts presented by the evidence in the cause, and, then again, in 1909, there was another change of counsel for respondent, the Guardian Trust Company, which occasioned additional briefs and suggestions. For the past three years, the Master has given a large part of his time to the examination and consideration of this lengthy record in connection with the arguments and brief of the learned counsel for complainants and defendants, and the intervenor.

It is estimated that the items involved, first and last, in this accounting, will aggregate, 10,000 to 12,000, and hence, it will be readily seen that it has been impossible, within the compass of this report, to do more than group together the different classes of items which characterize the issues in this cause.

663 In the Matter of the Complaints or Charges in the Second Amended and Supplemental Ancillary Bill of Complaint.

I.

General Statement.

1. The original bill of complaint in this cause was filed in this court by the complainant, Cambria Steel Company, on September 6, 1900, against the Kansas City Suburban Belt Railroad Company, Union Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, defendants, and, in and by which bill of complaint, the Cambria Steel Company set up the recovery of a judgment by it against the Kansas City Suburban Belt Railroad Company for the sum of $100,962.91, and the issuance, and delivery, and return unsatisfied, of an execution thereon, and it was sought to subject to the payment and satisfaction of said judgment, certain assets, rights and properties belonging to said Belt Company, and the other above named defendants (Rec. 36-19253-'55).

The scope of the Cambria bill and the relief which it seeks to obtain for the complainant, Cambria Steel Company, will be hereafter considered, in so far as the same may be involved in and by the orders of reference to the Master, and stipulations in this cause.

For more convenient reference, the corporate companies involved or concerned in the matters, growing out of the filing of the original and ancillary bills of complaint in this cause, are as follows:

1. Cambria Steel Company, hereinafter referred to as Cambria Company.

2. The Kansas City Suburban Belt Railroad Company, hereinafter referred to as the Suburban Company.

3. Kansas City Suburban Belt Railroad Company, hereinafter referred to as the Belt Company.

4. Missouri, Kansas & Texas Trust Company, later by change of name the Guardian Trust Company, hereinafter referred to as the Trust Company.

5. The Missouri, Kansas & Texas Real Estate Trust Company hereinafter referred to as the Real Estate Trust Company.

6. Missouri Elevator & Terminal Company, hereinafter referred to as the Elevator Company.

664 7. Central Improvement Company, hereinafter referred to as the Central Company.

8. Fairmount Amusement Company, hereinafter referred to as the Amusement Company.

9. Consolidated Terminal Railway Company of Kansas City, hereinafter referred to as the Consolidated Company.

10. The Union Terminal Railroad Company, hereinafter referred to as the Union Company.

11. Kansas City & Independence Air Line, hereinafter referred to as the Air Line.

12. Kansas City & Northern Connecting Railroad Company, hereinafter referred to as the Connecting Company.

13. Northern Townsite Company, hereinafter referred to as the Townsite Company.

14. Kansas City, Pittsburg & Gulf Railroad Company, hereinafter referred to as the Gulf Company.

15. State Realty Company, hereinafter referred to as the Realty Company.

16. Second Street Improvement Company, hereinafter referred to as the Improvement Company.

17. The Kansas City Southern Railway Company, hereinafter referred to as the Southern Company.

18. Kansas City Fruit Auction & Coal Storage Company, hereinafter referred to as the Fruit Auction Company.

19. Kansas City Terminal Construction Company, hereinafter referred to as the Construction Company.

20. The Provident Life & Trust Company, hereinafter referred to as the Provident Company.

The original ancillary bill of the Belt Company and its receivers, Stuart R. Knott and Edward F. Swinney, was filed in this cause on November 20, 1901. On March 5, 1905, an amended and supplemental ancillary bill by the same complainants was filed and the Trust Company's answer thereto was filed on June 1, 1905.

On July 2, 1906, their second amended and supplemental ancillary bill of complaint was filed by the Belt Company and Edward F. Swinney, as sole receiver, and, on the same day, the Trust Company filed its answer thereto, which adopted, as part thereof, its answer theretofore filed on June 1, 1905, to the first amended ancillary bill. The second amended and supplemental ancillary bill of complaint, hereinafter referred to as the second ancillary bill, was brought by the complainants therein, against the Cambria Company, Trust Company, Elevator Company, Central Company, and Thomas T. Crittenden, its receiver, Townsite Company, and Amusement —, the Southern Company subsequently becoming an

intervenor in the cause. Each and all of the defendant cor-
665 porations, except the Cambria Company, are organized and existing under the laws of the State of Missouri, having their offices and places of business at Kansas City, Missouri, and are citizens and residents of this state. The Cambria Company is a Pennsylvania corporation, existing under the laws of the State of Pennsylvania, and is a non-resident of Missouri (Rec. 36-19254).

On October 19th, 1906, the answers of the Elevator Company, Townsite Company, Amusement Company, Central Company and its receiver, were filed to said second ancillary bill of complaint and, replications in the usual form were afterwards filed by complainants.

In the cause entitled W. W. Bierce, et al., against the Trust Company, brought and still pending in this division of this Circuit Court, one Francis M. Black was, on November 30, 1900, appointed receiver of the defendant Trust Company, and, at the time of the filing of the ancillary bill herein, was the duly qualified and acting receiver of such company, until his death in May, 1902; that he was succeeded as receiver by Wash Adams, who continued to act as such receiver until he was discharged by order of this Court, made on or about November 1, 1902, and, that thereafter, the Trust Company has been continuously, and is now, in the possession of all its corporate property, and is continuing to wind up its own business affairs in connection therewith (Rec. 21-11313-'14).

In said Bierce action, the said Wash Adams was, on November 8, 1900, appointed receiver of the Elevator Company, but thereafter, the assets and property of that company have, since the filing of the original ancillary bill of complaint, been turned over to the trustee, the mortgagee in certain mortgages covering the property of the Elevator Company (Rec. 21-11311-'14, 11315-'20, and Vol. 36-19254).

At the time the original ancillary bill was filed, Wash Adams was the duly qualified and acting receiver of the Central Company, having been, in this Cambria case, appointed such receiver on November 8, 1900 (see admissions Vol. 21-11311). Adams afterwards resigned, and T. T. Crittenden, a resident and citizen of Missouri, was appointed his successor on or about June 27, 1902 (Vol. 21-11321).

Prior to the filing of the original bill of complaint by the Cambria Company, four certain other bills of complaint were filed in this Court by the Provident Company of Philadelphia, Pennsylvania, two of these bills being against the Belt Company, a Missouri corporation, as sole defendant, the third being against the Union
666 Company, a Kansas corporation, and the Belt Company, as defendants, and the fourth being against the Air Line and Belt Company, Missouri corporations. Each of said bills sought the foreclosure of the first mortgage upon the railroad and other properties, real and personal, described in the respective mortgages and bills of complaint, and all of which several described properties had been operated by the Belt Company as a continuous and allied system, the Belt Company being also the beneficial owner thereof, by reason of owning the capital stock of the several companies. Upon

the same day that said bills of complaint were filed, an application was made for the appointment of a receiver for the property of the Belt, Union and Air Line, and, on September 6, 1900, an order was duly entered of record in this Court, in all of said causes, as well as in the above entitled Cambria cause, appointing Edward F. Swinney and Stuart R. Knott as receivers of the Belt, Union and Air Line Companies, and vesting in them, as such receivers, all the right, title, interest, estate and property of said companies, and authorizing and directing them, as such receivers, to take such steps and institute such proceedings as might be necessary, to make restoration to the Belt Company, and its said receivers, of any property rights belonging to it, and to compel an accounting from any and all persons, firms or corporations, from whom the Belt Company might be entitled to such accounting, and Knott and Swinney were authorized to appear in any and all suits theretofore or thereafter instituted against the Belt — in its name, or in the names of the receivers, and to defend any and all suits (pages 3 and 4, paragraph 4, Trust Company's answer to the amended and supplemental ancillary bill; and the orders of appointment of receivers in the four foreclosure causes, Rec. 56-34416 to 34440).

Knott and Swinney, as such receivers, appeared and filed an answer to the Cambria bill, and, since the filing of the original ancillary bill herein, Stuart R. Knott resigned as receiver, his resignation being accepted on July 5, 1905, and Edward F. Swinney was continued as sole receiver.

Immediately after their appointment as receivers, and pursuant to the orders appointing them, they took possession of each and all of the properties of the Belt, Air Line, and Union Companies, and thereafter continuously operated all these railroad properties, until the foreclosure sales, which vested in the Southern Company the title to all the railroad properties comprising the Belt System.

667 On November 6, 1901, in said four foreclosure causes, decrees of foreclosure and sale were rendered, directing the sale of the railroad properties of the Belt, Air Line, Consolidated, and Union Companies, covered by mortgages upon said railroads and properties, respectively, and, on December 31, 1901, the properties so covered by said mortgages, were, in pursuance of said decree of foreclosure and sale, duly sold and conveyed to the purchaser, the Kansas City Southern Railway Company (see paragraph 4, page 4, Trust Company's answer to amended supplemental ancillary bill of complaint; also, certified copies of decrees of sale, Vol. 44-28775 to 28808, and, orders and decrees confirming said foreclosure, pp. 28810-'14, and commissioners' deeds pp. 28867 and 28877).

The Missouri, Kansas & Texas Trust Company was incorporated under the laws of Missouri, February 14, 1889 (Rec. 11-5680) and so continued until July 17, 1899, when, by the proper statutory proceedings, its name was changed to Guardian Trust Company (Rec. 11-5680).

2. Before taking up, for consideration, the various "items", or complaints, contained in the second ancillary bill, the Master has thought best to make a somewhat extended reference to the con-

trolling question in this cause, that is, the alleged Domination and Control by the Trust Company of, and over, the Belt Company, and its constituent companies, which complainants contend to have existed throughout the whole period, covered by the transactions, complained of in said bill.

It will be manifest to the Court, from a careful reading of this second ancillary bill, that it is grounded upon the proposition that the Trust Company so dominated and controlled these other companies, that their directors and officers were merely agents of the Trust Company to execute the wishes of A. E. Stilwell and others dominant in the control of Trust Company affairs. If, however, under the proofs in the record and the law applicable thereto, it shall be determined that these corporations, as legal entities, were not so dominated or controlled by the Trust Company or its officers, as to destroy or impair their reasonable freedom of corporate action along lines beneficial to themselves, then it follows that the very basis of the bill will be gone, and, that all other questions, affecting the legality or validity of the various complaints in the bill, may be disposed of according to their individual or respective merits, without regard to any alleged domination. The substance of the particular paragraphs of the second ancillary bill, necessary to show, in a general way, the contentions of complainants, in respect to such
668 alleged domination and control, are next hereinafter stated, though continuously throughout the bill, similar allegations are made as to such dominations of the Trust Company, respecting the thousands of items involved in the various accountings, sought by complainants in this cause.

The general nature of the Bill and particularly of the charge in respect to the Trust Company's Domination and Control over the Belt and other companies, will be shown in the following averments in the Second Ancillary Bill:

(*a*) That the Cambria Company filed its bill of complaint against the Belt Company and the other defendants, setting up the recovery of a judgment by it against the Belt Company for the sum of $100,962.91, and the issuance and delivery, and return unsatisfied, of an execution thereon, and, thereupon, the Cambria Company sought to subject to the payment of said judgment certain rights, properties and assets belonging to said Belt Company, and the other defendants.

(*b*) That, prior to the filing of the Cambria bill of Complaint, four certain other bills of complaint had been theretofore filed in this Court by the Provident Life & Trust Company of Philadelphia, two of which being against the Belt Company, as the sole defendant, the third bill being against the Union Company, a Kansas corporation, and the Belt Company, as defendants, and the fourth bill being against the Air Line, and the Belt Company. Each of said bills sought the foreclosure of a first mortgage upon the certain railroad properties, described in the respective bills of complaint, and, all of which railroad properties had been for some time prior theretofore operated by the Belt Company as a continuous and allied system, the Belt Company being also alleged to be the beneficial owner of said

properties, by reason of its owning the capital stock of said companies; that, upon the same day said bills of complaint were filed, an application was made for the appointment of a receiver of all the properties of the Belt Company, and thereupon, on September 6, 1900, an order was duly entered of record, in each of said causes, appointing Edward F. Swinney and Stuart R. Knott as such receivers, and vesting them with all the rights, property and interest of said Belt Company, and authorizing and directing them to take such steps and institute such proceedings, legal or otherwise, as might be necessary to compel a restoration to said Belt Company, and to said receivers, of any property rights belonging to it, and, also, to compel an accounting from [*from*] all persons, firms or corporations; and, they were further authorized to appear in and defend any and all suits theretofore or thereafter instituted against said Belt Company.

669 (*c*) That, under the authority so vested in them, the receivers, for and on behalf of said Belt Company, appeared and filed their answers to all said bills of complaint, and, thereupon they brought their ancillary bill of complaint herein against the defendants, and, the said Stuart R. Knott having resigned as receiver, the said Edward F. Swinney as its sole receiver, has brought a second ancillary bill against the defendants; that, immediately upon their appointment, the receivers took possession of all the Belt properties and operated the same until the foreclosure sales hereinafter mentioned; and that, on November 6, 1901, in the four foreclosure causes, decrees of foreclosure and sale were duly rendered, directing the sale of the railroads, and properties, of the Belt, Air Line, Consolidated and Union Companies, which were covered by the mortgages executed by said respective companies, and, on December 31, 1901, the said railroads and properties so mortgaged were, pursuant to said decrees of foreclosure, sold and duly conveyed to the purchaser thereof, the Southern Company.

(*d*) That the matters and things set forth in this second ancillary bill of complaint are ancillary to said foreclosure suits pending in this Court, and are properly cognizable in this Court, which has possession of all the property of the Belt Company, excepting such as was covered by its mortgage and has been conveyed, as stated, to the Southern Company.

(*e*) That the Trust Company was incorporated, according to law, in 1883, and, until the month of June, 1899, its name was the Missouri, Kansas & Texas Trust Company, but at a later date was changed to the Guardian Trust Company.

(*f*) That, on or about the 1st day of January, 1887, the Suburban Company was organized for the purpose of building a belt line of railroad to encircle the cities of Kansas City, Missouri, and Kansas City, Kansas, and was either organized by the Trust Company, or the control thereof passed to the Trust Company shortly after its incorporation, so that the servants and employees of the Trust Company were elected as officers and directors of the Suburban Company, which was at all the times mentioned in the bill, dominated and controlled by the Trust Company; that, by reason of the Trust Com-

pany's dominating and controlling the Suburban Company, by virtue of holding possession of the officers of its board of directors and officers, it caused the Suburban Company to issue and deliver all its capital stock to the Trust Company, and, also, caused the Suburban Company to execute its bonds, aggregating $1,000,000.00,
670 and secured by a first mortgage upon all of its corporate properties then held, and to be thereafter acquired; and, that said bonds, in like manner, by virtue of such domination and control of the Trust Company, were delivered to it, and the Trust Company thereupon proceeded to sell and otherwise dispose of said bonds and stock and to apply the proceeds thereof, as claimed by it, for the corporate purposes of the Suburban Company, in the construction and operation of its railroad, but the Trust Company, although often requested so to do, has not, at any time, truly accounted to the Suburban Company for the proceeds, realized by it from the sales of said bonds and stock, and has never accounted for the proceeds, or the manner in which it expended the same, except as stated in the bill.

(*g*) That the Trust Company caused to be incorporated, under the laws of Missouri, a corporation known as the Consolidated Company, for the purpose of building a line of road to connect with that constructed, or proposed to be constructed, by the Suburban Company, although it is alleged that the latter had full power, under its charter, to have itself constructed said road; and that the Trust Company caused the Consolidated Company to issue and deliver to it its entire capital stock, and, also, caused it to issue a first mortgage upon all its corporate property, to secure bonds aggregating the sum of $750,000.00, which it is alleged were, by reason of said domination of the Trust Company, delivered to it, and it thereupon sold and disposed of said stock and bonds, but has never truly accounted to the Consolidated Company for the disposition thereof, nor for the proceeds of the sales.

(*h*) That, thereafter, on or about July 25, 1892, the Consolidated Company and the Suburban Company, as authorized by the statutes of the State of Missouri, entered into articles of consolidation, whereby the two companies became one consolidated corporation, known as the Belt Company, and of which the said Swinney and Knott were appointed receivers, as above stated, and, by reason of which consolidation, the Belt Company and the receivers have succeeded to all the rights of the Consolidated and Suburban Companies; and that, at the time of the consolidation of these two companies, as aforesaid, the Trust Company caused its officers and employees to be elected to the positions of officers and directors of the Belt Company, so formed by said consolidation, and continued such persons in such respective positions, continuously, until about April, 1900, and whereby the Trust Company completely dominated and controlled the actions of the Belt Company.

671 (*i*) That, on or about December 30, 1891, and prior to said consolidation, it was found advisable, in the course of the construction of the line of road of the Suburban Company, to have a corporation formed under the laws of Kansas, for the purpose of building and holding the title to that portion of the line of

road of the Suburban Company, lying within the State of Kansas, and, for that purpose, the Trust Company caused the Union Company to be incorporated and its own officers and employees to be elected as the officers and directors of the Union Company; that the Trust Company caused all the stock of the Union Company to be issued to the Suburban or Belt Company, and, also caused the Union Company to execute its first mortgage bonds in the sum of $2,000,000.00, secured upon all corporate properties then owned and thereafter to be acquired, and that all of said bonds were issued and delivered to the Trust Company, for the use and benefit of the Suburban or Belt Company, and were disposed of by the Trust Company, but that the latter, though liable to account to the Belt Company for the proceeds and disposition of said stocks and bonds, has failed and refused to truly do so.

(*j*) That, on January 23, 1891, the Trust Company caused to be incorporated a Missouri corporation, known as the Air Line, for the purpose of building a line of railroad connecting the line of the Suburban Company and the City of Independence, Missouri, the capital stock of such company being $500,000.00; that the Trust Company caused its officers and employees to be elected directors and officers of the Air Line Company, which was caused by the Trust Company to issue its first mortgage bonds in the amount of $300,000.00, and to secure the same by a mortgage on all its corporate property, then owned, and thereafter to be acquired; that through the officers and directors of the Air Line, elected as above stated, the Trust Company at all times dominated and controlled the Air Line until the month of April, 1900; that, thereafter, the Trust Company acquired all the stocks and bonds of the Air Line, in consideration for building its railroad, and disposed of the same for corporate purposes, but, though often requested to do so, it has never truly accounted to the Belt Company for the disposition of said stocks and bonds, or their proceeds, except as hereinafter stated.

(*k*) "That the Trust Company, at all times, up to, and about the month of April, 1900, absolutely and completely dominated and controlled the affairs of the Belt Company, by reason of the fact that the officers and employees of the Trust Company were
672 elected officers and directors of the Belt, at the behest of the Trust Company, and were simply dummies, acting as the agents of the Trust Company;" that the Trust Company disbursed all the moneys realized from the sale of bonds and stocks of the several companies hereinbefore named and attended to the disbursement of all moneys used in the building of the lines of railroads of said companies, and that the total cost of said railroads did not exceed the sum of $2,000,000.00, but that there was actually delivered to and disposed — by the Trust Company, the aforesaid stocks and bonds, aggregating more than $5,000,000.00, and for which the Trust Company has never accounted to the Belt Company, except as hereinbefore stated.

(*l*) That, on or about June 30, 1896, the Trust Company either in its own name, or in the name of some of its officers, or some

corporation controlled by it, had entered into a contract, whereby it was obliged to construct a line of railroad from Kansas City, Missouri, to Pattonsburg, Missouri, for the purpose of connecting at that point with the Omaha & St. Louis Railroad Company, and the Omaha, Kansas City & Eastern Railroad Company; that the Trust Company thereupon caused the incorporation of the Connecting Company, and certain of its officers and employees to be elected officers and employees of the Connecting Company, and, by virtue thereof, at all times dominated and controlled the affairs of the Connecting Company; that the Trust Company, being under obligations to construct said road, and, in order to avoid all liability, or the possibility of loss in such construction, conceived the idea of having the Belt Company undertake the construction, in consideration of the issuance and delivery to it of the stocks and bonds of the Connecting Company, and by virtue of its domination and control over the affairs of both the Belt and Connecting Companies, the Trust Company caused a contract to be entered into between the Belt and Connecting Companies, whereby the Belt Company agreed to construct, and did construct, said line of railroad for the Connecting Company, in consideration of the issuance to the Belt Company of certain first and second mortgage bonds and stock of the Connecting Company, fully specified in said contract, and set up in Exhibit "A" to the answer of the Trust Company filed in this case; that said line of railroad, so built as aforesaid, was constructed for the sole use and benefit of the Trust Company, and for the purpose of enabling it to comply with its obligations to furnish said railroad, which was not and never has been of any value whatever to the Belt Company; that the construction of said road by the Belt Company was the result of the Trust Company's domination and control of the Belt Com-
673 pany, and, all of the moneys paid out by the Belt Company, in the construction of the railroad of said Connecting Company, passed through the hands of the Trust Company, and all the stocks and bonds, which were to have been delivered to the Belt Company under terms of said contract, likewise passed through the hands of the Trust Company, which sold or otherwise disposed of the same, and has never accounted to the Belt therefor, except as hereinafter stated; and it is alleged by complainants that, in so using the Belt Company in the construction of said road, the Trust Company is chargeable, in law and in equity, with the amount of the loss claimed by the Trust Company to have resulted to the Belt, and should be held accountable therefor.

(*m*) That, during the time it [*do*] dominated and controlled the affairs of the Belt, Consolidated, Union and Air Line Companies, the Trust Company, at various times, had said last named companies advanced to it, or take out of their earnings, and assets, large sums of money, which it pretended to expend on account of and for said companies, respectively; that, on account of the fact that the Trust Company at all time so dominated and controlled the affairs of said other named companies, the complainants are unable to state the amount of money so appropriated by it, but charge

that the same aggregates upwards of $500,000.00, and for which the Trust Company has never truly accounted for, in any manner whatever, except as hereinafter stated.

(*n*) That, during the times hereinafter mentioned, the Trust Company took upon itself the business of paying out practically all the moneys, which were paid out for the benefit of the Belt Company, and of buying for the Belt Company practically all the properties, which the latter needed to acquire in its business of operating its said railroad, and used the moneys of the Belt Company for that purpose, but, instead of taking title of the properties so purchased in the name of the Belt Company, the Trust Company caused other corporations to be formed for the purpose of holding the naked legal title to said respective properties, and caused the capital stock of said corporations, so organized, to be issued to the Belt Company, and then turned over to the Trust Company, or to be issued to the Trust Company direct, in trust for the use and benefit of the Belt Company; and the Trust Company caused its own servants and agents and employees to be elected and continued as the officers and directors of said companies, respectively, so that the Trust Company, in the same manner that it controlled the affairs of the Belt Company, also dominated and controlled the affairs of the said subsidiary companies; that, among the companies so
674 organized by the Trust Company, in the manner aforesaid, was the Elevator Company, with a capital stock of $100,000.00, of which $42,500.00 has been issued; that said Elevator Company owns two certain elevators in Kansas City, Missouri, along the line of the Belt Company, the construction of which was caused by the Trust Company, and, also, another elevator built with the money of the Belt Company upon the request of the Trust Company, and which elevator was destroyed; that no true accounting has been had between the Trust Company and the Belt Company, as to the amount of money which it actually expended for the construction of said elevators, or the manner in which it disposed of the funds received by it from the Belt Company, although requests for such accountings *has* frequently been made upon the officers of the Trust Company; that the Trust Company caused the Belt Company to assume all the outstanding debts and liabilities of the Elevator Company, and upon the same the Belt Company paid large sums of money, for which it has never been reimbursed; that, since November 8, 1900, the Court made an order in this cause, turning over to the Trust Company the said properties of the Elevator Company for the collection of rents therefrom, and the application of said rents upon the mortgages or encumbrances held by the Trust Company.

(*o*) That the Trust Company caused to be organized the Central Company, a Missouri corporation, with a capital stock of $200,000.00 of which $141,500.00, par value, has been issued, and which company was organized for the purpose of holding the title to various pieces of real estate in Kansas City, Missouri, and elsewhere, purchased for the use and benefit of the Belt Company, the Gulf Company, and others of the above named companies, so organized,

dominated and controlled by the Trust Company; that the officers and employees of the Central Company were officers and employees of the Trust Company, and continued in control and management until April, 1900; that certain pieces of real estate, of vital importance to the Belt Company, are held in the name of the Central Company, and which real estate the Trust Company caused to be purchased with the Belt funds; that the Trust Company has never truly accounted to the Belt Company, although often requested to do so, for the many sums of money paid out by the Belt to the Trust Company, in purchasing such real estate; that certain shares of stock of the Central Company, though belonging to the Belt Company, were issued to the Trust Company, which disposed of the same, and never truly accounted therefor to the Belt Company; that a large amount of property was purchased with money advanced by the Belt Company, and was really Belt property, though
675 the title thereto was taken in the name of the Central Company, and for the moneys so advanced by the Belt Company, it has never been reimbursed, unless the title to such properties has passed from the Central Company by virtue of the foreclosure sale of the properties covered by its mortgage.

(*p*) That another subsidiary company organized by the Trust Company was the Amusement Company, with a capital stock of $2,500.00, all of which belonged to the Belt Company; that said Amusement Company was dominated and controlled by the Trust Company in the same manner as the other corporations herein set forth, and all the moneys expended by it were supplied either by the Belt Company, or by the Trust Company, and charged to the Belt Company; that the Trust Company took upon itself the duty of disbursing all of said funds, and large sums of money were paid by the Belt Company to the Trust Company for that purpose, but the latter has never at any time truly accounted to the Belt Company for said moneys so received, or for the manner in which they were expended; that said Amusement Company was organized for the purpose of operating Fairmount Park, along the line of the Air Line road, and, during the time it so dominated and controlled the Belt Company, the Trust Company caused it to advance large sums of money for the purpose of fitting up Fairmount Park, and aggregating nearly $350,000.00, and for which the Trust Company, though often requested so to do, has never, at any time, truly accounted to the Belt — for the manner in which it expended such money, except as hereinafter stated.

(*q*) That the Trust Company also caused the incorporation of the Townsite Company, a Missouri corporation, with an authorized capitalization of $100,000.00, of which $92,800.00 has been issued, said company having been organized in connection with the construction of the railroad of the Connecting Company, for the purpose of acquiring property at or near townsites along the line of said road; that the Trust Company, in the same manner that it dominated the other corporations above named, caused its own servants and employees to be elected and maintained as officers and directors of the Townsite Company and did cause the Belt Company

to advance to the Townsite Company upwards of $47,000.00, which it used in the purchase of property, and was taken in the name of the Townsite Company; that substantially all the money with which the property of the Townsite Company was acquired, was advanced by the Belt Company, and that the Trust Company, instead of issuing to the Belt Company all the capital stock of the Townsite Company, issued large portions of it to itself or to other persons,
for its use and benefit, or otherwise disposed of the same,
676 and that the Trust Company, though requested so to do, has
never truly accounted to the Belt Company for the moneys so received by it for the Townsite Company, or the manner in which it was expended except as hereinafter stated.

(*r*) That the Trust Company also caused the incorporation of the Gulf Company, for the purpose of constructing a line of railroad from Kansas City, Missouri, to the Gulf of Mexico, and in order to acquire the funds, with which to construct such railroad, it caused the railroad company to issue its first mortgage to secure an issue of bonds, the amount of which outstanding on April 1, 1899, was $23,000,000.00, at which time a default was made in the payment of interest on the bonds, and a bill was forthwith filed for the foreclosure of said mortgage, and receivers were appointed, and proceedings had, resulting in the sale of said railroad under the foreclosure and decree.

(*s*) That the Belt Company, the Union Company and the Air Line, were largely dependent upon the Gulf Company for their earnings so that it was well known to the Trust Company that, if the Gulf Company went into the hands of receivers, it would necessarily result in the insolvency of the Belt and the other companies named, and would, ultimately, necessitate their being also placed in the hands of receivers, and the foreclosure of the mortgages upon the property; that the Trust Company, by reason of its domination and control over the affairs of the Gulf Company, well knew, prior to the 1st day of March, 1899, that the Gulf — would make default in the payment of the installment of interest due on that date, and that such default would result in the filing of a bill to foreclose the mortgage, and for the appointment of receivers for the road, and that thereupon, the Trust Company set about to contrive a scheme whereby it might appropriate to itself, before the Belt Company passed beyond its control, all of the remaining property and assets of the Belt Company, which were in such shape that they could be transferred to the Trust Company; that the Trust Company caused to be exhibited to its own officers and employees who were holding positions as officers and directors of the Belt Company, various claims and demands which it alleged were due and owing by the Belt Company to it, and caused such officers to pass upon and approve said claims and demands, and thereupon caused such officers and directors of the Belt Company, between March 31, 1899, and February 9, 1900, to execute to the Trust Company various pretended promissory notes and other negotiable instruments, for the alleged purpose of securing to the Trust Company

the payment of the same pretended claims, which it held
677 against the Belt Company, and, also, caused its own officers and employees to cause to be delivered or transferred to it various stocks, bonds, and accounts and other personal property belonging to the Belt Company, as collateral security for the pretended indebtedness of the Belt Company to the Trust Company: that the notes so fraudulently caused to be made by the Belt Company to the Trust Company, and the stocks and bonds held as collateral security therefor, are fully stated on pages 19, 20 and 21 of the second amended and supplemental ancillary bill.

(*t*) That said notes were executed, and said properties turned over as collateral security, solely by virtue of the domination and control of the Trust Company over the Belt Company, in the manner hereinbefore stated; that the Trust Company continued to keep its own officers, servants and employees filling the positions of officers and directors of the Belt Company, until about the month of April, 1900, and that at no time was there any true accounting had between the Trust and the Belt Companies, for or by reason of the matters hereinabove set forth, except such an accounting as the officers and employees of the Trust Company, so holding like positions of the Belt Company, pretended to make in looking over and going through the form of approving the accounts and statements rendered to the Trust Company by the Belt Company; that, since the filing of the original ancillary bill herein, the Trust Company has prepared and submitted a statement of account which it pretends and claims to be a full and complete statement as to all matters and transactions had between it and the Belt Company, and the other companies aforesaid, covering the matters hereinbefore set forth, but the complainant charges that the said account is insufficient, untrue, and does not properly or truly account for the stocks and bonds and other properties received by the Trust Company from or on account of the Belt Company and the other companies named; that many of the charges against the Belt and other companies are untrue, illegal, unauthorized, and ought not in law or equity be permitted to stand as charges against the Belt and other companies; that the Trust Company, in making said account, had omitted therefrom a large number of credits to which the Belt and other companies are entitled.

3. The answer of the Trust Company in effect admits the incorporation of the various companies hereinbefore mentioned, but denies that it dominated or controlled such corporations in the manner stated in the Bill, or in any other way, or that it caused said companies, or any of them, to do any of the things
678 alleged by the complainants to have been done by them, at the direction or instigation of the Trust Company, and it further denies that complainants are entitled to have any accounting in this cause.

Statement of Witnesses Cone, Woods, Telfer, Wilcox, McCarty, Howe, Nolthenius, Pickering, and Martin.

4. In support of their claim that the Belt and other companies were dominated and controlled by the Trust Company, the complainants rely, principally, upon the statements in the record made by witnesses Cone, Woods, Telfer, Wilcox, McCarty, Howe, Nolthenius, Pickering and Martin, all of whom were intimately connected with one or more of the companies involved in this cause.

(*a*) Robert B. Cone testified, in substance, that he was connected with the Missouri, Kansas & Texas Trust Company when organized, February 14, 1889, and, prior to that, with the Missouri, Kansas & Texas Real Estate Trust Company, a Kansas corporation, and occupied every position with the Trust Company from office boy to secretary; that, in November, 1889, he was elected cashier, in May, 1890, assistant secretary and cashier, in January, 1892, assistant treasurer, in March, 1892, secretary, and in May 1896, severed his connection with the Trust Company and moved to Boston (Rec. 57-34777 to 34781); that, during the time he was with the Trust Company, it engaged in the business of organizing companies, and acting as their financial agent in the sale of stocks and bonds; that the Belt Company was the Trust Company's first proposition of that kind, and, continuously thereafter, its principal business was in the promotion line; that the Trust Company also, organized and promoted the Air Line, Consolidated and Union Companies, and some other companies, and its profits consisted largely in selling, marketing and trading in the stocks and bonds of these companies, and it did little outside business; that A. E. Stilwell was connected with the Old Kansas corporation, and was the organizer and leading figure in it, and continued to be the leading figure in the Trust Company (Rec. 57-34788 to 34790); that he (witness) attended principally to the minute books of the Trust Company, and the Gulf Company; that, as to Stilwell being the dominating and controlling figure in these companies, he was the president of the Trust Company, and the leading officer of the other companies, which were referred to as the Stilwell companies (Rec. 57-34794 to 34795); that the Trust Company issued prospectuses of the new companies and sent them around and invited investments (Rec. 57-34802).

679 (*b*) W. S. Woods testified, in substance, that he was a stockholder and director in the Trust Company, had general and special knowledge of its railroad affairs, and that it had been engaged in promoting the Union, Belt, Air Line, Connecting, and Consolidated Companies, as well as other enterprises, and as the promoter of such enterprises, it was necessary for the Trust Company to market their securities; that in the building of the Belt Railroad, the Trust Company organized the Construction Company; that he regarded all these railroads as Trust Company enterprises, and the Trust Company as their promoter, and this would include the Air Line, Consolidated, Belt, Union and Northern Connecting roads,

and it was the general understanding among the directors of the Trust Company that it was the promoter of these railroads (Rec. 53-31742-'44).

(c) John C. Telfer testified, in substance, that in 1890, he became auditor of the Belt, also of the Air Line, when constructed kept the books of the Construction Company, had supervision of the accounts of the Union Terminal and Consolidated Terminal, was also auditor of the Kansas City, Nevada & Fort Smith, and continued as such from May, 1890, until June, 1893, when he became assistant general auditor of the Missouri, Kansas & Texas Railroad Company in St. Louis, but prior to that, for three weeks, he was general auditor of the Trust Company. At the time he was acting as auditor of the Trust Company, Stilwell gave him a list of 28 subsidiary companies, for which he was to arrange the form and system to be used by these different companies in keeping their accounts, and, Stilwell gave him to understand that he was to have oversight of the accounting of these companies, stating that he wanted the Trust Company officials to handle, take charge of, and care for, the accounts of these various companies, which were to account to witness. At that time he had severed his connection with the subsidiary companies, though he was an official of the Trust Company. Up to that time, there had been no general auditor of the Trust Company (Rec. 17-8685-'91). The officers of the Belt, Kansas City Nevada & Fort Smith, and other companies, were in the same building, and on the same floor as the Trust Company offices, and the officials of the Belt and Trust Companies were "like one family of officers and clerks." Howe, who was cashier of the Belt, also acted as cashier of the other subsidiary companies. Dobson & Trimble, later Trimble & Braley, represented the Trust Company, as well as the Belt, Consolidated, Air Line and Union Companies, and all of the 28 companies a list of which had been handed to witness by Stilwell (Rec. 17-8692 to 8700.)

680 Stilwell, president of the Trust Company, received as vice president of the Construction Company, from July, 1889, to November, 1889, $50 a month, and subsequently, from December 1889, to July, 1900, $100 per month and he also received from the Belt Company from May 1, 1890, a salary of $100 per month. W. S. Taylor (one of Belt Company's officers), received a salary from the Construction Company of $50 per month from August 1, 1889, to November 30, 1889, and from December 1, 1889, to April 1, 1890, $100 per month, and he also received compensation from the Belt from May, 1890, or $100 per month (Rec. 17-8706). From the time of witness' connection with the Belt Company, until he left the Trust Company, the bulk of the latter's business was that of promoter of railroads and other subsidiary companies, the Trust Company having organized and incorporated various companies in its office, and used its clerks and others as incorporators, and for the first board of directors. At the time he became connected with the Belt Company, A. L. Howe was its cashier, and also the cashier of the Missouri Coal & Construction Company, which was then constructing the Kansas City, Nevada & Fort Smith Railroad (afterwards

called the Pittsburg & Gulf) and both of which companies were being promoted by the Trust Company and Taylor, as manager of the Trust Company, indicated to Howe what payments should be made, and what moneys should be paid out to these companies (Rec. 17-8945-'46). The Trust Company had in its charge, and kept in its vaults, all the securities owned by the Belt and these various subsidiary companies, in which it was interested. The minute book, stock books, ledgers and bond ledgers, were kept in the trust Company's vaults for safe keeping. The Belt Company had a vault of its own in the Trust Company building, but nothing was kept there except books of accounts, cash books, ledgers and journals. Cone and Wilcox were the custodians of the securities of the Belt, Union, Consolidated and Air Line, and kept them with the minute books, in the vaults of the Trust Company (Rec. 17-8947-'49).

As to the relations between the Belt Company and the Trust Company, and the control exercised by the Trust Company over the financial affairs of the Belt, witness stated that he had a great many conversations with Stilwell at various times, and was given to understand that the relations between the Belt and Trust Companies were very close, and that he should take his instructions from Stilwell, or his confidential clerk, Cone, in regard to entries of financial transactions. Witness stated "I cannot definitely point out any particular conversation, but it was a matter of daily occurrence in my intercourse with Mr. Stilwell, that I came to understand that
681 I must do so and so in regard to such transactions, and, if I did not do as I was told, I would simply be discharged."

These conversations were held in the Trust Company office, and witness would consult with him as president of the Trust Company, "because in those dealings he was all powerful." In other matters, witness would go to Martin, as president of the Belt. The conversations between Stilwell and the witness apply to matters between the Trust Company, Union Company, Consolidated Company, and Air Line, and witness was never permitted to question any of the Trust Company's charges made for fees and commissions as against any of the railroads. Stilwell instructed him to take instructions from Cone, his confidential clerk and secretary, and, throughout the books of the Belt Company and other companies will be found such notations "as per advice of R. B. Cone" or "as per advice of F. B. Wilcox", and these entries mean that advice was received from Cone or Wilcox. As auditor of the Belt, Union, Consolidated and Air Line, witness had power to originate charges, and make entries between these companies and other companies, but not as between these companies and the Trust Company. As to all charges growing out of the transactions between the Trust Company building department and these railroad companies, such charges were originated upon bills of H. C. Lindsay, and witness was not allowed to enter into the merits or demerits of the bills sent to him by Lindsay, and he was required to make entries of those charges and place them upon the books without investigation. At times, the Trust Company would direct him, as auditor of the Belt, to open on the Belt books, certain accounts (Rec. 17-8963-'70). In

the organization of the Union Air Line and Consolidated, Stilwell, among the officers of the Trust Company, was the moving spirit, and most active in that respect (Rec. 17-8977). The conditions existing between the Trust Company and the Kansas City, Nevada & Fort Smith Railroad Company, afterwards the Pittsburg & Gulf, were much the same as those existing between the Trust Company and the Belt, and the other subsidiary companies (Rec. 17-8981). Later on, the Construction Company undertook the construction of the Air Line, and issued its stock for the purpose of raising money to build the road, and a clerk of the Trust Company made the entries in the general journal of the Construction Company, the entries appearing on pages 51, 52 and 53 of the journal, being in the handwriting of E. J. Davison, clerk of the Construction Company, and were on that journal when the books were turned over to the witness by the Trust Company (Rec. 17-9010 to 9016.) On page 18, of the Consolidated Company minute book, the recital that the
682 witness was elected auditor of the Consolidated Terminal is in the handwriting of J. T. Nolthenius, who at that time was connected with the Trust Company (Rec. 17-9057). At the time that Stilwell appointed witness general auditor of the Trust Company, he stated what the salary would be. That it is usual and customary, when a railroad executes its notes, to have them pass through the hands of the auditor for original entry, but that none of the notes of the Belt Company payable to the Trust Company passed through his hands in that manner (Rec. 17-9058 to 9061.) In building the first division of the Belt Company by the Construction Company, he compiled the Construction Company's books from data furnished him and when completed, he would turn them back to the Trust Company (Rec. 17-9064-65). Stilwell as well as others connected with the Trust Company, referred to these companies as subsidiary, and he indicated to witness that he wanted a man connected with the Trust Company to prescribe the method of the accounting of these various companies (Rec. 16-9068-69). The officers of the Trust Company and the other companies were in the same building "and the Trust Company was the overshadowing organization in all these matters and things that came up and the officers of the Trust Company were in constant communication with him, and he thought very little of them but as officers of the Trust Company."

When Stilwell handed to witness, as auditor of the Trust Company, the list of 28 companies, it was his recollection that Stilwell said in substance, to him, that these subsidiary companies were creatures of the Trust Company, and managed by it (Rec. 17-9125-26).

(*d*) Frank B. Wilcox testified, in substance, that he was assistant treasurer of the Missouri, Kansas & Texas Trust Company, in April 1892, and remained with the Trust Company until 1900, and, during that time, had general supervision of the Trust Company books, it being his duty to see that the accounts were correctly kept. W. S. Taylor was nominally treasurer of the company, but his office was in Philadelphia, though the Trust Company books and bulk

of the securities were kept in Kansas City. The active management, supervision and control of these books was in the witness. Later on, Mr. Willey became auditor, and after that, he, witness, did not give much attention to the books, except in a supervisory way. In the fall of 1899, he became manager of the Trust Company at Kansas City, after the main office had been moved to Chicago, and he had a great deal to do making or having made entries upon the Trust Company books (Rec. 34-17991-94). The
683 offices of the Trust Company were at 7th and Wyandotte streets, Kansas City, Missouri, in the Missouri, Kansas & Texas Building, and in which were located the offices of the surety department, and building department, of the Trust Company, and the entire building was, in fact, occupied by the Trust Company, and the companies in which it was interested. The surety department provided bonds for these different railroads, and the building department did construction work for them (Rec. 34-17995-'98). The men actively engaged in the Trust Company, and also some of the investors who were directors therein, developed the policy of extending the Belt system of Kansas City, and, in carrying out such purposes, many other companies were incorporated for the purpose of developing the natural resources, locating town sites, and creating business enterprises along the roads; and, in the organization of these companies, the same men, who were acting as officers of the Trust Company, were selected as the officers of the various companies promoted by it, and these men directed the development and operation of the subsidiary companies. There were 40 of these corporations so organized by the Trust Company, and among the number were the Belt, Consolidated, Air Line, Connecting and Gulf Companies, and the Elevator, Central, Amusement, and Townsite Companies; also, the Arkansas Construction Company, Philadelphia Construction Company, Shreveport & Gulf Terminal Company, Port Arthur Land Company, Port Arthur Townsite Company, Port Arthur Rice & Irrigation Company, Missouri Irrigation & Pine Land Company, Pine Land Manufacturing Company, Plymouth Pine Land Company, Central Coal & Coke Company, Randolph Land & Improvement Company, State Realty Company, Second Street Improvement Company, Oronoke Mining Company, Victoria Zinc Mining Company, Chicago Zinc Mining Company, United States & British Columbia Mining Company, Liberty Bell Gold Mining Company, Janssen Place Land Company, Exchange Building Company, Port Arthur Channel & Dock Company, Pittsburg Land Company, Missouri Water & Light Company, Southwest Missouri Light Company, Nevada Light Company, American Incandescent *Land* Company, Stilwell Curtain Fixture Company, Stilwell Automatic Shade Company, National Surety Company, Missouri, Kansas & Texas Building Company, Horse Show Monthly Publishing Company, Ozark Orchard Company, and Ozark Stone & Lime Company.

When witness resigned and left the Trust Company, he resigned either as president, vice-president, secretary, assistant secretary, treasurer, assistant treasurer, or director from 43 of this class
684 of companies, organized in carrying out the original policy of the Trust Company in the promotion business. The di-

versity of the business, represented in the different companies promoted, contemplated railroad construction, railroad operating, land and townsite handling, building of elevators, erection and operation of light and water companies, building of warehouses, docks, hotels, ship canals, development of fruit orchards, buying and selling of timber land, and development of mines, stone quarries, building of houses, etc. Whenever a project was contemplated by any officer of the Trust Company, usually Stilwell, Martin, Mosher, Trimble, Braley and Taylor, would suggest the organization of the company for that purpose, and the incorporation papers would then be prepared and the expenses of incorporation were usually paid by the Trust Company, and included fees of the Secretary of State, attorneys' fees, the cost of stock books, ledgers and seals, though the Trust Company would be reimbursed therefor later on by the companies so organized by it. The men named would usually decide at a conference held in the Trust Company office, who would be selected as officers of the newly incorporated company, but Stillwell's views as to this were more often accepted, "he being a very influential man among this group of men, and as the years rolled by became more so, and his desires became more and more deferred to by the others, he being the man who obtained most of the capital for the purpose of nearly all the companies. Stilwell's influence grew in power, and his desires, during the later years, were generally complied with, as he became the ruling spirit of the entire crowd; and by 'ruling spirit' I mean the ruling spirit of the Trust Company. If Stilwell wanted some certain men elected as a director of any of these companies, he would express it, and have him elected." (Rec. 34-17998 to 18006).

After these companies were organized, the officers of the Trust Company would go ahead and acquire property for the companies, and arrange, when necessary, for the Trust Company to furnish the money for such purposes. The conclusions as to what properties should be acquired, and as to shaping the business policies of these companies, were generally reached in the Trust Company offices, and most of the participants were the officers of the Trust Company, and its attorneys and directors, and these persons would generally select the officers of each particular company from the employees, officers or directors of the Trust Company, and also determined how the capital stock should be issued. After these new companies had been incorporated, these same men would direct the issuance of its securities, and the Trust Company would take an active part
685 in marketing them. In the early stage of these new companies, the Trust Company would dispose of the new securities, and before their sale would, when necessary, advance the money to those companies for these expenses, sometimes taking the securities and paying for them, and at other times arranging with such companies in respect to the price to be paid for such securities, when sold by the Trust Company, and also as to the commissions, trustees' fees, or bonuses to be allowed by those companies for the services rendered by the Trust Company; in other words, the Trust Company undertook the general financing and managing of those

companies, and, in view of their relations with the Trust Company, they were usually operated in a manner following the policy desired by the Trust Company, the books of the majority of the companies being kept in the office of the Trust Company, and by its clerks.

This specially applies to the books of the Elevator Company, Fruit Auction Company, Central Company, and the State Realty Company, and, also, in respect to the Union, Air Line, Consolidated, Belt and Connecting Companies, as to their bond and stock ledgers, stock certificate books and minute books, which were kept in the Trust Company vaults. The Trust Company offices were also the general offices of those companies organized to do business outside of Kansas City, and the clerical work was done here. The securities of the Belt, Union, Consolidated, Air Line and Connecting Companies, were kept in the Trust Company vaults until they were disposed of. The Trust Company, through its officers, was the custodian of the stock and bond ledgers and minute books of these various companies and Cone was the Trust Company officer, so delegated to look after the stock certificates and other books and to keep custody of these securities. When any of the securities were sold, a report would be made to the witness, who would get them out of the boxes and have them delivered to the purchaser and collect the proceeds. The Trust Company had foreign offices and agencies in London, Amsterdam, Berlin and Paris. The Philadelphia office was more of a retail department for these securities, and the Kansas City office was in the nature of a wholesale department, the Philadelphia office being a branch of the Kansas City office. Stilwell sold the bulk of the bonds and securities of these various companies, when he was away from Kansas City, and reports would be made, indicating the prices for which they were sold, and, also, the price to be allowed to these companies for their securities so sold, which would be indicated or fixed by Stilwell; sometimes there was a regular price allowed the
686 companies for their securities, and, if there was any doubt as to the amount, he would go to Stilwell for information, and Stilwell would indicate the price that should be allowed for the securities sold, the railroad companies usually being credited at a price lower than the price obtained by the Trust Company; the range of difference would vary from one per cent to ten per cent. Sometimes the Trust Company would buy the securities direct from those companies, on which a commission would be charged, in addition to a stock bonus, and, in re-selling, the Trust Company might give the subsequent purchaser the same proportion of stock as a bonus with the bonds, or re-sell the bonds and keep the balance of the stock in its own treasury as a part of the profits of the transaction. In some cases, where Stilwell would sell the securities at certain prices, he would instruct the witness to credit the Belt at a lesser price. There were many instances of that kind. As to the amount of the bonus or commission, or trustee's fees, to be charged by the Trust Company for the promotion of those companies, or for services rendered by it in the sale of the securities, it would rest largely with Stilwell to regulate the same (Rec. 34-18007 to 18021).

The officers and directors of those companies, being usually the

same men holding the position of officers and directors in the Trust Company, the decision as to what the Trust Company would take for its services, would be determined by the same men who had planned and arranged for the organization and policy of the different companies. For a long time, the securities belonging to the railroad companies, and in the custody of the Trust Company, were kept in the same boxes that the securities of the Trust Company were, then afterwards receipts were given to the railroad companies for such securities (Rec. 34-18025-'27).

Originally, the business of the Trust Company was that of building houses and making loans upon real estate, but, subsequently it developed broadly into the general promotion business; the profits of the Trust Company being through the acquirement of securities for its services, and on account of the securities bought by it, and resold, and, also, through the commissions, bonuses, earnings or profits on securities it might sell for the subsidiary companies. The bulk of the Trust Company's business arose out of its original promotion projects, and the handling of the securities of the companies promoted; but the volume of its business decreased when it became difficult to promote new enterprises, which seriously affected its net income (Rec. 34-18027-'033). As a general thing, the salaries
687 of the officers of the newly incorporated companies would be determined by Stilwell, but in most cases, they were merely nominal, except occasionally to an officer of the subsidiary company, who was active in its management. In many of the companies, the officers received no salary, except what they received from the Trust Company, and were expected to discharge the additional duties without additional salary from the other companies. The directors, officers or clerks of the Trust Company, who were made directors of the subsidiary companies, would resign when indicated to them, so that an investor could be elected to take their place, and such requests for resignations usually came from Stilwell. The journals, cash books and ledgers of the Belt, Consolidated and Union Companies were kept in the vaults of those companies, under the control of the auditor or treasurer, or assistant treasurer of those companies. The term "subsidiary" was generally used when witness was with the Trust Company, to indicate those companies, which had been organized by the Trust Company, and whatever control the Trust Company had in them, with the exception of the Central Coal & Coke Company, continued in spite of the fact that the Trust Company did not own any controlling amount of stock in those companies (Rec. 34-18033-'37). The Central Company is one of the subsidiary companies, and was organized for the purpose of acquiring properties for the railroad corporations, in which the Trust Company was interested (Rec. 34-18038-39). The State Realty Company was organized as a direct subsidiary company to the Trust Company, for the purpose of acquiring, at foreclosure, the properties, upon which the company had made loans, the Trust Company holding all of the stock of the State Realty Company (Rec. 34-18040-'42). Stilwell was a heavy stockholder in the Trust Company, and so were Martin and Taylor, and they retained their hold-

ings largely as permanent investments. They also owned stock, from time to time, in the Belt Company, and other railroad companies promoted by the Trust Company, but these securities would be sold from time to time. Martin was the president of the Belt Company, active in its management, and received a good salary from it. The others were actively engaged in the Trust Company. Stilwell's salary from the Trust Company was $10,000.00 annually, and one year perhaps $20,000.00, but it was not over $100 or $150 a month from the Belt, or any of the companies subsidiary to the Belt, and from some of them no salary at all. The ideas of Stilwell were usually considered important by all of those in charge of the Belt, Union Terminal, or Consolidated Terminal, and as a rule his ideas would predominate and be adopted (Rec. 34-18044-'48).

688 It was a frequent occurrence for Stilwell to inform witness that he had sold certain securities at a certain price, and then direct that a credit be given to the Belt, or these auxiliary companies, at a less price, and, oftentimes, securities would be sold in that way, and then purchased by the Trust Company from the other companies, so as to fill the orders. As to Stilwell having a wide discretion in the sale of securities, witness did not remember of any question ever being raised by any party as to the prices at which he marketed them, nor did he recall that any objection was ever raised by any one in respect to the sale of the securities by him or the Trust Company. In nearly every case where the stock would be sold by Stilwell at one price, and purchased of the Belt at a lower price, the lower figure would be credited to the Belt Company on the Trust Company books. The parties, who had active management of the sale of those securities, and who did the work for the Trust Company in marketing them, were also officers or employees of the Belt Company and drawing a salary from both companies (Rec. 34-18052-'57).

The Fairmount Park proposition was one of Stilwell's ideas. Although witness was president of that company, Stilwell and others, who were not officers of it, negotiated the contract for the electric cars in connection with the Metropolitan system, whereby they were to be running to the Park instead of the Air Line steam cars, and he, witness, had nothing to do except to sign the contract which was prepared for his signature (Rec. 34-18066-'68). There was a contract between the Belt and Connecting Companies for the building of the Connecting Railroad by the Belt, and witness supervised a great many entries on the books of the Trust Company with reference to that contract, the Connecting securities going to the Belt Line from time to time as the work progressed, and the Trust Company having the custody of such securities after they were issued, and when they belonged to the Belt (Rec. 34-18068-69) The attention of witness was called to his letter to Stilwell, attached to the Trust Company journal voucher, appearing in Rec. 10-5394-5, showing a charge against the Belt for $30,850.00 in Connecting Company interest coupons paid by the Trust Company, and, he stated that it was the usual and customary way of securing advices from Stilwell in reference to entries to be made upon the books,

that if Stilwell was in the city, witness would consult him, and if he was away, he would write to him in respect to the entries to be made, and which would be made as directed by him on the books of the Trust Company, and then a slip would be sent to the Belt Company, the same entry, in a reverse order, to be made upon its
689 books (Rec. 34-18074-'77). There was nothing unusual about this letter to Stilwell in January, 1899, asking which company he prefered should owe the Trust Company, for Stilwell was in the habit of either directing verbally, or by letter, which company should be charged with each account, and his instructions were carried out, and entries made accordingly, on the books of the Trust Company, and on the Belt Books. The Belt Company never actively opposed any policy that was inaugurated or established by the Trust Company (Rec. 34-18087 to 18094). The Trust Company advanced to the Fruit Auction Company all the money represented by its capital stock, excepting a small amount received as income during its brief existence (Rec. 34-18247-48).

It was the custom of the Trust Company to have the custody of the stocks and bonds of the various allied companies, and to keep them in its possession, and whatever was represented by the books as being the amount of the stocks and bonds in the treasury, was understood to be in the Trust Company's possession (Rec. 34-18415). The stock ledgers, bond ledgers, stock transfer book, and minute books of these various companies, were kept for the convenience of the Trust Company, because the work was being done at the Trust Company's office. The minutes of the meetings were written up in the office of the Trust Company, and it was convenient to have those minutes books close at hand. The Trust Company had specially provided a room for directors' meetings (Rec. 34-18323-24). The Belt offices were in the same building, adjoining the Trust Company's office, from 1894 to 1900, but, prior to that time, they had been at 2nd and Wyandotte Streets, from where they were removed because there was not sufficient office room available at the depot, and it was more convenient to have the auditing offices of the Belt and its allied companies located closer to the Trust Company. The Bond and stock ledgers and transfer books of the Belt, and minute books, were kept in the custody of the Trust Company (Rec. 34-18348-49). The Construction Company, after completing its operations in connection with the Belt road, was dormant five or six years, then was revived, its capital enlarged, and used in the construction of the Gulf Railroad (Rec. 34-18351). The purchase of securities by the Trust Company from these railroads was not always in the shape of a written contract, the arrangement being usually made between the president of the Trust Company and the officers of the Belt. In many cases Stilwell and Martin would agree upon the transaction and, in others, Stilwell would act for both companies; unless the matter was one of great importance, these purchases would not be a matter of general discussion between the officers of the two companies. "It was simply a matter of the Trust
690 Company using its best efforts to dispose of securities; and either Mr. Martin, or Stilwell, or Taylor, would effect the

sales, and they would be accepted by the Belt, and the usual entries covering them made upon the books. And these men had discretion in the matter or used discretion in the matter." (Rec. 34-18353-54). The Trust Company had the custody of the securities of the Connecting Company, after they were issued to the Belt (Rec. 34-18369). As the Belt constructed the Northern Connecting railroad, for the Connecting Company, the latter issued its securities to the Belt, which turned over to the Trust Company for disposition and sale for its account, and the transaction was treated and regarded by the Trust Company as for the benefit of the Belt. (Rec. 34-18369-70). The Fruit Auction Company was an enterprise started by the Trust Company, whereby daily, or almost daily, auction sales of fruit and produce was inaugurated, and held in the warehouse building at 2nd and Main Streets. It was operated for several months, quite a business being done, but afterwards abandoned (Rec. 34-18396).

In respect to the statement made by the witness to the effect that these various corporations were operated according to the policy of the Trust Company, he stated that he meant that the officers of the Trust Company had such policies and that the operations of the Trust Company followed these policies (Rec. 34-18416).

The Belt stock, after it was exchanged for the stock of the Air Line and Union Companies, and after the consolidation of the Belt with the Consolidated, was largely held in Europe, and that which was held in this country was held principally in the east: the stockholders were numerous and scattered (Rec. 34-18416).

As to the building of the Northern Connecting Railroad, witness stated that it was his recollection that at the outset the Trust Company intended to construct the road, but afterwards it was decided to have the Belt Company build it. At the time the Connecting Company was incorporated, the securities issued by the Belt and its allied companies had nearly all been sold, and it was thought advisable by the officers of the Trust Company to have the Belt Company construct it, and that the Connecting Company would issue its securities, which would pass from the Belt to the Trust Company, and be marketed by it, and moneys realized therefrom. It was also his recollection that it was considered that the business of the Trust Company would be augmented in a profitable way, by organizing the Connecting Company, and getting its securities and marketing them, and that such was understood to be a con-
691 tinuation of the general policy, by which the Trust Company and its allied companies had been operated (Rec. 34-18432-'35).

The meetings of the Belt stockholders were usually arranged to be held about the same time as those of the Trust Company, and there were generally a small number present. The Trust Company would secure proxies from the non-resident shareholders, so as to have a majority present at the meetings, and these proxies would usually run to Stilwell, and he, as such proxy, would vote the stock at these meetings. Cone looked after the matter of obtaining a majority of the proxies, and he was instructed by Stilwell to keep

writing to stockholders until he had a majority. The statements usually presented at these stockholders' meetings were balance sheets, showing the assets, liabilities, earnings and expenses and the net result in surplus, but in those statements there would be no specification, showing the amount in detail, the amount of commissions or of interest, or of other charges by the Trust Company, and in the statements sent out to financial publications, or to stockholders, these matters would not appear in detail in any of those statements (Rec. 34-18437-'40).

(*e*) R. J. McCarty, in substance, testified that for five or six years he was auditor of the Gulf Railroad Company, and its receivers, becoming associated with the company in 1897, and continued while the receivership lasted. He was also auditor of the Connecting railroad, and of the Omaha, Kansas City & St. Louis, and Quincy, Omaha & Kansas City, all of said roads being under the same general management and control (Rec. 25-13147-48). The offices of the Gulf and of the Trust Company were on the same floor of the general main office building of the Trust Company, but in adjoining rooms. He had frequent dealings with the Trust Company officers, who were joint officers of the Trust Company and Gulf Company, but, in their dealings, they did not distinguish themselves as officers of one company from that of the other, so that very often communications from either company would be on the letter-head of the other; and, it was frequently difficult for him to decide whether he was dealing with an officer of the Trust Company or of the railroad company. He knew that Stilwell was the controlling spirit of all these different enterprises, the Trust Company, the Belt Company, the Gulf Company, the Connecting Company, and the other lines, was an organizer and promoter of various enterprises, and whatever he wanted done, or decided, was done.

There were services for switching rendered to the Connecting Company by the Belt and Gulf, from month to month, for
692 which bills were rendered, but unpaid, and notwithstanding that fact these roads continued to render services to the Connecting railroad until the receivers were appointed for the Belt, and witness resigned as auditor for the Connecting Company. After the bills were due and not paid, and prior to appointment of receivers for the Belt, these bills kept piling up right along (Rec. 25-13253-'60).

(*f*) A. L. Howe, in substance, testified that, early in 1890, he was appointed assistant secretary of the Belt Company, and continued as such until the year 1900, and, during all that time, he was informed and instructed that in all financial transactions any instructions that should be given by Cone or Wilcox, of the Trust Company, should be accepted and followed accordingly; that during the month of July, 1899, Wilcox gave instructions that certain minutes should be placed upon the minute books of the Belt Company, whereby a large number of shares of stock of various railroads and other companies, should be turned over to the Trust Company, and that, in pursuance of such directions, he, witness, signed said minutes, and the stocks were turned over to the Trust Company;

that it was a matter of frequent occurrence that the affairs of the Belt, particularly the financial affairs, would follow a course indicated and directed from communications received from Cone or Wilcox, and, in pursuance of such instructions, entries would be placed upon the Belt books, in accordance with instructions (Rec. 49-30245-46).

(*g*) J. T. Nolthenius, in substance, testified that he entered the employ of the Trust Company in 1891, became assistant treasurer in 1896, and fourth vice-president, and so continued until the year 1899, when he was elected third vice-president of the Trust Company; that, in July, 1899, Wilcox, assistant treasurer of the Trust Company, called upon him as treasurer of the Belt Company, to turn over to the Trust Company a large amount of stocks and bonds of the Union, Consolidated, Air Line, and Connecting, and other companies, belonging to the Belt Company; that, he, witness, objected, but owing to the position then held by the Trust Company in relation to the affairs of the Belt Company, his objection was overruled, and said stocks and bonds were turned over to the Trust Company, in connection with a certain indebtedness then held by it against the Belt; that during all the time he was with the Trust Company, and in the year 1900, the minute books, seals, stock books, stock ledgers and bond ledgers of the Belt Company, Consolidated Company, and the various other companies, were made up by employees of the Trust Company, kept in the vaults of the Trust Company, and in its care and custody, and under its direc-
693 tions and supervision (Rec. 49-30248-49).

(*h*) James H. Pickering, in substance, testified that he became superintendent of the Belt Company in February, 1892, continuing as such until March, 1899, and his duties also extended over the Consolidated Union and Air Line. Shortly after becoming acquainted with Stilwell in 1890 or 1891, the latter advised him in respect to the terminal facilities of the Belt road, and with reference to extending the Belt into the West Bottoms, and around into Kaw Valley. At that time, neither the Consolidated nor Union had been constructed, nor their franchise obtained. Witness was then interested in a railroad, known as the Kansas Circular Railway, and the franchise for which was granted in Kansas City, Kansas, and he went to Stilwell and Mosher, in the Trust Company's office, and made them a proposition for the purchase of these franchises, and in going to see Stilwell and the others at the office of the Trust Company, he supposed he was dealing with them as officers of that company. The proposition made by Stilwell and others to acquire the franchise of the Kansas Circular Company was rejected, and thereafter, upon the suggestion of witness, a franchise was obtained for the Union Terminal railroad over practically the same ground as that of the Kansas Circular Railway (Rec. 35-18590-'93).

That he was a stockholder and director in the Union Company and attended its annual meetings, but never attended any directors' meetings, other than annual meetings, nor was he ever notified of any such meetings, and he did not know of any such meetings ever having been held (Rec. 35-18601). That the first time he ever

heard or saw the contract for the building of the Union Terminal by the Belt (appearing at pp. 7308-'10 of the record), was a few days before he testified, when his attention was called to it by counsel, and, as a director of the Union Company, he never ratified or approved the contract, nor was it ever submitted to him for his inspection or approval (Rec. 35-18603).

He was elected director of the Union Company in 1896, and was in Kansas City all the time, except about two months' absence in England in 1898 (Rec. 35-18606-'06), and, as a director of the Union Company, he never ratified or approved the contract for the extension of the Union Terminal to a connection with the Santa Fe railroad, neither was such contract presented to him for inspection or approval (Rec. 35-18606-'08). As a director of the Union Company the contract appearing in Johnson's exhibit 155, page 7879, for building certain spurs into the packing houses, was never submitted to him for his approval or ratification (Rec. 35-18612). As to the entry appearing at page 3941 of the record, being for 250 Union bonds for extension to the Stock Yards, he was
694 familiar with that extension, but as a director never knew anything about it, and never ratified or approved it (Rec. 35-18625-'26).

The contract, appearing at page 7890 of the record, dated July 6, 1898, providing for certain facilities for the St. Louis & San Francisco Railroad Company, and the St. Joseph & Grand Island Company, was never submitted to him as a director of the Union Company, for his approval or ratification (Rec. 35-18627); nor, as a director of the Union Company, did he ever ratify or approve giving to the Belt 350 bonds for any purpose, this being the transaction whereby the Belt received from the Union 350 bonds for the purpose of clearing up the floating indebtedness of the Belt (Rec. 35-18641-42).

He was frequently in conversation with officers of the Trust Company, and knew that it financed various other companies, in addition to the railroad companies, and Stilwell would frequently send for him to take prospective purchases of the Company he was promoting, over the Belt Line, so as to explain to them the good features of that system; and he often heard Stilwell call Cone or Wilcox and give them instructions for making charges against the Belt, or this or that road, and tell them to use the money of one company for another company to help it out; that it was a frequent occurrence to hear instructions as to charging one company and crediting another (Rec. 35-18671-73). Later on, it became a custom for the heads of the various departments of the railroad company, and the officers of the Trust Company, to lunch together at the office of the Trust Company, and at that time, the business of the various companies, that is, the Air Line, Union, Gulf, and all the collateral companies, 30 or 40 of them, would be discussed, and at such conferences, Stilwell was the only man who gave any instructions as to the affairs of the Trust Company and the various railroad companies, which he had organized. "Stilwell was always the supreme dictator and issued the instructions, and we obeyed

them. We would advise him, and he would take our advice, just as he pleased."

He, Stilwell, always looked after the interest of the Trust Company first, before that of the railroad companies or any of the other companies; that he, witness, had heard Stilwell, while discussing some contemplated railroad enterprise, in connection with these railroads, state that the Trust Company should make so much out of the deal, and he would then outline the plan (Rec. 35-18673-'79). While witness was a Union director, Mosher was vice-president of the Trust Company, and, on one occasion, witness had a
695 conversation with Mosher about the cost of the Union Terminal, and Mosher informed him that it was a matter that did not concern the witness; that at that time he was a director of the Union Company, and making inquiry as to the cost of the road (Rec. 35-18679-'83).

As a director of the Belt Company, he was never consulted in matters that concerned him as a director, and, when present at one of the Belt meetings, he was not asked to pass upon any matters, as the resolutions had already been prepared, and upon being submitted were passed in a very few minutes; nor was he consulted in advance of the meeting as to any such matters (Rec. 35-18683-'88).

Prior to the construction of the railroad of the Connecting Company by the Belt, Stilwell told him that the Belt was to undertake the construction of the road (Rec. 35-18688).

The Fruit Auction Company was organized by the Trust Company, and operated by it, and was used to handle fruit and carload lots of oranges from California, and they maintained a daily auction of fruit for several months (Rec. 35-18767).

The Air Line paid the expenses of running Fairmount Park, the expenditures reaching large proportions. While the Park was being operated, Stilwell frequently sent for witness to take out to the Park prospective investors for the securities of the company. In talking to Mosher, regarding the enormous expenditures at the Park, he told witness [*he*] was the policy of the Trust Company to make as good showing as possible, in order to show that their enterprises were in a flourishing condition, and that there was a large amount of travel over the Air Line, the intention being to create as good an impression as possible on proposed investors in the securities which the Trust Company was promoting (Rec. 35-18857-'61).

(*i*) E. L. Martin, testified, in substance, that the Trust Company acted simply in the capacity of a financial agent for the various companies allied with it, and marketed most of their securities. His attention being called to a former statement in his testimony to the effect that the Trust Company was the financial sponsor and backer of the Belt and other railroad companies, and that there was a mutual interest between it and these other companies, he stated that what he meant was that the Trust Company was the source, from which the finances were raised to build all the railroads, constructed by those companies. Generally speaking, the Trust Company sold practically all the securities of such companies, and A. E.
696 Stilwell was the active man, who gave general direction to the sales in this country and in Europe (Rec. 55-33665-'69).

He, Stilwell, did not always fix the prices for the securities. This was frequently done by the companies, respectively interested, or their officers, after consultation on the subject of prices. When Stilwell went east with general authority to do the best he could, he would be authorized to fix the selling price. The securities were sold sometimes at a profit, other times at a loss. There were mutual interests between the Trust Company and the Belt and other Companies, and the Belt was liberal in its dealings with the Trust Company, "did not cut cents in two"; and Stilwell, Taylor and Mosher did everything that was legitimate in being liberal to the Trust Company (Rec. 55-33666 and 33727).

Martin further stated that the Trust Company financed the Gulf road in the same general manner that it financed the other railroads, that investors were brought to Kansas City for the purpose of going over these roads, and make an examination of them; that he was president of the Construction Company which built the Gulf road, that the stock of the Construction Company, after being used to build the roads of the Suburban Company and Air Line, was cancelled and re-issued to take up the construction of the Gulf Company on the south end; that the first construction company organized to build the Gulf was the Missouri Construction Company, then the Philadelphia Construction Company, succeeded the Missouri Coal & Construction Company, and the Arkansas Construction Company succeeded the Philadelphia Construction Company. The Gulf exploitation started about 1890, and continued until 1899, and during that time, the Trust Company was handling the securities of all these various railroads and construction companies, and placed them upon the market, and also handled the securities of the Belt, Union, Consolidated and Air Line, as well as various other companies, in which the Trust Company was interested.

Officers and Directors of the Companies Associated with the Trust Company.

5. Respecting the identity of the different persons, who were incorporators, officers and directors of the various allied companies, associated with the Trust Company up to the year 1900, reference is made to the following records:

Wilcox's testimony, Rec. 34-18263 to 18278, 18408 to 18411, 18424 to 18427, 18448 to 18449.
Telfer's testimony, Rec. 17-8981 to 8988, 8692 to 8697.
Martin's testimony, Rec. 55-33833 to 33850.
Pickering's testimony, Rec. 35-18590 to 18600.

697 For a list of the Trust Company officers and directors for the years 1899 to 1900, see Rec. 11-5694 to 5705; and, for the Trust Company stockholders, at various dates see Rec. 48-28944 to 29069. For a list of the officers and directors of the various other companies, see Rec. 12-6647 to 6677.

Construction Company.—The articles of association of the Construction Company will be found in Rec. 13-6967 to 6971. All the

officers and directors of the Construction Company, shown by their minutes (Rec. 13-6966 to 6977), covering the period from its incorporation, and during the time it was building the railroads of the Suburban Belt and the Air Line, were either officers, directors or stockholders of the Trust Company (Rec. 42-22473 to 22581; Rec. 48-28944 to 28069).

It is shown that 2137 shares of the total 3000 shares of the Construction Company stock, issued for the building of the Suburban Company's road, were held by stockholders, or officers or directors of the Trust Company (Rec. 42-22492), and that out of the 2000 shares Construction Company stock to be issued to the Belt and Air Line, 1446 shares stood in the name of the record stockholders or officers of the Trust Company, and in the name of the Trust Company itself (Rec. 12-6652).

Suburban Company.—The articles of association of the Suburban Company are in Rec. 52-30301 to 30305. The names of the incorporators, officers and directors of the Suburban Company up to June 1, 1899, will appear in Rec. Vol. 18-9138-'39; and, by reason of changes made in the names of the officers and directors, between June 1889, and May 9, 1890, the old officers and directors of the Suburban Company, who were not officers and directors of the Construction Company, had been replaced by officers and directors of the Trust Company, and Construction Company, with three exceptions (Rec. 52-31246-'47, 31255-'59; Rec. 11-5694-'95). At page 6661 of Rec. 12, a list is given of the Suburban Company directors and officers up to the time of the consolidation with the Consolidated Company, and all of these Suburban officers and directors were officers and directors of the Trust Company, with the exception of A. L. Howe, who was a brother of a stockholder of the Trust Company.

Consolidation of Suburban Company and Consolidated Company.

The articles of consolidation will appear in Rec. 52-31309 to 31317. All the officers and directors of the Belt Company (being the company occasioned by the consolidation of the Suburban Company and the Consolidated Company), were officers, direc-
698 tors or employees of the Trust Company, except Bowen, Shipley and A. L. Howe. Bowen being a Trust Company shareholder, and Howe a brother of a large Trust Company shareholder and director. The directors and officers of the Belt Company, from the date of the consolidation up to the year 1899, were officers, directors or employees of the Trust Company, (Rec. 12-6662-'65). As shown by the Belt minutes (Rec. 52-31433-'35), the old Belt directors and officers resigned, and new officers and directors of the Belt Company were elected, that had no connection with the Trust Company. In this connection, counsel for complainant called the Master's attention to Belt minutes in Rec. 52-31373 to 31378, 31395 to 31399, 31399 to 31405, 31413 to 31418, and 31432, and showing these pages of the minutes O. K'd by the following initials: "C. W. H." or "E. E. E." or "A. C. R." or R. H. S."; the initials C. W. H.

being those of Charles W. Hastings, and the initials R. H. S. being those of R. H. Stewart, and E. E. D. being the initials of E. E. Dearborn, and A. C. R. being the initials of A. C. Robinson, all being Trust Company employees. These memoranda have naturally suggested the inquiry by complainants' counsel, why should the Belt minutes be O. K'd by Trust Company employees.

Consolidated Company.—The articles of incorporation of the Consolidated Company are in Rec. 52-31305 to 31309. All of the incorporators of the Consolidated Company, except one Whipple, were Trust Company directors, officers or employees, and all of the officers and directors of the Consolidated Company, from its incorporation up to its consolidation with the Suburban Company, were officers, directors or employees of the Trust Company, with a few exceptions (Rec. 12-5669). The Trust Company paid for the incorporation and filing fees of the incorporation articles of this company, and, also for its seals, stock registers, stock certificates, and all of which payments, made by the Trust Company, were charged to the Consolidated Company (Rec. 26-13745-'52).

Air Line.—The articles of incorporation will be found in Rec. 15-8007, and all of the Air Line incorporators were either officers, directors or employees of the Trust Company, except A. L. Howe, who was a brother of a Trust Company shareholder and director, and C. R. Barnhart, who was the superintendent of the Belt Company (Rec. 12-6651-'54). As shown by the Trust Company's account with the Air Line (Rec. 49-29655), the Trust Company paid the legal fees, and other expenses of incorporation and prospectus, amounting to $675.00, which were, in May, 1891, credited by the Trust Company to the Air Line, and charged by the Trust Company against the Construction Company.

699 Union Company.—The articles of incorporation of this company are in Rec. 21-10919; and all of the incorporators of the Union Company were officers and directors of the Trust Company, except J. H. Pickering, who was superintendent of the Belt Company, O. D. Hall and William Thompson, residents of Kansas City, Kansas, and suggested by Pickering, and J. J. Spencer, in the employ of the Belt, as right-of-way agent (Rec. 12-6655 to '68). It is shown that the Trust Company paid out for the Union Company divers sums on account of the incorporation expenses, promotion services, retainer fees, newspaper publications, etc., all of which items were charged by the Trust Company against the Consolidated Company (Rec. 3-628, 655, 667, 683, 718).

Elevator Company.—The articles of incorporation will be found in Rec. 14-7387, and all of the incorporators, officers and directors of the Elevator Company, as shown in Rec. 12-6666-'7, were either officers, employees, stockholders or directors of the Trust Company, except A. L. Howe, a brother of a Trust Company stockholder and director. The Trust Company's account with the Elevator Company (Rec. 45-30059) shows that it paid for the articles of incorporation, and the other expenses incident to the incorporation, all of which were charged by the Trust Company against the Elevator Company. In this connection, attention has been called to the minutes of the

Elevator Company in Rec. 43, at pages 22944-45, '48, '49, '50 and '51, which are O. K'd by the following initials. "A. C. R." and "C. W. H.", these being the initials of A. C. Robinson and Charles W. Hastings, who were Trust Company employees.

Central Company.—The articles of incorporation of the Central Company will be found in Rec. 18-9158. A list of the directors and officers of the Company, down to the year 1900, will be found in Vol. 12-6668-69, and they were officers, directors or employees of the Trust Company. The minutes of the Central Company (Rec. 43-22969-71, '76 and '77) were O. K'd by the following initials. "A. C. R." and "C. W. H." being the initials of A. C. Robinson and Charles W. Hastings, who were Trust Company employees. The Trust Company paid the incorporation expenses, and for stock book and seal of the Company, all of which were charged by the Trust Company to the Central Company (Rec. 30-16130).

Amusement Company.—The articles of incorporation will be found in Rec. 16-8343. A list of the incorporators, directors, and officers of the Amusement Company, from its incorporation down to the year 1900, are in Rec. 12-6670-71, and they were officers and employees of the Trust Company, except A. L. Howe, a brother of a Trust Company stockholder, and Neil S. Doran, who was auditor of the Belt. The minutes of the Amusement Company were O. K'd by the initials "C. W. H.", being the initials of Charles W. Hastings, a Trust Company employee (Rec. 43-22989-'94).

Connecting Company.—The articles of incorporation of the Connecting Company are in Rec. 15-8165. A list of incorporators, directors, and officers of the Connecting Company from its incorporation to the year 1899, shows that all of them were either officers, directors or employees of the Trust Company, with a few exceptions (Rec. 12-6672-'75). All the incorporation expenses were paid by the Trust Company, and afterwards charged to the Connection Company.

Townsite Company.—A list of the incorporators and directors of the Townsite Company, from the date of its incorporation to 1900, is shown in Rec. 12-6676, and all of them were officers, directors or employees of the Trust Company, which paid for the incorporation expenses, amounting to $314.82, and charged the same to the Belt Construction. The Townsite Company minutes (Rec. 43-22920-'29) are O. K'd by the initials "C. W. H." and "R. H. S." being the initials of Charles W. Hastings and R. H. Stewart, who were Trust Company employees.

Gulf Company.—The articles of incorporation will be found in Rec. 21-10940. All the incorporators were either officers, directors or employees of the Trust Company, except two, and the directors and officers of the Gulf Company, from its incorporation to the year 1899, at the time of the appointment of the receivers for the Gulf Company, were officers, directors, employees or stockholders of the Trust Company, with a few exceptions, varying from one to five in these different years.

Realty Company.—All of the incorporators, directors and officers of the State Realty Company, from 1892 through 1899, were officers,

directors or employees of the Trust Company (Rec. 47-28466). Wilcox states that all the stock of the State Realty Company was owned by the Trust Company.

Improvement Company.—The articles of association will be found in Rec. 21-10935, and show a total capitalization of $300,000.00 divided into 3000 shares. All of the incorporators, officers and directors of the Improvement Company, from its incorporation to the year 1900, were officers, directors, employees or stockholders of the Trust Company (Rec. 12-6647-'50). Wilcox states that no salaries were paid to Improvement Company officers for 1892, and,
701 prior to that time, there was only $300.00 paid out for salaries, and that the books of the company were kept by the employees of the Trust Company (Rec. 47-28203, 28314-15).

Willey, in his testimony (Rec. 47-28221) shows that as early as September, 1892, the Trust Company was a subscriber and paid for 500 shares of the 3000 shares of the Second Street Improvement Company stock; that Martin, in May, 1890, had 200 shares of this same stock, and that Taylor held 60 shares of the same stock. The Trust Company paid $175.00 for filing fee and expenses of the articles of incorporation of the Second Street Improvement Company, which were charged against the Improvement Company (Rec. 12-6475).

Fruit Auction Company.—The articles of incorporation are in Rec. 34-18244, and all of the incorporators, officers and directors were officers and directors of the Trust Company, and the expenses of the incorporation were paid by the Trust Company, and by it charged to the Fruit Auction Company.

II.

The Incorporate Relations of the Trust Company and Belt Company Arising Out of Their Having One or More Common Directors, and, as Affecting the Question of the Alleged Domination and Control of the Trust Company Over the Belt Company.

In the foregoing references to the proofs in the record, respecting the relations between, and the course of business of, these two companies, the Master has endeavored to fairly and fully present, for the consideration of this Court, the more important facts, or combination of facts, which have been relied upon by complainants to support their domination and control theory. Their counsel have, with great industry, compiled, and furnished to the Master, a printed brief of legal authorities, of approximately 500 pages, which exhaustively treats of "Intercorporate Relations", "Liability of Promoters" and "Laches", the three important propositions, specially involved in the determination of the issues raised in the second ancillary bill. The character or nature of the kind of domination and control, which complainants contend that the Trust Company and its dominating officials exercised over the Belt and constituent companies, and their alleged subservient directors, and officials, clearly appears in those portions of the bill hereinbefore mentioned.

Complainants' counsel assert the following propositions of law, as decisive of the issues in this cause.

702 First. All contracts or transactions between two corporations, having one or more common directors, are voidable at the election of either corporation, without the necessity of inquiry as to their fairness, subject to the usual limitations that the right of avoidance must be exercised with reasonable promptness, and that the adverse party must, so far as practicable, be put in statu quo.

Metropolitan, etc., Railway Co. v. Manhattan Railway Co., et al., 11 Daly, 375.
Fitzgerald v. Fitzgerald & Mallory Const. Co., 41 Neb., 374.
Fitzgerald v. Fitzgerald & Mallory Const. Co., Rehearing, 44 Neb. 463.
Wardell v. Union Pacific Railroad Company 103 U. S., 651.
McGourkey v. Toledo, etc., Railway Co., 146 U. S. 536.
Dickerman v. Northern Trust Co., 176 U. S. 204.
Bridgens v. Savings Bank, 66 Fed., 9.
Bill v. Western Union Telegraph Co., 16 Fed., 14.
Thomas v. Peoria & R. I. Ry. Co., 36 Fed. 808.
Jackson v. McLean, 36 Fed. 213.
Currier v. New York, etc., R. R. Co., 35 Hun., 355.
Barr v. New York, etc., R. R. Co., 125 N. Y., 263.
Munson v. Syracuse, etc., R. R. Co., 103 N. Y. 58.
Sage v. Culver, 147 N. Y., 241.
Jacobs v. Mexican, etc., Company, 93 N. Y. Supp., 776.
Pearson v. Concord Railroad, 62 N. H., 537.
Memphis etc., R. Co. v. Woods, 88 Ala., 630.
Finch Company v. Stirling Company, 187 Pa. St., 596.
Gilman v. Kelly, 77 Ill., 426.
Attalla Iron Ore Co. v. Virginia Iron Co., Ill. Tenn., 527.
O'Connor v. Coosa Co., 95 Ala., 614.
Goodin v. Verdugo, etc., Co., 138 Cal., 308.
German National Bank v. First National Bank, 55 Neb., 86.
McLeod v. Lincoln Medical College, 98 N. W., 672 (Neb.).
Coombs v. Barker, 79 Pac., 1 (Mont.).
Thompson, Corporations, Vol. 3, Secs. 4079, 4082.
Morawetz, Corporations, 2nd Ed., Vol. 1, Sec. 520.
Clark & Marshall, Corporations, Vol. 3, Sec. 760.
Hoffman Co. v. Cumberland Co., 16 Md., 394.

Second. A majority stockholder who actually controls the Board of Directors, though not himself a member of the Board of Directors, stands in the same fiduciary relation to the corporation as does its Board of Directors, and contracts or transactions made with him are likewise voidable at the election of the corporation.

Authorities hereinabove cited in first paragraph; and

703 Meeker v. Winthrop Iron Co., 17 Fed., 48.
Ervin v. Oregon, etc., Co., 27 Fed., 625.
O'Connor v. Virginia, etc., Company, 92 N. Y. Supp., 525.

Third. Similarly, where one corporation dominates and controls another, the corporation so dominated and controlled may avoid all contracts and transactions entered into between the two corporations.

Authorities cited above in first and second paragraphs; and

Earle v. Seattle, etc., Railway Co., 56 Fed., 909.
Pondir v. New York, etc., R. R. Co., 72 Hun., 384.
Glengary Mining Co. v. Boehmer, 28 Colo., 3.
Farmers Loan & Trust Co. v. New York, etc., Ry. Co., 150 N. Y., 410.
Pittsburg, etc., Ry. Co., v. Dodd, 115 Ky., 176.
Robotham v. Prudential Ins. Co., 64 N. J. Eq., 673.
Miner v. Belle Isle Ice Co., 93 Mich., 97.
Ryan v. Leavenworth, 21 Kan., 270.

Fourth. The promoters of a corporation stand in a fiduciary relation towards it from the moment they begin its organization, and, if after beginning its organization, they purchase property at one price and turn it over to the corporation at a higher price, the corporation, at least where it has not been provided with an independent and impartial Board of Directors, free from the influence and control of the promoters, or full disclosure of all material facts has not been made to such Board of Directors, may compel them to account to it for the profit so made by them, or may, if it choose, rescind the whole transaction.

Bagnall v. Carlton, L. R., 6 Ch. Div., 371.
Emma Silver Mining Co., v. Grant, L. R., 11 Ch. Div., 918.
in re Olympia, L. R. (1898), 2 Ch. Div., 153.
Dickerman v. Northern Trust Company, 176 U. S., 181.
Hayward v. Lesson, 176 Mass., 310.
Exeter v. Sawyer, 146 Mo., 302.
South Joplin Land Co. v. Case, 104 Mo., 572.
Woodbury Heights Land Co. v. Loudenslager, 43 Atl., 671 (N. J.)
Plaquemines Tropical Fruit Company v. Buck, 52 N. J. Ep., 230.
Pittsburg Mining Company v. Spoiner, 74 Wis., 307.
Brewster v. Hatch, 122 N. Y., 349.
Simons v. Vulcan Oil & Mining Co., 61 Pa. St., 202.
Getty v. Devlin, 54 N. Y., 403.
Densmore Oil Company v. Densmore, et al., 64 Pa. St., 43.

704 Fifth. Promoters may also be compelled to account for any other secret profits, whether in the form of commissions, or otherwise made at the expense of the corporation which they promote.

Cases cited in fourth paragraph; and

Emma Silver Mining Co. v. Lewis & Son, L. R., 4 C. P. Div., 396.
Chandler v. Bacon, 30 Fed., 538.
Central Land Company v. Obenchain, 92 Va., 130.
Fountain Spring Park Company v. Roberts, 92 Wis., 345.
Groel v. United, etc., Co., 61 Atl., 1061 (N. J.).

Sixth. Corporations which undertake the promotion of other corporations stand in the same relation toward them as do individual promoters, and transactions between them are subject to the same rules.

In re Leeds and Hanley Theatres, etc., L. R. (1902), 2 Ch., 809.

Rubins v. Pressed Steel Co., 53 Atl., 1050 (N. J.).

Seventh. Upon similar principles, a corporation which is dominated and controlled by another corporation may compel such other corporation to account for all profits made by reason of its domination and control of the first corporation, in all cases where rescission is impracticable or is not desired by the first corporation.

Fitzgerald v. Fitzgerald, etc., 41 Neb., 374.
Fitzgerald v. Fitzgerald, etc., Co., (Rehearing), 44 Neb., 463.
Ervin v. Oregon etc., Co., 27 Fed. 625.
Thomas v. Peoria, etc., Co., 36 Fed. 808.
Currier v. New York, etc., R. Co., 35 Hun., 355.
Pondir v. New York, etc., R. Co. 72 Hun., 384.
O'Connor v. Virginia, etc., Co., 92 N. Y. Supp., 525.
Jacobus v. Diamond, etc., Company, 88 N. Y. Supp., 302.
Loewenstein v. Diamond, etc., Co., 88 N. Y. Supp., 314.
Goodin, v. Cincinnati, etc., Co., 18 Oh. St., 169.
Montgomery Traction Co. v. Harmon, 140 Ala., 505.
Gilman v. Kelly, 77 Ill., 426.
Pittsburg, etc., Railway Co. v. Dodd, 115 Ky., 176.
Goodell v. Verdugo Canon Water Co., 138 Cal., 308.
German National Bank v. First National Bank, 55 Neb., 86.
Ryan v. Leavenworth, 21 Kan., 270.
Beeny v. Moeller, 59 Atl., 97 (N. J.).

Eighth. Laches is not a question of time alone, but depends upon the existence of circumstances, making it inequitable
705 to grant relief after the lapse of time, and it is not to be imputed to one whose failure to act promptly was cause- by lack of knowledge of the facts giving him a right to act; nor is laches readily imputed to a cestui que trust, who fails to proceed promptly against an unfaithful fiduciary through reliance on the fiduciary's faithfulness.

Morgan v. King, 27 Colo., 539.
Montgomery Light Co., v. Lahey, 121 Ala., 131.
Oliver v. Lansing, 49 Neb., 338.
Bryan v. Kales, 134 U. S., 126.
Galliher v. Cadwell, 145 U. S., 368.
Halstead v. Grinnan, 152 U. S., 412.
Townsend v. Venderwerker, 160 U. S., 171.
Penn. etc., Insurance Co. v. City of Austin, 168 U. S., 685.
Hoffman Co. v. Cumberland Co., 16 Md., 456.
Bent v. Priest, 86 Mo., 475.
Pomeroy Equity, 3rd Ed., Vol. 2, Sec. 917.
Kessler & Co. v. Ensley Co., 129 Fed., 397.

Krohn v. Williamson, 62 Fed., 869.
McInture v. Pryor, 173 U. S., 38.
Anthony v. Campbell, 112 Fed., 212.
Barron v. Rhinelander, 1 Johns. Ch. 550.
Rhinelander v. Barron, 17 Johns., 538.

Ninth. Laches will not be imputed to a corporation which is dominated and controlled by another corporation for failure to act immediately in avoidance of a transaction between the two corporations, provided it acts with reasonable promptness when freed from the domination and control of such other corporation.

Metropolitan etc., Ry. Co., v. Manhattan Ry. Co., 11 Daly, 375.
Fitzgerald v. Fitzgerald, etc., Co., 41 Neb., 374.
Fitzgerald v. Fitzgerald, etc., Co., (Rehearing), 44 Neb., 463.
Gilman v. Kelly, 77 Ill., 426.
Goodell v. Verdugo, etc., Co., 138 Cal., 308.
German National Bank v. First National Bank, 55 Neb., 86.
Pacific Railroad Co. v. Missouri Pacific Railway, *Ill.* U. S. 505.
Ryan v. Leavenworth, 21 Kan., 270.

Excerpts from the Aforesaid Cases.

Tenth. For the convenience of the Court, the following excerpts are taken from a few of the above mentioned leading authorities cities by complainants:

In Metropolitan, etc., Railway Co. v. Manhattan Railway Co., et al., 11 Daly, 375, the Court say:

706 "The language used by the Court in its opinion in Twin Lock Oil Co. v. Marbury, 91 U. S. Sup. Ct., 587, seems, certainly, to sustain the views of the learned counsel for the defendant upon this point. The court says 'That a director of a joint-stock corporation occupies one of those fiduciary relations where his dealings with the subject matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this court, and in others. Koehler v. Black River Falls Iron Co., 2 Black, 715; Drury v. Cross, 7 Wall., 299; Luxemburg R. R. Co. v. Maquay, 25 Beav., 586; The Cumberland Co. v. Sherman, 30 Barb., 553;; 16 id., 456. The general doctrine, however, in regard to contracts of this class, is, not that they are absolutely void, but that they are voidable at the election of the party whose interest has been so represented by the party claiming under it. We say, this is the general rule; for there may be cases where such contracts would be void ab initio; as when an agent [so] sell buys of himself and by his power of attorney conveys to himself that which he was authorized to sell. But, ever here, acts which amount to a ratification by the principal may validate the sale."

Again:

"I think, therefore, that the undoubted rule of law in this state is, that every contract entered into by a director with his corporation may be avoided by the corporation within a reasonable time, irrespective of the merits of the contract itself.

But we are asked, does this disability extend to the case of a contract between two corporations, some of whose directors hold that office in each corporation?

I can see no difference in principle between the case of a director contracting with his corporation and that of directors of one corporation contracting with themselves as directors of another corporation. The evils to be avoided are the same; the temptations to a breach of trust are the same; the want of independent action exists, and the divided allegiance is just as apparent."

In Fitzgerald v. Fitzgerald & Mallory Const. Co., 41 Neb. 374, a part of the syllabus is as follows:

"Where the officers of a corporation responsible for its management, are shown to have abused their trust, to the great damage of such corporation, in the interest of another corporation, of which they were then, and still remain, managing officers, any
707 stockholder of the corporation wronged may bring an action in his own name for the benefit of the wronged corporation against the other corporations above referred to for the redress of such grievance, and for an accounting between said corporations; and for these purposes may properly join both corporations as defendants."

The Court says:

"The trial court found, as we have seen, that since April 6, 1887, the organization of the Denver, Memphis & Atlantic Railroad Company had been under the control of the Missouri Pacific Railway Company, and that its officers and directors had acted in the interests and under the direction of the said Missouri Pacific Railway Company. To complete the responsibility of the Missouri Pacific Railway Company for the unwarranted discount of $500,000 enforced against the Construction Company, it is necessary to note but another finding of the Court, which was that since November 3, 1886, "Three of the Directors of the Construction Company, together with its treasurer (R. J. Cross), have been directly or indirectly interested in the defendant railroad company; have acted in the interest of said railroad company, in all matters concerning the management of said Construction Company where the interests of the railroad company and the Construction Company came in conflict." This finding is, of course, upon conflicting evidence, but it has ample support. It would subserve no useful purpose to fortify these facts as to the domination of the Missouri Pacific Railway Company over the Denver, Memphis & Atlantic Railway Company by an extended analysis of the testimony which would be indispensable for that purpose, but which, while scattered through an immense volume, when gathered and considered, fully sustains the findings made."

Again:

"In argument, it is tenaciously contended, however, that the long acquiescence of the Construction Company effected the same result. There was no finding of such acquiescence by the Court. Indeed, there could not be, consistently, with the finding that the Construction Company was dominated in all things by the officers of the Missouri Pacific Railway Company."

In Rehearing, Fitzgerald v. Fitzgerald & Mallory Co., 44 Neb. 463, it was held:

"Persons who are directors of two corporations have no implied authority to bind either by contracts with respect to subjects
708 in which their interests are adverse, and all such agreements, unless subsequently ratified, may be avoided at the suit of non-consenting stockholders."

Again:

"Acquiescence in a fraudulent transaction is, in effect, a new agreement, made consciously with an intent to condone the wrong done, and will not be inferred from doubtful evidence, but should be established like any other material fact by the party asserting it. We are referred to no positive act indicating acquiescence in this instance, the only claim being that it should be inferred from the time intervening between the date of the action complained of, and the institution of the suit, to-wit, 1 year, 10 months and 17 days. Time alone, unaffected by other circumstances, will not bar the right to rescind a voidable transaction, since it is not for a wrong doer to impose extreme vigilance and promptitude as conditions to the exercise of the rights of the injured party. Pol. Cont., 546; Pence v. Langdon, 99 U. S., 581; Montgomery v. Pickering, 116 Mass., 227; Tarkington v. Purvis, 128 Ind., 187, 25 N. E., 879; Moxon v. Payne, 8 Ch. App., 881; Foley v. Hoity, 41 Neb., 563, 59 N. W., 781.

See also Missouri Pacific Ry. Co. v. Fitzgerald, 160 U. S. 556, for report of this case in the Supreme Court of the United States."

In Wardell v. Union Pacific Railroad Company, 103 U. S., 651, the Court say:

"Hence, all arrangements by directors of a railroad company to secure an undue advantage to themselves at its expense by the formation of a new company as an auxiliary to the original one, with the understanding that they, or some of them shall take stock in it and then that valuable contracts shall be given to it, in the profits of which they as stockholders in the new company are to share, are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and will be condemned whenever properly brought before the courts for consideration. Great Luxembourg Ry. Co. v. Magnay, 25 Beav., 586; Benson v. Heathorn, 1 Y. & Col. C. C., 326; Flint R. R. Co. v. Dewey, 14 Mich., 477; European Ry. Co. v. Poor, 59 Me., 277; Drury v. Cross, 7 Wall., 299."

In Dickerman v. Northern Trust Co., 176 U. S., 204, the Court say:

"In those cases where the scheme or organization gives the pro-

moters the power of selecting the directors who are to repre-
709 sent the company in the proposed purchase, they are bound to select competent and trustworthy persons who will act honestly in the interests of the shareholders. A purchase made from the promoters under these circumstances will not bind the company unless it was a fair and honest bargain. Morawetz, Priv. Corp., Sec. 546; New Sombrero Phosphate Co. v. Erlanger, L. R. 5 Ch. Div., 73; Brewster v. Hatch, 122 N. Y., 349, 25 N. E., 505; Simons v. Vulcan Oil & Min. Co., 61 Pa., 202, 100 Am. Dec., 628; Twycross v. Grant, L. R. 2, C. P. Div., 469, 503; Whaley Bridge Calico Printing Co. v. Green, L. R. 5 Q. B. Div., 111; Thompson, Liability of Officers & Agents, 218, Sec. 20".

In Bridgens v. Savings Bank, 66 Fed. Rep., 9, Judge Philips in that case stated the general rule applicable in equity as follows:

"It is a settled rule of equity jurisprudence that the directors and agents of two companies are disqualified from representing both companies in a transaction where the interest of the two companies are opposed, nor will one corporation be permitted to form a company ancillary to the original one, and contract with it to the disadvantage of the creditors and stockholders of one of the companies. Mor., Priv. Corp., Secs. 529, 530. And a court of equity will, in such case, notwithstanding the apparent legal effect of such transfer and transaction between two such corporations, treat the same according to the real facts and equities of the case. McVicker v. Opera Co., 40 Fed., 861; Interstate Tel. Co. v. Baltimore & O. Tel. Co., 51., Fed., 49; Trust Co. v. Kneeland, 138 U. S., 414, 11 Sup. Ct., 357; Day v. Telegraph Co., (Md.) 7 Atl., 608."

In Meeker v. Winthrop Iron Co., 17 Fed. Rep., 48, the Court says:

"The ownership of a majority of the capital stock of a corporation invests the holders thereof with many and valuable incidental rights. They may legally control the company's business, prescribe its general policy, make themselves its agents, and take reasonable compensation for their services. But, in thus assuming the control, they also take upon themselves the correlative duty of diligence and good faith. They cannot lawfully manipulate the company's business in their own interests to the injury of other corporators. Any contract made by them in behalf of their principal with themselves or with another for their personal gain, would be voidable at the option of the company."

In Thomas v. Peoria & R. I. Ry. Co., 36 Fed. Rep., 808, the Court say:

710 "The court cannot, consistently with any sound principle of equity or of public policy, recognize the contracts between the Western Car Company and the Peoria & Rock Island Railway Company, one dated March 1, 1872, and the other dated October 1, 1873, as the basis of accounting between the parties to this cause. The officers and individuals dominating the Car Company were substantially the same officers and officials that dominated the railroad company. For every purpose of business, the masters of the lessor company were also masters of the lessee company. Those who con-

trived and directed the making of the leases in question in behalf of the car company must, under the circumstances disclosed by the record, be deemed to have contracted simply with themselves in reference to the monthly rental of its cars, and the terms upon which they were to be used by the railroad company."

In Jackson v. McLean, 36 Fed. Rep., 213, (Circuit Court, Eastern Division, Eastern District of Missouri), the Court say:

"From the foregoing statement of the contents of the bill it appears that the profits of the enterprise, to which the complainant lays claim, and with respect to which he desires to have an account taken, were all realized from a contract made by himself and McLean with the railroad corporation, for the building and equipment of its road, and beyond all question that contract was constructively fraudulent. Complainant himself was one of the directors of the corporation when the contract was executed. The remaining directors were clerks of McLean, who had become directors at his request, merely to represent his interest and execute his orders. They had no personal interest in the corporation or in the enterprise in which it was engaged, and were not even the beneficial owners of the respective shares of stock that stood in their names. According to the showing made by the bill, Jackson and McLean were the real managers and directors of the company, but, notwithstanding that fact, they caused the company to enter into a contract with themselves, or, rather with their representatives, for the building and equipment of the road, by which the company parted with all of its stock, mortgage bonds, and other available assets, for what plainly appears to have been an inadequate consideration. The contract was manifestly an improvident one, so far as the corporation was concerned, but, without reference to that fact it was obviously fraudulent and unlawful, for the reason that both Jackson and McLean, by virtue of their relation to the corporation, were incapable of making an agreement with it. It is hardly necessary to add that the law would lend no sanction to the agreement made by them with the
711 corporation, even though the bargain had not been detrimental to the company".

In Currier v. New York, etc., R. R. Co., 35 Hun. (N. Y.), 355, the Court say:

"If it was the fact that those defendants did control the actions of the railroad company, either through their own acts or those of their associates as directors thereof, it is plain that since they also controlled the Construction Company they were simply contracting with themselves, and that the railroad company was helpless in their hands. It requires no argument to demonstrate that a contract made under such circumstances was presumptively fraudulent." Citing N. Y. Cent. Ins. Co. v. Nat. Protection Ins. Co., 14 N. Y., 85, and other cases.

In Lowenstein v. Diamond etc., Company, 88 N. Y., Supp., 313, in an action by the minority stockholders of the Diamond Company, on behalf of the company, the Court, in granting similar relief, say:

"The facts stated in our other opinion show that the Diamond

Company is dominated and controlled by the American Company, a rival corporation engaged in the same line of business. The contracts made and relations established between the Diamond Company and the American Company were made and established by the directors, who were such at the time of the commencement of this action. The relief demanded and awarded is the cancellation of the contracts between the companies, the severance of their relations, and an accounting to the Diamond Company, for the damages sustained by those contracts and relations which the directors made, established or ratified, and the execution and continuance of which they permitted."

In Memphis etc., Railroad Company v. Woods, 88 Ala., 630, 16 Am. St. Rep., 81, the Court say:

"Although, as we have said, directors of a pecuniary corporation may not be trustees in the technical sense of that term, they are under the same restraints, and labor under the same disabilities, which rest on trustees proper, so far as questions raised by the present bill are concerned. When personal interest antagonizes the disinterestedness and impartiality which the law, as well as morality, exacts in the exercise of fiduciary trusts, this is per se, a disqualification, not by reason of any abuse committed, but in fear that weak human nature will yield to temptation. Justice Field, speaking of the conflict between duty and interest, says: 'Constituted as humanity is,
in the majority of cases duty would be overborne in the strug-
712 gle.' March v. Whitemore, 21 Wall., 178; Nathan v. Thompkins, 82 Ala., 437; Gr. Luxembourg Ry. Co. v. Magnay, 25 Beav., 586."

In Gilman etc., R. R. Co., v. Kelly, 77 Ill., 426, a portion of the syllabus is as follows:

"It is illegal for directors of a railway company to become members of a company with whom they have made a contract to build and equip the road, so as to share in the profits, and if they do, they will, in equity, be compelled to account for profits realized."

Again, the Court say:

"No ratification will estop the principal, unless he has been made aware of all the material facts and circumstances of the transaction that would in any way influence his mind *of* affect the value of the contract. Hofman Steam Coal Co., v. Cumberland Coal and Iron Co., supra; Cockrell v. Cholmelly, 1 Russ. & Mylne, 418."

In Atalla Iron Ore Company v. Virginia Iron Company, 111 Tenn., 527, 77 S. W., 774, the Court say:

"The principle here announced authorizes the annulment of a contract such as the present one, if seasonably challenged, without regard to whether it is favorable or unfavorable to the complaining principal."

In O'Connor v. Coosa Co., 95 Ala., 614, the Court say:

"If the same persons, as directors of two different companies, represent both companies, in a transaction in which their interests are opposed, such transaction may be avoided by either company, or at the instance of a stockholder in either company, without regard to the question of advantage or detriment to either company. Both

the corporations are armed with the right to repudiate such a transaction no matter how fair and open it may be shown to be. Railroad Co. v. Woods, 88 Ala., 630, 641, 7 South. Rep., 108. But the duty which disqualifies the directors from binding the corporation by a transaction in which they have an adverse interest is one owing to the corporation which they represent and to the stockholders thereof."

In Glengary Mining Company v. Boehmer, 28 Colo., 3, 62 Pac. Rep., 839, the syllabus is as follows:

"Where a mining corporation purchases a majority of the stock of another mining corporation, and by so doing is able to elect a directory under its control, and secure a bond and lease of the property of such corporation on its [*ocn*] terms and conditions, such lease
713 and bond will be set aside at the suit of minority stockholders of the latter corporation, though obtained without any actual fraud."

In Pittsburg etc., Railway Co. v. Dodd, 115 Ky., 176, 72 S. W. Rep., 822, the court say:

"In this case the complaint shows a contract between two corporations having directors in common, both dominated by the same controlling interest, and that one of them has reaped material advantage over the other because of the former's breach of the contract, which the directors of the latter refuse to sue to redress.* * * To close the doors of the courts to a single stockholder in such a case upon the theory that the majority must rule, and that, having embarked in a common enterprise with them, he must abide the judgment of the majority, would be to turn over to a possible wrong doer the adjudication of his own case. In such an unequal struggle between duty and interest, it would more frequently happen that 'duty would be overborne in the conflict.' It is clear to us that upon the allegations in the petition in this case a cause of action was shown against the Pan Handle Company."

In Miner v. Belle Isle Ice Co., 93 Mich., 97, a portion of the syllabus is as follows:

"A ratification of his own act by a majority stockholder and his dummies, who constitute a board of directors, cannot purge it of its fraudulent character."

In Thompson's Commentaries on the Law of Corporations, Vol. 3, Section 4079, the author says:

"A contract between two corporations, where the same persons are directors and officers in both, is probably not bad in law; since by a fiction of law the corporation is a person distinct from the individuals who compose it. But here, as in most other matters in respect of corporations, the weakness of what is called law, in clinging to fiction, is supplied by the strength of that part of the law which is called equity, in cutting through forms and getting at the substance of things."

In Section 4081 the author says:

"A better view is, that such contracts are voidable, although there was a quorum in each board of directors who were not directors in the other. This view is founded upon experience and rests upon

the well known opportunities for fraud which exist where all the members of each contracting body are not in a situation to think and act freely for their own constituents without being swayed by any considerations in behalf of the other, and upon the right of
714 those directors who are disinterested to be able to consult with a full board, whose allegiance, like their own, is clear. Accordingly it has been held that a contract between a railroad and a construction company is void, in the sense that it cannot be made the foundation of equitable relief when any of the directors of the railroad company are members of the construction company; and that the fact of long acquiescence on the part of the stockholders of the railroad company makes no difference. Citing Thomas v. Railroad Co., 109 U. S., 522, s. c., 1 McCrary, 392, and 2 Fed., 887; Barr v. New York R. R. Co., 5 N. Y. Supp., 623; s. c., 52 Hun., 555; also Bunnell v. Empire Laundry Co., 24 N. Y. St., 675; s. c., 5 N. Y. Supp., 591."

Section 4082 of the same volume, is as follows:

"Clearly a contract between two corporations is voidable in equity at the suit of either corporation or its representative, where the same persons were directors of both corporations. Citing, Bill v. Western Union Tel. Co., 16 Fed., 14."

In Morawetz Corporations, 2nd Ed., Vol. 1, Sec. 520, the author says:

"It is clear that the directors of a railroad company have no right to make contracts on behalf of the company for the construction or equipment of its road by a construction company in which they are interested as shareholders, and even if they were not interested in the construction company at the time when the contract was entered into they would have no right to become shareholders thereafter and continue to act as directors of the railroad company. Their interest in adding to the profits of the construction company by allowing the railroad to be built cheaply and imperfectly would be opposed to their duty to the railroad company to insist upon a strict performance of the contract and a careful construction of the road."

In Clark & Marshall, Corporations, Vol. 3, Sec. 760, the authors say:

"No principle in the law of corporations, therefore, is founded on sounder reasons, or more surely settled, than the principle that the directors, trustees, or other officers of a corporation, who are intrusted with its interests, and occupy a fiduciary relation towards it, will not be allowed to contract with the corporations, directly or indirectly, or to sell property to it, or purchase property from it, where they act both for the corporation and for themselves. In such a case the transaction is, at the very least, voidable at the op-
715 tion of the corporation; and, it may be voided and set aside, or affirmed and any profits recovered, without proof of actual fraud or of actual injury to the corporation * * * It has also been held in a number of cases that the doctrine applies to a contract or other transaction between two corporations, where the directors or other officers of one of them, or some of the directors or officers

of one of them, are also stockholders or directors or officers of the other."

In Dickerman v. Northern Trust Company, 176 U. S., 181, the court say:

"The promoter is the agent of the corporation and subject to the disabilities of an ordinary agent. His acts are scrutinized carefully, and he is precluded from taking a secret advantage of other stockholders. Cook, Stock & Stockholders, Sec. 651." * * *

"In those cases where the scheme of organization gives the promoters the power of selecting the directors who are to represent the company in the proposed purchase they are bound to select competent and trustworthy persons who will act honestly in the interests of the shareholders. A purchase made from the promoters under these circumstances will not bind the company unless it was a fair and honest bargain."

In Yeiser v. U. S. Board & Paper Co., 107 Fed., 340; 46 C. C. A., 567; 52 L. R. A., 724, the opinion by Severens, C. J., Circuit Court of Appeals, Sixth Circuit, is in part as follows (p. 344):

"It is a well settled principle of equity that those who participate in bringing about the organization of an incorporated company, and in getting it in condition for transacting the business for which it was organized, assume the obligations of a trust toward the company and those who shall be invited to come into the enterprise as stockholders and share in its fortunes. The latter have the right to rely on the good faith and fair dealing of those who have promoted the company, and to assume that they have not perverted the organization by secret means to the accomplishment of selfish purposes, and the destruction of that equality of right which in the absence of some known modification, all the stockholders are entitled to enjoy. Indeed, some of the decided cases hold a wider doctrine, and declare that whether the promoter becomes a stockholder himself or not, he owes a like duty to those who became such, and cannot, by covert manipulation of the company while it is under his control, and without the faculty of acting for itself, take a personal profit from his dealings with it. The recognition of a fiduciary relation in such circumstances is merely for the application
716 of a familiar principle of equity, which fastens a trust upon one who has such power over another and his affairs as to give the former an opportunity to make personal gains in his dealings with them * * * Of course these observations do not apply to a case where the corporation, having knowledge of the facts and freedom of action, consents to a contract proposed by another, even though he may be a stockholder or director. The corporation could not in such case complain, nor could a stockholder, if there had been no actually fraudulent purpose towards him * * *. When, on August 93, 1896; Browne and Stuart made their proposition to sell the mill to their company, and they and their co-operating associates, acting as the board of directors, accepted it for the company, the company was completely in fetters. While it was made to be a purchaser, it was dominated by the seller. It had no organ for seeing, hearing, or even knowing what was going on.

Its whole constituency was engaged in bringing about the sale for the sellers. We have, on several occasions, held that where one who assumes to act as the agent of another in a given transaction is really acting as the agent of a third person, or in behalf of some scheme of his own, his apparent principal, having no knowledge of such alien purpose, is not bound by such pretended agent's acts, nor by any notice or knowledge of facts which such agent had at the time the transaction was going forward. Thompson-Houston Electric Co. v. Capitol Electric Co., 12 C. C. A., 643, 22 U. S. App., 639, 65 Fed., 341; Wilson v. Pauly, 18 C. C. A., 475, 37 U. S. App., 642, 72 Fed., 129, 134; Louisville Trust Co. v. Louisville N. A. & C. R. Co., 22 C. C. A., 378, 43 U. S. App., 550, 75 Fed., 433, 469."

In Hayward v. Lesson, 176 Mass., 310; 57 N. E. Rep., 656; 49 L. R. A., 725, the Court say:

"The defendants say that they did disclose the fact to the East Tennessee Land Company and they did get the consent of the East Tennessee Land Company to the payment of this $700,000 of stock to them for their remuneration as promoters, and that is not only enough, but it is final. It is true that the vote authorizing the issue of this stock to them as the profits which they were to have out of the organization of the company was voted unanimously by all the incorporators of the East Tennessee Land Company, and all who were then subscribers to its capital stock; that is, by all the persons who then had any interest in that corporation. That is to say, it is true that the fact that the promoters were to receive $700,000 of paid up capital stock as remuneration for their services was disclosed and consented to by all the persons who then had any interest in the corporation. But it is also true that at that
717 time, no person except the promoters had any interest in the corporation, barring one Mason, in whose name some of the options were subsequently taken, and who was plainly a mere nominee of the promoters, and that at that time no capital stock of the corporation had been issued to the public. Payment to promoters or remuneration for their services, is not made valid by a vote passed by the corporation, when the corporation is in the sole control of the promoters, before the capital has been issued to the public. Phosphate Co. v. Erlanger, 5 Ch. Div. 73; Erlanger v. Phosphate Co., 3 App. Cas., 1218; In re Olympia, (1898) 2 Ch. Div., 153; in re British Seamless Paper Box Co., 17 Ch. Div., 467, 471, 472. The persons to whom the promoters owe the duty which they owe by reason of their fiduciary relation are the persons who put their money into the enterprise at the invitation of the promoters; that is to say, the future stockholders."

In Morgan et al., v. King, 27 Colo., 539, 63 Pac. Rep., 416, the Court say:

"Conceding, however, that by the exercise of ordinary diligence upon the part of the plaintiff in connection with the affairs of the bank, he could not have acquainted himself with the sale, we are not aware of any rule of law which would require him to take these steps. He certainly was not required to assume that the agents of the bank charged with the management of its affairs would make

a wrongful disposition of its assets, nor does the law impose upon him any obligation to examine into the affairs of the bank for this purpose. If, in fact, the defendant directors have been wrongdoers, their relation to the plaintiff and the bank was such that they are not in a position to impose upon the plaintiff any considerable degree of vigilance in ferreting out their wrongs, as a condition precedent to his right to maintain an action against them on account of their wrongful acts. Fitzgerald v. Construction Co., (Neb.) 62 N. W., 899; Jenkins v. Hammerschlag (Sup.) 56 N. Y. Supp., 534; Light Co. v. Lahey (Ala.) 25 South. 1006."

In Bent v. Priest, 86 Mo., 475, the Court say:

"Our statute of limitations applies to equitable, as well as legal causes of action, and we agree with counsel for the defendant that this cause [*underation*] should be considered in the light of the former equity rules, the place of which, in many respects, at least, it was designed to take. * * * Much, we think, depends upon the fact whether the fraud is a secret or open one. If the sub-
718 stantial facts constituting the fraud, in cases like the one under consideration, were open, it is believed, under the equity rules, the statute of limitations would have been applied at once, but if these facts were in their nature secret and were unknown, it is believed the statute would not begin to run until they were discovered, there being no want of diligence on the part of the complainant."

In Bryan v. Kales, 134, U. S., 126, Justice Harlan says:

"If, as contended by the defendants, a court of equity may deny relief because of laches in suing, although the plaintiff commenced his action within the period limited by the statute for actions at law, still the granting or refusing relief, upon that ground, must depend upon the special circumstances of each case."

In Galliher v. Cadwell, 145 U. S., 368, the Court say:

"But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relation of the property or the parties."

In Rhinelander v. Barron, 17 Johns, (N. Y.), 538, the Court say:

"The Chancellor, therefore, correctly ordered the special reference to the master as before stated. Numerous cases go to show that accounts have frequently been ordered to be opened after a longer period than the present; where, as in this case, it appeared that undue advantage had been taken of the peculiar situation of the party. In Bosanquet v. Dashwood, (Cases temp., Talbut, 37), usurious agreements were made and repeated from 1710 to 1724. The accounts were ordered to be opened, and the demands reduced to money really lent. So in Vernon v. Vawdy, 2 (Atk., 119), the whole account was opened after a period of 23 years. The same principles governed the decision in a number of cases cited by the respondent's counsel, in the argument of this cause in the court below. (1 Johns, Ch., 555)."

In Ryan et al., v. Leavenworth, 21 Kansas, 270, the Court say:

"It was not necessary to allege that the Missouri River Railroad Company and the Leavenworth, Atchison & Northwestern Railroad Company, or either or them, did not discover the frauds of the defendants until within two years next before the suit was com-
719 menced, as the allegations of the petition show satisfactorily that these companies were, and continue to be under the actual potential control of the wrongdoers, who are necessary defendants, and knowledge on the part of the guilty officers and agents of the corporations of the fraudulent acts and conduct of themselves and guilty associates, is no notice to the corporation or its stockholders so as to give the advantage of this notice to such agents and associates."

In O'Brien v. Wheelock, 184 U. S., 450, the Court say (p. 493):

"The doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time is thoroughly settled. Its application depends on the circumstances of the particular case. It is not a mere matter of lapse of time, but of change of situation during neglectful repose, rendering it inequitable to afford relief."

In Pomeroy on Equity Jurisprudence, 3rd Ed., Vol. 2, Secs. 917, 965, the author says:

"Sec. 917: Promptness—Delay through ignorance of the fraud.—The most important practical consequence of the two principles above mentioned is the requisite of promptness. The injured party must assert his remedial rights with diligence and without delay, upon becoming aware of the fraud. After he has obtained knowledge of the fraud, or has been informed of facts and circumstances from which such knowledge would be imputed to him, a delay in instituting judicial proceedings for relief, although for a less period than that prescribed by the statute of limitations, may be, and generally will be, a bar to any equitable remedy. To this rule, there is one limitation; it applies only when the fraud is known or ought to have been known. No lapse of time, no delay in bringing a suit however long, will defeat the remedy, provided the injured party was, during all this interval, ignorant of the fraud. The duty to commence proceedings can arise only upon his discovery of the fraud; and the possible effect of his laches will begin to operate only from that time.

Sec. 965: Acquiescence and lapse of time—A second mode by which the remedial right may be destroyed and the transaction rendered unimpeachable, is acquiescence. The term "acquiescence" is sometimes used improperly. It differs from confirmation on the one side; and from mere delay on the other. While confirmation implies a deliberate act, intended to renew and ratify a transaction known to be voidable, acquiescence is some act, not delib-
720 erately intended to ratify a former transaction known to be voidable, but recognizing the transaction as existing, and intending, in some extent at least, to carry it into effect, and to obtain or claim the benefits resulting from it. The theory of the doctrine is, that a party, having thus recognized a contract as existing, and having done something to carry it into effect, and to obtain or claim

its benefits, although perhaps only to a partial extent, and having thus taken his chances, cannot afterwards be suffered to repudiate the transaction and allege its voidable nature. It follows that mere delay, mere suffering time to elapse, without doing anything, is not acquiesence is thus a recognition of and consent to the contract or for refusing equitable relief, either affirmative or defensive. As acquiscence is thus a recognition of and consent to the contract or other transaction as existing, the requisites to its being effective as a bar are, knowledge or notice of the transaction itself, knowledge of the party's own rights, absence of all undue influence or restraint, and consequent freedom of action; a conscious intention to ratify the transaction, however, is not an essential element. When a party with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all the material facts, freely does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time and knowingly permits the other party to deal with the subject matter under the belief that the transaction has been recognized, or freely abstains for a considerable length of time from impeaching it, so that the other party is thereby reasonably induced to suppose that it is recognized there is acquiesence, and the transaction, although originally impeachable, becomes unimpeachable in equity. Even where there has been no act or language properly amounting to an acquiesence, a mere delay, a mere suffering time to elapse unreasonably, may of itself be a reason why courts of equity refuse to exercise their jurisdiction in cases of actual and constructive fraud, as well as in other instances. It has always been a principle of equity to discourage stale demands; laches are often a defense wholly independent of the statute of limitations. Promptness in asserting a remedial right against fraud is sometimes required; but no delay will prejudice a defrauded party as long as he was ignorant of the fraud. Each case involving the defense of delay or lapse of time must, to a great extent, depend upon its own circumstances."

Cases cited by Complainant Classified and Distinguished from the Case at Bar.

721 1. There are distinguishing features between the case at bar and that class of complainant's cases in which dissenting minority stockholders sought to prevent, by speedy, seasonable resistance the consummation or execution of an oppressive contract or course of conduct by the majority, by instituting proper proceedings to rescind a contract before its execution and before the status quo has changed, and in nearly all which cases, the prayer was for injunctive relief against offending directors. Of this class are the following cases, cited by complainant.

Met. Ry. Co. v. Manhattan, etc., Co., 11 Daly, 375;
Bridgens v. Bank, 66 Fed., 9;
Bill v. Western Union Tel. Co., 16 Fed., 14;
Meeker v. Winthrop Iron Co., 17 Fed., 48.

Earle v. Seattle R. R. 56 Fed., 909.
Pearson v. Concord, R. R., 62 N. H., 537.
Memphis R. R. v. Woods, 88 Ala., 630.
Glengary Mining Co. v. Boehmer, 28 Cal., 3.
Robothorn v. Prudential Ins. Co., 64 N. J., Eq., 673.
Pacific R. R. v. Mo. Pacific R. R., 111 U. S., 505;

and many other cases cited by complainants.

For example, in the case of Bridgens v. Savings Bank, 66 Fed., 9, decided by Phillips, Judge, the transaction challenged occurred on July 17th, 1893, and on the same day a receiver was appointed in insolvency proceedings. Within one month, the receiver demanded a rescission of the transaction which on its face was a gross fraud not only on stockholders but existing creditors. The transaction was a secret one, had never been entered on the books of either company, had never been reported to or ratified by the directors of either corporation, and the offending officer knew at the time of his wrongful act that the concern was on the eve of insolvency.

2. Nor is the case at bar analogous to that class of cases relied upon by complainants and insolving secret and concealed frauds, and to which class belong Wardell v. U. P. R. R., 103 U. S., 651; Attala Iron Co. v. Virginia Iron Co., 111 Tenn., 527; Bridgens v. Bank, 66 Fed., 9, and many other cases cited by complainant's counsel. For example, in Wardell v. U. P. R. R. Co., supra, the contract had been entered into by the Executive Committee of the railroad company, had never been reported to the Board of Directors and had never been approved by them. This feature of that case was made the basis of distinguishment by Mr. Justice Harlan in Jesup v. R. R., 43 Fed., 483.

3. Nor is there any decided similarity between the case at bar and those relied upon by complainant's counsel, wherein the
722 corporation defendant was enabled to keep itself in control of the injured corporation through its ownership of a majority of the shares of the other company, and where the action was instituted by a diligent minority.

In the case at bar, the Trust Company at no time owned voting control of the railroad companies involved in this proceeding. To this class of cases belong Pittsburg R. R. v. Dodd, 115 Ky., 176; Miner v. Belle Isle Ice Co., 93 Mich., 97; Pacific R. R. v. Mo. Pacific Ry., 111 U. S., 505; Hoffman Co. v. Cumberland Co., 16 Md., 456; Farmers Loan & Trust Co. v. N. Y. & N. R. R., 150 N. Y., 410; s. c., 34 L. R. A., 76; McGourkey v. R. R., 146 U. S., 536, and other cases cited by complainant's counsel.

4. It has been strongly contended by counsel for the Trust Company that the class of cases cited by complainants, respecting the "liabilities of promotors", has no application to the case at bar, that such cases are simply declaratory of the well established doctrine that, where promoters buy property at a certain price and afterwards sell it for a greater price to a corporation, organized by them for the purpose of acquiring the property, they are legally bound to disclose to the corporation the price at which they bought; in other

words, while such promoters are prohibited from making a secret profit, they are not debarred from making a profit on their sale to the corporation, provided they make proper disclosures to it.

In this case it is questionable whether any of the transactions of the Trust Company with the Belt Company could be even inferentially brought within the application of the "secret profits doctrine", but, later on, further reference will be made to this subject in connection with certain items, which have been designated in the ancillary bill as of a promotion character. As an additional reason against the applicability of the promotion cases to the facts in this case, it is contended by respondent's counsel that no showings were made in those cases as to acquiescence, laches or long lapse of time, such as are proven to exist in the case at bar.

III.

The Master's Conclusions as to Certain Propositions of Law Applicable to the Facts in the Record.

After a careful examination of the cases, submitted by counsel for both parties, the Master has reached the following conclusions, in respect to the principal propositions of law, which have to be determined, preparatory to his findings upon the various questions to be decided in this cause.

723 First. "Rights of Receiver".

The rights of the complainant, as receiver of the Belt Company, being wholly derivative, are neither greater nor less than those of the Belt Company itself, and, hence, if the latter is barred or estopped by reason of the proofs in the record, so likewise is its receiver.

The receiver is authorized to sue in his own name to recover any assets of the company from one, who has wrongfully misappropriated or wasted them with the connivance or assistance of the company's officers, under circumstances, similar to those stated in Alexander v. Relfe, 74 Mo., 495.

Generally speaking, however, and in the absence of an intention to defraud the corporate creditors, a receiver has no right of action for an alleged improper diversion of corporate funds, which was made by and with the consent of the stockholders, or subsequently ratified by them, while the corporation was solvent, and still a going concern. In an action by the receiver on any claim or demand, which is part of the receivership estate, any defense, which might have been set up to an action by the corporation, may be asserted against the receiver.

Kessler v. Ensley Land Co., 148 Fed., 1019.
Graham v. R. R., 102 U. S., 148.
Lawrence v. Greenup, 97 Fed., 906.
Alexander v. Relfe, 74 Mo., 495.

Second. "Common Directors."

Where two corporations enter into a contract, through their re-

spective boards of directors, in which a majority of such directors are common to each board, such contract will not, necessarily, be declared void on that account, regardless of its fairness or of the benefits accruing to both or either of the contracting corporations, nor will the common directors, under such circumstances, necessarily come within the rigid rule of those cases, which hold that one, who acts in a fiduciary capacity, cannot deal with himself in his individual capacity; in other words, the right of two corporations to contract with each other is not absolutely impaired or destroyed by reason of the fact that a portion or a majority of the directors are common to both corporations, and to which corporations such directors owe fidelity. There is a marked distinction between the "want of power" and the "abuse of power".

Complainant's authorities, hereinbefore cited; and

724 Twin Lick Oil Co. v. Marbury, 91 U. S., 587.
Pneumatic Gas Co., v. Berry, 113 U. S., 322.
Omaha Hotel Co. v. Wade, 97 U. S., 13.
Jesup v. R. R., 43 Fed., 483.
Coe v. E. & W. R. R., 52 Fed., 531.
Robison v. McCracken, 52 Fed., 726, c. c. 57 Fed. 375.
Gould v. R. R., 52 Fed., 531.
Leavenworth v. C. R. I. & P. R. R., 134 U. S., 688.
R. R. v. Keokuk Bridge Co., 131 U. S., 381.
Barr v. R. R., 125 N. Y., 263.
San Diego, etc., R. R. v. Pacific Beach, etc., R. R., 112 Cal., 53, s. c. 33 L. R. A., 788 (and see elaborate note to this case in 33 L. R. A., collecting all the authorities).
Roberts v. Bank, 11 Wash., 550.
Davidson v. R. R., 11 App. Div. (N. Y.), 28, s. c. 58 Fed., 663.
Richardson v. Green, 133 U. S., 30.
Kitchen v. R. R., 69 Mo., 224.

In Twin Lick Oil Co. v. Marbury, supra, the statement is made that, "the property in controversy had been appropriated and used for the production of mineral oil from wells, a species of property which is, more than any other, subject to rapid, frequent and extreme fluctuations in value. The director who bought it committed no actual fraud, and the corporators knew at the time of his purchase all the facts upon which their right to avoid it depended. They refused to join him in it, or to pay the assessments then made on their stock; and it was nearly four years thereafter when the hazard was over, and his skill, energy and money had made his investment profitable, that any claim to, or assertion of right in, the property was made by the corporation, or the stockholders. Held that the court below properly dismissed the bill of complaint of the corporation."

Mr. Justice Miller, delivering the opinion of the Court, says:

"The general doctrine, however, in regard to contracts of this class, is, not that they are absolutely void, but that they are voidable at the election of the party whose interest had been so represented

by the party claiming under it. We say, this is the general rule; for there may be cases where such contracts would be void ab initio; as when an agent to sell buys of himself, and by his power of attorney conveys to himself that which he was authorized to sell. But, even here, acts which amount to a ratification by the principal may validate the sale.

725 The present case is not one of that class. While it is true that the defendant, as a director of the corporation, was bound by all these rules of conscientious fairness which courts of equity have imposed as the guides for dealing in such cases, it cannot be maintained that any rule forbids one director among several from loaning money to the corporation when the money is needed, and the transaction is open, and otherwise free from blame. No adjudged case has gone so far as this. Such a doctrine, while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those much interested in giving aid judiciously, and best qualified to judge of the necessity of that aid, and of the extent to which it may safely be given.

The authorities to the point of the necessity of the exercise of the right of rescinding or avoiding a contract or transaction as soon as it may reasonably be done, after the party with whom the right is optional is aware of the facts which gave him that option, are numerous and well collected in the brief of appellees' counsel. The more important are as follows: Badger v. Badger, 2 Wall. 87; Harwood v. R. R. Co., 17 id., 78; Marsh v. Whitman, 21 id., 178; Vigers v. Pike, 8 Cl. & Pin., 650; Wentworth v. Lloyd, 32 Beav., 467; Follansbee v. Kilbreth, 17 Ill., 522."

In Jesup v. R. R., supra, a railroad company had leased all of its property to another railroad company, and the question involved was respecting the validity of the lease, which was the only transaction in controversy between the two companies, and not a series of transactions, as in the case at bar. Both of the companies had common directors, and the transaction was attacked on that account.

Mr. Justice Harlan, delivering the opinion of the Court, says:

"But to avoid misapprehension it is well to say that, in the judgment of the court, the lease would not have been void, even if a majority of the directors of the Dubuque Company occupied the same relations to the Cedar Falls Company that Jesup, James, Frost, and Smith did when the lease was made. It would, at most, have been simply voidable at the election of the Dubuque Company, or, in a proper case, at the suit of its stockholders, and that election must have been exercised, or that suit brought, within such time as was reasonable, taking into consideration the facts and circumstances of the case, including the nature of the property that was the subject of the lease."

726 In San Diego, etc., R. R. v. Pacific Beach, etc., R. R., supra, the syllabus, is as follows:

"1. The fact that some, or a majority, of the directors of two corporations, are common to both, does not make a contract between the companies absolutely void or prevent its ratification.

2. Ratification of a contract between corporations having common

directors is shown where one company has entirely performed its part of the contract, and the other has performed a part of it and cannot restore anything or place the other party, in whole or in part, in statu quo,—especially when the stockholders have expressly approved the contract.

3. Unanimous consent of all the stockholders is not necessary to the ratification of a voidable contract which a majority of them could have authorized in the first instance."

The Court say:

"The main contention of appellant for a reversal arises out of these facts; The respondent had five directors, and the appellant nine; and at the time the contract was made four of the directors of the appellant were also directors of the respondent, and it is also claimed that, before the completion of the contract, a fifth director of appellant—D. C. Reed—became a director of the respondent. A majority of the directors of both corporations were also stockholders in both, and the contention of appellant is that, because they were common directors of the two corporations as aforesaid, therefore the contract was absolutely void, and incapable of ratification. Respondent contends that upon the facts the contract was, at the most, only voidable, and that the appellant ratified it. Appellant also contends that, even though ratification were possible there was none. In this cause, there is no actual fraud, either alleged or found; and this distinguishes it from many of the cases cited by appellant. The contract seems to have been a fair, open one, and carried into effect before the eyes of all persons interested. Neither is there any question of ultra vires; and he also distinguishes the case from the cases cited by appellant. The court found that appellant's charter expressly gave it the power to make such a contract. See also on this point Vandall v. South San Francisco Dock Co., 40 Cal., 83. The contentions, therefore, at this point of the case, is that the mere fact that there were common directors, as above stated, of the two corporations at the time of the contract, makes it absolutely void; and this contention cannot be maintained.

727 Where two corporations, through their boards of directors, make a contract with each other, the directors who are common to both are not within the rigid rule of the cases which hold that one who acts in a fiduciary capacity cannot deal with himself in his individual capacity, and that any contract thus made will be declared void, without any examination into its fairness, or the benefit derived from it to the cestui que trust. Two corporations have the right, within the scope of their chartered power, to deal with each other; and this right is certainly not destroyed or paralyzed by the fact that some, or a majority, of the directors are common to both. Of course, if such directors should wrongfully and wilfully use their power to the prejudice of one of the corporations, their actions, if not acquiesced in, and if contested at the proper time, could be avoided, as in any other case of actual fraud. But such common directors owe the same fidelity to both corporations, and there is no presumption that they will deal unfairly with the other. Therefore, their acts as such common directors are not void.

In the notes to Section 658, Cook, Stock & Stockholders, 3rd Ed., there are many cases cited on the subject. They are not all in perfect harmony, but they abundantly warrant the statement in the text that 'this class of contracts certainly are not void.' See also Booth v. Robinson, 55 Md., 119; Kitchen v. St. Louis, K. C. & N. R. Co., 69 Mo., 224. The decisions of this court and of other courts, cited by appellant, are mostly in cases where trustees attempted to contract about the trust property directly with themselves, for their individual benefit, and not cases where corporations dealt with each other through common directors; or in case of ultra vires in the strict sense; or in cases where actual fraud was the ground of the alleged invalidity of the contract."

It has been suggestively stated, in Bill v. Western Union Telegraph Company, 16 Fed., 14 (cited by complainants) that the theory that common directors are incompetent to vote on a contract between the two corporations, arises from confounding the distinction between "want of power" and the "abuse of power."

In Leavenworth v. C. R. I. & P. R. R. Co., supra, the cardinal facts were: The Rock Island Company, had guaranteed the bonds of the Southwestern Company, and for a number of years, it, through its officers, owned and voted a majority of the stock in that company, but finally foreclosed the bonded indebtedness on the company's properties, and through a new corporation, organized in its interest, purchased at the foreclosure sale the Southwestern railroad. A bill was filed by a stockholder of the Southwestern
728 to set aside the decree for fraud, mainly upon the grounds that,

(*a*) One of the trustees in the mortgage was a director in the Rock Island;

(*b*) The President of the Rock Island was the President of the Southwestern;

(*c*) A majority of directors in the Southwestern were directors in the Rock Island;

(*d*) The President of the Rock Island held a majority of the stock of the Southwestern;

(*e*) The attorney who represented the Southwestern, had been attorney for the Rock Island, and after the foreclosure again represented the Rock Island;

(*f*) One of the attorneys in the foreclosure was at one time a director in the Southwestern.

The finding of the court was that at times the officers of the Rock Island did control the Southwestern Company for the purpose of making it a feeder for it, "but that this purpose was not necessarily a bad one". At the end of two or three years, it was found that the Southwestern Company owed the Rock Island Company over $1,000,000 for repairs, besides the interest on bonds, paid by it. Mr. Justice Miller, in delivering the opinion of the court, said:

"If it could be shown that the Southwestern Company did not owe this interest, or that the Rock Island had in its hands the means of the Southwestern Company to meet this obligation, and that by reason of collusion between those who controlled both companies,

this fact was suppressed or concealed, it would present a strong case for relief. But this would be actual fraud, and one not necessarily growing out of the influence of the Rock Island directory over that of the Southwestern. Notwithstanding this commingling of officers, the corporations were distinct corporations. They had the right to make contracts with each other in their corporate capacities, and they could sue and be sued by each other in regard to the contracts, and the question is not, could they do these things, but, have the relations of the parties—the trust relations, if, indeed such existed—been abused to the serious injury of the Southwestern?"

Relief was denied to the complainant.

It will be observed that in this Leavenworth case, the quotation from the opinion of the United States Supreme Court is in respect to actual fraud, such as collusion between those who controlled both corporations, to suppress or conceal something, and is not
729 intended to apply to the ordinary conditions which necessarily grow out of the influence of either directory upon the other, where two corporations are involved. In fact, the learned Judge recognizes and states that the corporations, being distinct corporate entities, have the right to make contracts with each other in their corporate capacities, and to sue and be sued in respect to such contracts so made, and, it would seem to follow on principle, as the logical result of such authorities, even though the distinction has not been clearly made, that two corporations, having common directors, can make binding contracts with each other, just as two individuals could do, but subject to be avoided in case actual fraud is shown in their mutual transactions; in other words, that the corporate ability to act is complete and binding except only in cases of actual fraud to the detriment of the injured corporation.

In most of the "Common Director" cases, the controversy is between the injured corporation and the director, standing in a fiduciary relation to it and charged to have abused or violated his trust, and is not between two corporations, having such common directors. Complainants insist that there is no substantial difference, as affecting the principle involved, whether the injured corporation deals directly with the director, or through him with another corporation, which he serves to the detriment of the complaining corporation. Cases have been cited sustaining the view of complainant's counsel, and, yet, in the various ramifications of corporate transactions, and the division of the responsibilities cast upon each member of a directory, it does seem that there should be a difference between dealing with an unfaithful director, who has received all the benefits of the particular transaction, and, undertaking to open up and rescind transactions had with another corporation, simply because the two companies happen to have directors which are common to both; but in the determination of the issues in this cause, and the proofs in the record, as they appear to the Master, it is, perhaps, immaterial whether a distinction exists or not, respecting the measure of liability, in either case.

Third.—"Equity Rule." It is a well settled rule of equity jurisprudence that the directors, common to two corporations, are so far

disqualified to represent both, when the corporate interests are antagonistic, that they cannot absolutely bind either company, but that a court of equity will, "notwithstanding the apparent legal effect of the transfer and transaction between the two corporations, treat the same according to the real facts and equities of the case;" and, further, that a corporation will not be permitted to form an ancillary company and then contract with it to the advantage of
730 creditors and stockholders interested. Bridgens, v. Savings Bank, 56 Fed. Rep., 9, and cases therein cited.

Fourth.—"Acquiescence of Stockholders". In case a contract between two corporations, having a majority of directors in common, is of such nature that a court of equity would have set it aside, if it had been seasonably contested by non-assenting stockholders, yet if such stockholders either knew of such contract, or having the means of knowledge easily within their reach, "lie supinely by", and take no proper means to prevent its execution, they will be deemed to have acquiesced in the transaction, represented by the contract, and will be held estopped from attacking it. In the language of one of the leading cases, shareholders in such case "are not allowed to speculate at the risk of others on the unauthorized acts of their agents, with the privilege of adopting their acts, if the result prove favorable, and of repudiating responsibility in case of loss".

Morawetz Corp., Sec. 630.
Jesup v. R. R., per Harlan, J., 43 Fed., 483.
Foster v. R. R. 36 Fed., l. c., 637.
Pneumatic Gas Co. v. Berry, 113 U. S., 322.
Leavenworth v. C. R. I. & P. R. R., 134 U. S. 688.
Kessler & Co. v. Ensley & Co., 123 Fed., 546, s. c., 129 Fed., 397.
Twin Lick Oil Co. v. Marbury, 91 U. S., 587.
Coe v. R. R., 52 Fed., 53.
Kelly v. R. R., 141 Mass., 496.
10 Cyclopedia Law & Procedure, 1075.
San Diego, etc., R. R. Co. v. Pacific Beach Co., 112 Cal., 53, 33 L. R. A. 788.

In Jesup v. Illinois Cen. R. R. Co., supra, Mr. Justice Harlan says:

"Now it is said that during the whole period of 20 years while the Cedar Falls Road was controlled by the Illinois Central Railroad Company, Jesup was either president or in control of the Dubuque Company, had possession of its records and papers, and dominated its proceedings, and that it was not until he and the directors whom he controlled resigned in 1887 that the Dubuque Company was in a position or was able, to ascertain the facts, and take such steps as would right the wrong alleged to have been done to it in 1866. * * * "What facts?", the court asks, "It is inconceivable that the fact of the lease of the Cedar Falls road to the Dubuque Company, as well as the terms of the lease, were not known, or could not easily have been known, to every director and stockholder in
731 the Dubuque Company. If directors or stockholders of that company were ignorant for 20 years of the terms of the lease,

it was because they were guilty of the grossest negligence in not making inquiry on the subject."

Again:

"The proof satisfactorily shows that this report went to the stockholders of the Dubuque Company. But if there was no proof on the subject, it would be presumed at this late day that it was known to them, or that every stockholder could know, if he tried to know, all the facts. During all that time, the Dubuque Company its offices and stockholders, have remained silent, not only leaving the Illinois Central Railroad Company to treat the lease of September 27, 1866, as valid and binding upon the Dubuque Company, and therefore to be assumed by the former company during its possession of the Cedar Falls road, but inducing, as may be reasonably inferred, the holders of the stock and bonds of the Cedar Falls Company to believe that the rental agreed to be paid by the Dubuque Company could be looked to as a security for the full term of 40 years. This silence and delay upon the part of the Dubuque Company cannot be excused upon the ground suggested in its answer, namely, that so long as the Illinois Central Railroad Company agreed to pay, and paid, the rent of the Cedar Falls road, it was of 'no moment' to the shareholders of the former company what was the amount of such rent. The suggestion assumes that the question of the continuance of the lease concerned only the Dubuque Company. But it was of moment to the Cedar Falls Company, its bondholders and creditors, to say nothing of its stockholders, to know whether that lease was to be carried out according to its terms, and whether the Dubuque Company intended to dispute its binding force. If, at the instance of the latter company, or of its stockholders, the lease had been abrogated shortly after it was executed, it may be that the Cedar Falls Company could have made with the other railroad corporations arrangements quite as favorable as those set forth in the lease.

The Dubuque Company had no right, therefore, to treat it as valid lease, to be respected by the Cedar Falls Company and by the Illinois Central Railroad Company, so long as the latter retained possession of the Dubuque road, but to be repudiated as soon as the Illinois Central Railroad Company ceased to be under obligation to assume it.

The suggestion that the acts entitling the Dubuque Company to a decree cancelling the lease could not have been discovered by it until its own road was turned back to it by the Illinois Central Railroad Company, and until after the election of new di-
732 rectors in 1887, has no substantial grounds upon which to rest. Here is a lease of a railroad which was treated as valid, and acted upon by all the parties concerned for more than twenty years. At the expiration of that long period, the lessee company asks a cancellation of the lease because of certain facts which it claims to have just found out, but which its stockholders and directors either knew or could easily have ascertained at any time within the past twenty years * * * Even if such ignorance existed upon the part of some of those who became stockholders of

the Dubuque Company after that corporation resumed possession of its road, that circumstance cannot shut out of view that those who were in any wise interested in the Dubuque road, either as directors or stockholders, when the lease of 1866 was made and for 20 years thereafter, knew or could easily have ascertained, all the circumstances attending the execution of that instrument, as well as the nature of its terms and conditions."

Again:

"Seasonable resistance cannot be predicated of a case of a merely voidable contract, where the party complained has not simply been silent for 20 years, but with knowledge of the facts, or with full opportunity to ascertain them, has enjoyed the fruits of the contract, and treated it as valid.

The court is of the opinion that, independently of any question as to the statute of limitations of Iowa, in which state the contract of lease was made, and was to be executed, the Dubuque Company is estopped to dispute the binding force of the lease of September 27, 1866, and, therefore, is not entitled to a decree of cancellation."

In the case of Pneumatic Gas Co. v. Berry & Another, supra., the court said:

"A release by a corporation of its directors of all claims equitable or otherwise, arising out of transactions under a contract between the corporation and the director, made in excess of its corporate powers, is valid, if made in good faith, and without fraud or concealment."

This is a case in which the corporation sought an accounting, not with another corporation (as in the case before us), but with certain directors with whom it had contracted, and afterwards asserted that such contract was void by reason of the fiduciary relation of the directors.

The Court said, again:

"A court of equity does not listen with much satisfaction to the complaints of a company that transactions were illegal which
733 had its approval, which were essential to its protection, and the benefits of which it had fully received. Complaints that its own directors exceeded their authority come with ill grace when the acts complained of alone preserved its existence.

But it is not necessary to rest our judgment of affirmance of the character of those transactions. After seven years' acquiescence in the lease, something more must be shown than that it was executed in excess of the powers of the directors, before the lessee will be required to surrender the profits he has made under it.

The lease expired June 1, 1874; the disposition of the property was settled by the agreement of March 15, 1876; and the release is an answer to all claims for the profits made by the defendants. The release is of itself sufficient to justify the dismissal of the bill. There is no evidence that it was obtained by any fraudulent representations. Nothing was kept from the parties when it was executed. Indeed all the transactions between the defendants and the company, from the time they took from Frost an assignment of the lease, were open and well known. There was no concealment either had or

attempted, of anything that was done, and no just reason can be given for disturbing the settlement made."

In San Diego, etc., R. R. Co. v. Pacific Beach Co., supra, the court said:

"The contract, therefore, was not void; and assuming that it was voidable, and might have been avoided by the appellant at the proper time and in the proper manner, it is clear that it was not so avoided, but that it was ratified. In the first place there was no attempt to avoid it, nor any intimation of such intention, until long after the time mentioned in the contract had expired, and respondent had performed all its covenants therein provided, until long after appellant had received all the benefits coming to it from respondent's performance, and until long after it had become impossible to restore anything to respondent, or to put it, in whole or in part, in statu quo. And during this time appellant without objection paid, from time to time, the greater part of the principal and a large part of the interest which by the contract it had promised to pay; thus inducing respondent to perform the whole of its part of the contract in confidence that appellant would do the same. This, we think, under the circumstances of the case, constitutes ratification by acquiescence; for the rule is that a party can-
734 not repudiate the burdens of a contract while enjoying its benefits."

Fifth. "Actual Knowledge." Actual knowledge by the stockholders of the transactions in question is not essential, either to convict them of laches, or to conclude them by acquiescence. "Means of knowledge plainly within the reach of stockholders by the exercise of the slightest diligence is in legal effect equivalent to knowledge."

Kessler & Co. v. Ensley & Co., 123 Fed., 546.
Jesup v. R. R. 43 Fed., l. c., 503.
Wood v. Carpenter, 101 U. S., 143.
Porter v. R. R., 36 Fed., l. c., 637.
San Diego R. R. v. Pacific Beach, 112 Cal., 53.
Morawetz Priv. Corp., Sec. 630.

Morawetz says, in Sec. 630, of his work on corporations:

"Nor can the shareholders of a corporation avoid responsibility for the unauthorized acts of their agents by abstaining from inquiry into the affairs of the company, or by absenting themselves from the company's meetings, and at the same time reap the benefits of their acts in case of success. If a shareholder fails to take the trouble of inquiring into the affairs of the corporation of which he is a member, or to attend the meetings, it seems no more than just that his supineness should be construed as an acquiescence in the proceedings of the majority."

In Jesup v. Illinois Central R. R. Co., supra, Mr. Justice Harlan makes this statement:

"Taking all the evidence together, the court must proceed upon the ground that means of knowledge, plainly within reach of stockholders by the exercise of the slightest diligence, is in legal effect equivalent to knowledge, and that the fact of the lease, as well as

its terms, were fully known to each stockholder and to every officer of the Dubuque Company for 20 years and more prior to this litigation."

Sixth. "Ratification." The contention of counsel for complainant that the transactions challenged could not be ratified except by the unamious consent of all the shareholders of the Belt, cannot be maintained. The corporation may ratify a transaction of its directors "either by the unanimous acquiescence of the shareholders, or by a vote of the majority, if the transaction is of such a character that the majority might have authorized it at the outset."

1 Morawetz Priv. Corp., Sec. 525.

Hotel Co. v. Wade, 97 U. S., 13.

735 Twin Lick Oil Co. v. Marbury, 91 U. S., 587.

San Diego R. R. v. Pac. Beach Co., 112 Cal., 53; 33 L. R. A., 788.

Kessler & Co. v. Ensley & Co., 123 Fed., 546, s. c., 129 Fed., 397.

In San Diego R. R. Co. v. Pacific Beach Co., supra., the court say: "The contention of appellant that the contract could not be ratified except by the unanimous consent of all the stockholders cannot be maintained. The principle does not apply to acts which might have been authorized by a majority in the first instance. 'The corporation may, however, ratify an unauthorized transaction of its agents, and this may be done either by the unanimous acquiescence of the shareholders, or by vote of the majority if the transaction is of such a character that the majority might have authorized it at the outset.' 1 Morawetz Priv. Corp., 2nd Ed., Sec. 525, and the cases there cited. The rule is that the majority governs, and every stockholder contracts that such shall be the rule.

There is nothing in the contention that the ratifications were made without knowledge of what they meant. In the first place, this is not an action by individual stockholders to set aside a contract made by the corporation. The point is made by the corporation itself in a defense in which it seeks to violate its own obligation; and it would be absurd to say that it did not know what it was doing. But, if we assume in this action the corporation could shield itself between the ignorance of a few of its stockholders, it is clear that the latter knew, or ought to have known, the nature of the contract, and the circumstances attending it."

The counsel for the respondent Trust Company contend that under the authorities, it is not necessary that ratification by the Belt Company should be shown by any particular or peculiar act, but that a course of conduct and the retention of the benefits may be sufficient to make a valid contract by acquiescence; and, further that if a contract is bad for fraud, then it is voidable as a whole and cannot be adopted in part, and repudiated in part, by the Belt Company or its receiver, that they cannot play fast and loose with the rights of the Trust Company. Citing Barr v. R. R. 125 N. Y., 263, and authorities supra; and Sec. 632 of Morawetz on corporations, in which the author says:

"After a corporation has enjoyed the benefit of a contract or other arrangement, made in good faith, with any of its regular agents, it is but fair that every reasonable presumption should be
736 made in order to hold the transaction binding upon the company. Under these circumstances the acquiescence of the shareholders may often be presumed."

Seventh. "Duties of promoters." The foregoing classified contentions of complainants, as to the duties, liabilities and responsibilities of promoters, individual, or corporate, and, especially as to the duty of providing the companies, promoted by them, with independent and impartial boards of directors, free from the control of the promoters, and, also, as to the necessity of making full disclosures of all material facts to such boards, are sustained by the cases hereinbefore cited by complainants, in connection with such propositions.

Eighth. "Domination and Control." The authorities, submitted by complainants, go to support their propositions of law, to the effect that one corporation may, under proper circumstances, dominate and control another corporation through their common directors, and, also, that the dominating influence of a majority stockholder may actually control a board of directors, and, in such case, he stands in a fiduciary relation to the controlled corporation in like manner as does its board of directors.

Other legal questions in respect to the items in dispute, and the accounting generally, will be considered in connection with an examination of such items, and the liability, if anything, therefore, by the Trust Company, as charged in the ancillary bill.

IV.

As to Alleged Trust Company Domination of the Belt Company and other Companies.

The underlying theory, upon which complainants' bill is grounded, is that the Trust Company dominated and controlled the Suburban Company, afterwards the Belt Company, and its constituent companies, and also, the subsidiary companies named in the bill, by virtue of causing the employees, officers and directors of the Trust Company to be elected officers and directors of the Suburban Company, and other corporations, and thereby placing the agents, employees and officers of the Trust Company in charge of such companies, respectively, so that these companies might be dominated and controlled at the behest and in the interest of the Trust Company, and, which complainants allege was done, continuously, through the period of years intervening between the incorporation of these companies and April, 1900, when what was known as the Stilwell management of the Belt and allied companies, lost control, and the Southern Company, and those associated
737 with it, acquired control thereof through the receivership and foreclosure proceedings, mentioned in the bill.

It is charged, in substance, that the Trust Company caused the

incorporation of each and all said companies, and, at the outset, caused its own officers and employees to be elected as officers and directors of such companies, and that they became and were merely the agents or dummies of the Trust Company for the purpose of carrying out the objects of that company, and that such condition continued down to April, 1900, as above stated; that, by reason of such domination and control, the Trust Company caused the making and issuance of the stocks and bonds by the corporations, named in the bill, and the delivery thereof to the Trust Company, and their sale and disposition by it, as stated in the bill; and, that, as a result of such domination, the Trust Company itself attended to the disbursement of all moneys which were realized from the sale of these bonds and stocks, including the disbursements in the construction and building of the lines of railroad of these companies, the nature of all of which charges of domination and control will more fully appear in those portions of the bill hereinbefore mentioned; and, further, that all the items contested in this cause are subject to the same infirmity of Trust Company domination and control, and, by reason of which, no proper accounting was ever had between the Trust Company, and the other companies interested, although the forms of accounting were had, from time to time, between them, and hence that, in a court of equity, an inquiry can be made into the merits of such items, and an accounting be had based upon the result thereof.

It will be observed that the allegations as to this domination and control are mostly of a general character, and are somewhat of the nature of conclusions from the proven fact that, generally speaking, the majority of the directors of the corporations involved in this bill, were the agents, officers, or employees of some character, of the Trust Company. It is not disputed that elections were held, from time to time, by the stockholders of these various companies, and that, outside of their first corporate organizations, which were provided for in their articles of incorporation, the new directors were invariably elected by the stockholders in the ordinary way, but, it is claimed that the dominating control of the Trust Company, which began at the very beginning of the corporate life of these companies, continued throughout all their dealings with the Trust Company. It is proven, as hereafter shown, that at no time did the Trust Company, as a stockholder, own or have anything like a majority of the stock of any of the corporations involved
738 in this accounting; hence, its alleged influence and control over these companies were not derived from a majority stock ownership, and if they existed at all, they must be traced to some other cause.

It is difficult to understand how any particular set of directors and officers could continue to act for years for the Belt Company and other companies, if they were in fact under the pernicious domination of the Trust Company, and without a protest from either the majority or the minority stockholders. In this large record, covering a great part of all the transactions between the Trust Company and these other corporations, there is not disclosed

a single protest from any stockholder, prior to April, 1900, in respect to any of the dealings of the Trust Company with said corporations, and for that reason, it is difficult now, after the lapse of so many years, and changed conditions, to go back ten or more years prior to 1900 and endeavor to uproot a part or all such Trust Company transactions, when those then interested therein apparently acquiesced in them or expressly ratified them, and that, too, regardless of any Trust Company influence and domination over these corporations.

It has been suggested by counsel that a corporation has no more inherent right to complain that it was caused to be incorporated than a man has to complain that he *caused was* to be born, the difference between the two being that, while the human product is helpless at birth, and incapable of binding himself by contract, the corporate product is capable of acting on the day of its birth, the same as after many years of existence. The point intended to be made is, so it is claimed, that the bill does not show in what way or manner the Trust Company caused the Belt Company, and other companies, to be incorporated, or to do any of the acts complained of. While the bill may not be specific, perhaps, in respect to the methods used by the Trust Company, a small minority stockholder, and as to the motives that actuated it in so causing the incorporation of the various companies involved herein, yet the obvious meaning of the bill, as gathered from its recitals and the character of the transactions between the Trust, and the Belt, and the other companies, as shown in the record, is that the Trust Company intended, in the organization of these companies, to bring into existence corporations, whose business transactions with it would inevitably lead to the benefit and advantage of the Trust Company, in the sale of their stocks and bonds, and otherwise in the numerous dealings, which are shown to have been entered into between it and these other companies. For the purposes of this cause it may be stated that the Trust Company is shown to have had a sufficient legitimate
739 interest in the future business of each and all of the companies alleged to have been incorporated by it, but which were really organized by friends of the Trust Company in the ordinary way, to have justified its active concern in assisting in their incorporation at the outset, by advancing the necessary expenses thereof, and otherwise endeavoring to place said companies upon a business basis, for all these things had to be done before they could possibly be made useful, either as feeders to the Trust Company or otherwise carrying out the business purposes, designed by their actual incorporators.

The Trust Company was the central and important and controlling corporation of the aggregation, known as the Stilwell companies, and which, in large measure, was influential in bringing into existence all the corporations, whose operations are involved in complainants' Bill, and which were substantially financed by it.

If there was any dominating control exercised in the controverted transactions between the Trust Company and any of these other companies, by reason of the mutuality of the officers and directors

representing the companies, so dealing with each other, it is evident from the proofs in the record, that such domination must have been on the part of the Trust Company, and not on the part of the subordinate companies.

From the foregoing statements of the witnesses, Cone and others, it cannot be questioned that A. E. Stilwell was the influential and dominant personage, who, more than any other person connected with it, outlined the polices of the Trust Company, and likewise, with E. L. Martin, and other associates, practically determined those of the railroad companies interested in this accounting.

It was his brain and genius and wonderful promoting and organizing ability, which conceived the idea of changing the original real estate corporation, known as the Real Estate Trust Company, into a great brokerage and commercial company, known as the Guardian Trust Company, for the very purpose of financing the large railroad interests which he saw could and must be built up in Kansas City, and which afterwards culminated in the Gulf and Belt systems. In the nature of things, the commanding influence of such a man must necessarily have been felt in all the enterprises, in which the Trust Company became interested, and his opinions and wishes were very influential whether intended to be of a dominating nature or otherwise, respecting the dealings of such companies with the Trust Company; and, while his opinions and wishes were at all times respected by his business associates,
740 yet, after a through examination of the large and cumbersome record in this cause, the Master is convinced that, in the conduct of the Trust Company, in its dealings with the Belt and other companies, in respect to the items in controversy, the proofs do not show such conditions as should authorize a finding to the effect that the Trust Company has been unfair and oppressive in such transactions, in view of the surrondings of the parties at the time thereof, notwithstanding the fact that [*if*] may have received, and did, in fact, receive large compensation for its services, in the way of commissions, trustee fees and bonuses. The Trust Company was instrumental in the making of these other companies, financing their enterprises, and thereby materially aiding their business activities by successfully manipulating the sale of their stocks and bonds.

A striking feature, respecting the relations of these companies with the Trust Company, is the fact that they were all, in a sense, more or less inter-dependent upon each other; for example, the Suburban railroad, and other roads, comprising the Belt system, were all built by separate corporations, and each contributed to the importance and earning capacity of the others. The same thing may be said as to the Southern and Belt systems, in their relations to and with each other. The subsidiary companies were likewise organized to serve supposedly useful purposes in connection with the building up of the business of the railroads, which were the more important corporations. Hence, there was a gigantic combination of friendly interests to be cared for, harmonized and made productive of substantial earnings for the stockholders who had made

investments in the securities of these different companies. The depreciation of the securities of one company would materially influence or affect the market value of those of one or more of the other companies, and so on through the series of companies, to a greater or lesser degree. Hence, it will be readily seen that the Trust Company, in order to harmonize and preserve the best interests of all these companies, as an aggregation of friendly, and not antagonistic, corporate interests, must necessarily have been more or less influential in the affairs of each and all of them, but it does not follow that, in carrying out the beneficial interests of such companies in a legitimate business way, their respective directories were controlled in the interests of the Trust Company, or were unfaithful to their trust, and authorized or sanctioned the making of contracts with the Trust Company, which were unfair, oppressive or inequitable. It was to the self interest of all such companies to assist and encourage the Trust Company in all proper ways, in its efforts to market their securities, so as
741 to provide the funds necessary for their respective business operations. In the judgment of the Master, that was the intention of all the interested parties, at the time the disputed transactions were conducted, though it is evident from the testimony of E. L. Martin and others, that there was at all times manifested a friendly disposition to deal "liberally" with the Trust Company. In view of the then prevailing financial conditions shown in the record to have existed at the time that the Trust Company financed these companies, by disposing of their stocks and other securities, it is very doubtful whether it would have been possible for these companies, as separate institutions, and wholly disconnected with the combination or union of interests, providing for an entire system of railroad transportation, and known as the Stilwell roads, to have made any substantial headway in selling their securities. As individual roads, standing alone, "commencing nowhere, and going nowhere," as stated by one of the witnesses, the securities of the different roads comprising the Belt system could not reasonably have been sold on the market for as much as they did bring as a part of the entire system. The promotion and financing methods of Stilwell's were unique and pushed so aggressively that foreign, as well as domestic markets were opened up for these securities, and the expenses, attendant upon his successful exploitation of such securities, were exceedingly large, and way beyond the ordinary range of commissions for selling the securities of going and established concerns, as is abundantly shown by the proofs in the record.

A thoughtful consideration of all the facts and circumstances connected with the promotion, construction and operation of the railroads known as the Stilwell system, will reasonably lead to the conclusion that, while the Trust Company was the principal or central institution, around which all the Stilwell enterprises and activities more or less revolved, and was intended to be liberally compensated for its great services financing such enterprises, yet that the stockholders interested in these various companies were satisfied with what was done, and, so far as shown by this record, did not indicate that they

had any just ground of complaint against the Trust Company by reason of anything which it had done, or caused to be done, in connection with the promotion or development of any of the enterprises, on account of which the items in controversy have arisen.

The proofs in the record materially distinguished this case from the following line of cases:

742 (*a*) Where a coterie of men get the controlling interest in a corporation, then elect themselves, or their dummies, or agents, as directors for it, and, with fraudulent intent, cause these companies to enter into contracts or transactions with themselves, or others conniving with them, to the ultimate prejudice of the minority stockholders; or

(*b*) Where a set of men, having the voting control of two corporations, in one of which they have a larger stockholding interest than the other, cause, with fraudulent intent, such corporations to enter into contracts with each other, which are grossly favorable to the one, in which they are more largely interested, and to the prejudice of the other, and thereby enriching themselves at the expense of such other company and its stockholders; or

(*c*) Where one company purchases or otherwise controls a majority of stock in another company, and then, through the election of its own agents, directors or officers, as the officers and directors of the other company, and with fraudulent intent on the part of such persons, causes mutual contracts to be executed, and of such nature as to directly result to the advantage of all the stockholders of the one company, and to the prejudice of the minority stockholders of the other company; or

(*d*) Where a set of men organize a corporation, and having themselves elected as directors of it, cause it to purchase of them certain property at a price which is prejudicial to the rights of other stockholders; in other words, the promoters' class of cases.

In this connection it will be noted that there is no allegation in the bill to the effect that the Trust Company, during the period of its alleged domination, was either a majority stockholder, or even a large stockholder, in the Belt; on the contrary, as will be hereinafter stated, the Trust Company was, comparatively, a small minority stockholder.

It will be readily observed that, in all of these suppositious cases, the power to dominate or control arises from the voting right or power to control the election of the directors and officers of the dominated company, who in turn dominate and control it in the interest of the parties, having such voting control.

When certain persons own the voting control of two corporations, they may dominate both, and cause contracts to be signed, and transactions to take place, between themselves as officers of one corporation, with themselves as officers of the other corporations, to

743 the gross disadvantage of either corporation, and these contracts will ordinarily be binding unless set aside by a court of equity. The corporations themselves were, in fact, the mere instruments of the men committing the wrong, though it seems to be recognized by the authorities that such acts are nevertheless corpo-

rate acts, and in that way, one corporation may be said to dominate the other.

It is not alleged in the bill that the Trust Company possessed voting control of the Belt Company, or of any of the corporations involved in this controversy, and, for that reason, its alleged domination and control must have been exercised, if at all, through its influence over its employees, agents or stockholders, who were elected, from year to year, as directors and officers of the Belt and other companies, in which they were likewise stockholders.

It seems then, that, in connection with the proven fact of Stilwell's strong personal influence and following among his business associates and investors (the latter being generally interested, more or less, in the securities of one or more of the other companies, as well as the Trust Company), the chief point relied upon by complainants is the dual capacity in which the directors of the contracting corporation acted, as is so fully stated in the bill.

There are, also, allegations in the bill, which relate to transactions had between two of the other companies, and not between the Trust Company and one of them, and which are to the effect that the Trust Company caused the Belt Company to enter into contracts with the other company, by reason of which loss resulted to the Belt, and for which loss the Trust Company should be held responsible, for the reason that the directors and officers, common to both the Belt and Trust Companies, were also elected directors and officers of such other company.

A Few Controlling Facts.

There either appear on the face of the bill, or are practically undisputed in the proofs, the following facts which serve to materially distinguish the case at bar from any cited by learned counsel in support of the complaints in the bill.

(*a*) This action is not instituted by one or more stockholders against unfaithful directors, but is against one corporation by the receiver of another corporation, the receiver having been appointed at the instance of a creditor, whose cause of action accrued long after the occurrence of the transactions complained of; nor is
744 there any creditor before the court, whose claim existed at or before such time.

(*b*) The bil does not attempt to excuse the long delay in seeking an accounting, but is wholly silent upon this subject, though counsel for complainants contend that, so long as the Trust Company domination existed, which they claim continued until April, 1900, the Belt Company could not be legally bound to assert its rights, as it was in "bondage", and not free to act.

(*c*) No stockholder, has at any time objected to any of the transactions complained of in the bill, as has been heretofore stated.

(*d*) When this bill was filed, the sole stockholder of the Belt Company was the Southern Company, which had acquired all of the Belt stock in the execution of a plan *or* reorganization by the usual exchange of new securities for old, the details of which re-

organization plan are hereinafter fully stated in this report as to the intervening petition of the Southern Company.

(*e*) If, at any time, any stockholder of the Belt Company was ignorant of the transactions in question with the Trust Company, and did not participate or acquiesce in, approve them, the name of such stockholder does not appear in the record.

(*f*) The transactions in dispute were open, not secret or concealed, and were either known to the stockholders, or could have been, if they had been at all diligent in trying to understand such transactions, which are spread with much explanatory detail, not only on the books of the Trust Company, but also on the books of the railway companies (See Wright's compilation in Rec. Vol. 44); and the very nature of the transactions, their magnitude and the long period of time over which they extended, tend thoroughly to negative the idea of ignorance on the part of any stockholders.

(*g*) The transactions now attacked in the bill, were expressly ratified by the stockholders, as shown by the minutes of the corporate meetings (see Belt minute book, in Rec. Vol. 52); and there was manifested, throughout many years, the most complete acquiesence in these transactions by the shareholders as a body, that is, so far as concerns any formal or open protesting on their part.

(*h*) The statutory period of limitations has run against the transactions in question, as will be hereinafter shown, unless by
745 reason of the alleged Trust Company domination, the statute has been inoperative.

(*i*) The transactions in question are executed contracts, closed and consummated years before the original bill was filed, and, as the accounts between the Trust Company and these other companies were settled, from time to time, the Belt Company gave its notes for the balances due, and which notes were also paid off, from time to time.

(*j*) It is shown by the record that the book-keeping was full, complete and accurate as to all original entries, and otherwise, and that the accounts between the companies were regularly stated and audited each month by formal certificates exchanged by their respective auditors, and that the books tallied to a cent.

(*k*) The successive and repeated re-elections by the Belt stockholders, under conditions well known to every one, of the same men to the Belt Directory, is in itself the strongest evidence of complete acquiesence on their part in the management, which is now for the first time attacked.

(*l*) The Belt in the transactions, which are now attacked, received therefrom certain benefits and advantages, which the complainants have never offered to return, and, in the nature of things, cannot return. The status quo cannot be restored, which fact, if true, becomes a most important one in the final determination of the issues involved in the bill, and, especially so, in the absence of fraudulent intent, or actual fraud, on the part of the Trust Company, which is not shown by the proofs in the record.

(*m*) The legal power to name directors is the power of the majority of the stockholders, and neither the Trust Company, nor the di-

rectors in question, at any time, held even a substantial minority of the stock of the Belt Company. The Trust Company at no time owned control of the Belt, and was therefore not in a position to dominate it by reason of any stock ownership (Vol. 53-32395). The mere fact that the majority of the directors of the Belt Company were during most of the period in question, the same persons who were directors of the Trust Company, was not necessarily the result of any controlling power of the Trust Company, but was because the representatives of the majority Belt stockholders, thought it to their interest to maintain the intimate relationship between the Trust Company and the Belt Company, indicated by their common directors.

746

V.

History of Belt Transactions with the Trust Company and as Explanatory of Their Dealings.

1. In the first paragraph of the second ancillary bill, including the subdivisions thereof, complainants allege, in substance, that the Suburban Company, though organized on or about January 8, 1887, did nothing in the way of constructing its road, or in issuing or selling its securities, until about May 31, 1889; that, prior to that date, A. E. Stilwell, vice-president of the Trust Company, and his associates, among the officers and directors thereof, came into control of the Suburban Company, and through them, the Trust Company undertook to promote and finance the Suburban Company, and to construct, or cause to be constructed, its line of railroad; that the plan adopted by the Trust Company for that purpose, was to cause the Suburban Company to issue a large amount of securities, consisting of stock and bonds, to be used in securing money with which to construct the railroad, and, for that purpose, to organize as its agency, a construction company, which directly, or through some contractor, should construct the line of the Suburban railroad, and take the securities in payment therefor; that it was the intention and purpose of the Trust Company, as a part of such plan, to cause the Suburban Company to issue securities in excess of the value of the work, and to cause such securities to pass through the hands of the Trust Company, which in turn would exact large and exorbitant amounts, under the guise of commissions, for promotion and other services, and also to cause the securities finally to be distributed among the officers and directors of the Construction Company, which itself was organized largely from the officers and directors of the Trust Company, so that the profits arising from the enterprise might inure to the benefit of the Trust Company, its officers, directors, friends and associates, and that, in accordance with the aforesaid plan, the Trust Company caused the Suburban Company, on or about May 31, 1889, to enter into a contract with A. E. Stilwell, dated June 1, 1889, by the terms of which he, or his assigns, agreed to organize a construction Company to be called the Kansas City Terminal Construction, and to cause said company to

build the line of the Suburban Railroad from Broadway and Second Streets, in Kansas City, to Cecil Station, near the Blue River, the road to be double track the entire distance, and to be first
747 class in all particulars. It was further alleged that it was provided in said Stilwell contract that the Construction Company should buy such ground as might be necessary for the use of the railroad company, for depot purposes, pay for all rights-of-way remaining unsecured by the railroad company, should build a depot of such dimensions and costs, and locate the same at such point, and equip the road in such manner as might be deemed to be for the best interests of the railroad company, and to pay all the expenses incurred in the building of such road; and that, in consideration for the building of said road, the Suburban Company agreed to issue its first mortgage bonds in the sum of $500,000.00, $450,000.00 thereof to be placed in escrow with the Trust Company, with $900,000.00, face value, of the capital stock of the Suburban Company, both to be delivered by the Trust Company as trustee for Stilwell or his assigns, upon the faithful completion of the road, as provided in the contract.

It was further alleged that, on the date of the execution of said contract, the said Stilwell transferred and assigned the same to the Trust Company, in consideration of the sum of $10,000.00 and the latter, as his assignee, undertook to comply with and perform the terms and conditions of said contract; that, in pursuance of the duty and obligation cast upon it by said contract, the Trust Company organized the Construction Company, which complainants allege was dominated and controlled by the Trust Company in the same manner as the other companies named in the bill, the stockholders of the Construction Company being made up of the stockholders, employees, officers and directors of the Trust Company, and such of their friends as were willing to come in and enjoy the fruits and profits of the plan; that the Construction Company began the construction of the railroad of the Suburban Company between the points above designated, and had only partially completed such construction and the acquisition of the right-of-way, and the performance of the duties required under the terms of said contract, when, on or about May 9, 1890, the officers of the Construction, Suburban and Trust Companies (who were alleged to have been substantially the same persons, and having the same purposes and objects in view), caused the Construction and Suburban Companies to go through the form of an agreement, by which the Suburban Company agreed to receive and accept the uncompleted railroad, then partially constructed by the Construction Company, as a full compliance with the requirements of the Stilwell contract, and to authorize and direct the Trust Company to turn over to the Construction Company the stocks and bonds described therein; and that, accordingly, by virtue of the control and domination so exercised
748 by the Trust Company over the Suburban Company, the latter went through the form of accepting the uncompleted railroad, and directed the Trust Company to release said securities, and the Trust Company did release and turn over to the Construction Company the Suburban bonds in the amount of $400,000.00 face

value, and stocks in the Suburban Company in the amount of $600,000.00, face value, retaining for itself and its officers $50,000, par value of the bonds and $300,000.00, par value, of the stock and that said stocks and bonds in the amounts of $600,000.00 and $400,000.00, respectively, were thereupon distributed by the Trust Company and the Construction Company, to the stockholders, employees and officers of the two companies and their friends; and that the action of the Trust Company in so causing the Suburban Company to accept a partial compliance, and in causing said securities to be so issued, was contrary to the best interests of the Suburban Company, and oppressive and inequitable, and, by virtue of such domination and control, ought not to be permitted to stand as against parties interested in the Suburban Company.

The Complainants, in the subdivisions of paragraph 1, have set out, in some detail, the respects in which it is claimed that the Stilwell contract was not complied with by reason of the domination and control of the Trust Company over the Suburban Company, as hereinbefore stated, all of which will more fully appear by reference to the second ancillary bill.

The series of itemized damages, on pages 25 to 43, which are alleged to have occurred to the Belt Company from a failure to complete said construction contract, or from causing the acceptance of the road in its alleged uncompleted condition, may be briefly summarized as follows:

In item (*a*) it is claimed that the cost of the road was $292,000, or less, and that the value of the securities turned over were worth $480,000.00, leaving a profit of $188,000.00, and for which, with interest, complainants ask a credit on the Trust Company account.

In item (*b*) it is stated that the total original bond issue was $500,000.00, $400,000.00 of which were, as above stated, turned over to the Construction Company, and that the balance of said bonds to-wit, $100,000.00, was fraudulently, wrongfully and unlawfully taken and appropriated by the Trust Company for its own benefit, and that said $100,000.00 bonds were reasonably worth $90,000.00; that the original stock issue was $1,000,000.00, $600,000.00 of which was turned over to the Construction Company, as above stated, and the balance of $400,000.00 was fraudulently, wrongfully and unlawfully taken by the Trust Company to
749 its own use, and that the value of said $400,000.00 stock was $80,000.00. Wherefore, it was stated that the Trust Company should credit the Belt Company with $170,000.00 (being the $90,000.00 and the $80,000.00), and interest thereon from May 9, 1890.

The other items (*c*) to (*n*), pages 26 to 41, relate to actual damages alleged to have resulted to the Belt Company, by reason of various outlays for the completion of the road, which, it is alleged, should have been paid, as provided for under said construction contract, such as contractors' bills, right-of-way, main depot grounds, other depot grounds, switching yards, etc., "and which" it is alleged, "would have been so furnished but for the unlawful action in causing the Suburban Company to accept a partial compliance."

Item (*n*) relates to the De Goeijen claim of $89,333.33.

In some instances, they were paid by the Suburban Company, such as items (*c*), (*e*), (*f*), (*g*), (*i*), (*l*) and (*n*); in other instances, payments were made by the Trust Company and charged to the Belt, and admittedly appear on the Trust Company statement of account, as in items (*d*), (*h*), (*j*) and (*k*).

The general nature of these items, or expenditures, are as follows: (*c*) for right of way and construction work; (*d*), (*e*), (*f*), and (*g*), for right of way; (*h*) and (*i*) for rental of lands alleged to be necessary for right of way use; (*j*) for main depot, Second and Wyandotte Streets; (*k*) for other station depots, platforms, sand house, round house and labor and material furnished; (*l*), Second Street Improvement Company "right of way and switching yards", and Trust Company "causing" the Improvement Company to execute a lease to the Consolidated Company, yearly rental of $3,000.00, the total alleged rental paid being $26,250.00, and the alleged value of the land (44,125.00). Complainants ask that both said items should be credited to the Belt Company, with interest. (*m*) for rental to said Improvement Company for other depot grounds (2nd and Wyandotte), total rent paid, $26,733.64, and value of lots, $26,750.00; and credit is asked for the Belt Company for both said items, with interest. As to item (*i*) $313.76, it is said that the Trust Company caused the Belt Company to pay an overdraft of the Construction Company, amounting to that sum, on May 9, 1890.

All these various items are based upon the theory that the settlement of the Construction contract, May 9, 1890, did not bind the parties, and can be thus collaterally set aside and inquired into after ten years' lapse of time.

750

Defenses of Trust Company.

2. The defenses are as follows: first, that no cause of action is stated in the bill; that the settlement of the Stilwell contract was binding between the Belt and Construction Companies, and that the Trust Company did not dominate or control such settlement. Second, that the accounts admittedly rendered from time to time, bar consideration of said items which were included therein, and if not so included, they were waived by not having been put into the accounts rendered by the Belt Company, from time to time. Third, laches. Fourth, ten year statute of limitations. Fifth, in the alternative; five year statute of limitations—in case any items are not covered by the ten year statute. Sixth, the Trust Company relies upon the acquiescence of the Belt Company and its stockholders, and an express ratification by them entered into corporate records. Seventh, the defenses to the De Goeijen item will be hereinafter stated.

Record of Facts as to Relation of Suburban Company and Construction Company in Building "First Division of Belt."

3. The Suburban Company was incorporated under the laws of Missouri, on January 8, 1887, the incorporators being E. L. Martin, L. R. Moore, T. B. Bullene, S. F. Scott, George W. McClelland, Conrad Stumpf, Theodor Peltzer and John W. Beebe, all of Kansas City, Missouri, and John Kelly, of Leavenworth, Kansas, and such incorporators were also directors for the first year (Rec. 18-9138-'39).

The articles of association provided that "the railroad of said corporation is to be constructed, maintained and operated from or near the Union Depot in the City of Kansas, Jackson County, Missouri, thence in an easterly direction to Cecil station, near the Blue River, thence in a southwesterly direction, by the most practicable route along said Blue River, and along Brush Creek in said Jackson County, to a point near Westport in Jackson County, thence in a northwesterly direction by the most practicable route to a point at or near said Union Depot.

The object was to build a belt line of railroad to encircle the cities of Kansas City, Missouri, and Kansas City, Kansas, and the number of shares of the capital stock was to be 10,000, of the par value of $100 each (Rec. 52-31301-'05).

At a meeting of the directors of the Suburban Company, January 13, 1887, the following officers were elected: E. L. Martin, president, L. R. Moore, vice-president; George W. McClelland, treasurer,
751 and S. F. Scott, secretary and general manager, and no other officials were elected until June 1, 1889, being a date subsequent to the time that the contract for the building of the First Division of the Suburban Company's railroad was entered into between that company and A. E. Stilwell.

The franchise granted the Suburban Company by Kansas City, Missouri, had been secured on or about October 29, 1887, authorizing the company to maintain and operate a double track railroad upon Second Street from the west line of Broadway to the east line of Harrison Street, and over and across the streets intersecting the same. The franchise further provided that the construction of the railroad should commence within three months after the acceptance of the ordinance, and that the road should be completed and operated within 24 months, barring certain legal delays. The Suburban Company was to plank the tracks with three inch oak planks, and keep the space between the tracks paved, etc. (see copy of ordinance, Vol. 21-10923-'29).

As shown by the testimony of both Martin and Scott, there was prior to May 31, 1889, only a small amount of work done towards the building of the Suburban Company's railroad, just enough to prevent a forfeiture of the franchise, that is, there was some little grading work done, and preliminary surveys made (Martin's testimony, Vol. 53-32708, and Vol. 55-33643; and Scott's testimony, Vol. 18-9136). Nothing was done by the Suburban Company

towards the issuance or sale of its securities prior to May 31, 1899 (Suburban Company stock ledger, Vol. 45-25582-'87).

From the testimony of S. F. Scott, it appears that up to June 1, 1889, none of the capital stock of the Suburban Company had been issued, though it had been subscribed for (Vol. 18-9142); and that the first issue of the Suburban Company's bonds was authorized July 24, 1889 (Vol. 52-31241-'44). It also appears from Scott's testimony, that he and Martin, about the time of the organization of the Suburban Company, also organized a railroad known as the Kansas City, Rich Hill & Southern Railroad, and the organization afterwards of the Kansas City, Nevada & Fort Smith Railroad, by change of name called the Kansas City, Pittsburg & Gulf, embraced the idea of Scott and Martin in their contemplated building of the Kansas City, Rich Hill & Southern Railroad (Vol. 18-9135-'6).

Prior to May 1, 1889, Scott and Martin held the majority interest in holdings of the Suburban Company. It also appears from said Scott's testimony that, prior to June 1, 1889, A. E. Stilwell,
752 then vice-president of the Trust Company, acquired all of Scott's interest in the Suburban Company, and in the Kansas City, Rich Hill & Southern, and, in payment therefor, Scott was to receive part cash, and part bonds and stock of the Suburban Company, that were to be issued. By such purchase, the control of the Suburban Company was given to Stilwell and Martin (Vol. 18-8140-'43).

Martin states, in his testimony, that along or about the time of the making of the Stilwell contract, June 1, 1889, Stilwell and himself, and their associates, controlled the majority of the Suburban Company's stock (Vol. 55-33643-'44), A. E. Stilwell being first vice-president, director and member of the executive committee of the Trust Company, and E. L. Martin being second vice-president, director and member of said committee (Vol. 11-5694).

At the time that Scott sold his interest to Stilwell, Moore likewise disposed of his interest to Stilwell on the same basis offered Scott (Vol. 18-9143).

June 1, 1889, the contract for the construction of the Suburban railroad from Second and Broadway to Cecil Station, was entered into between A. E. Stilwell and the Suburban Company, by E. L. Martin, its president. At that time, Stilwell was first vice-president, general manager and member of the executive committee of the Trust Company, and Martin was second vice-president, director and member of the said executive committee. By the terms of the Stilwell contract, Stilwell or his assigns, agreed to organize a company within sixty days from the date of the contract, to be called the Kansas City Terminal Construction Company, hereinafter referred to as the Construction Company, and to cause said Construction Company to build a line of railroad for the Suburban Company from Second and Broadway, in Kansas City, Missouri, and along Second Street to Harrison Street; thence in a northeasterly direction along said survey as near as may be, to Cecil Station, near the Blue River; said railroad to be double track the entire distance, of not less than 60 pound steel rails, and to be built in all particulars in a first class

manner. It was further provided in said contract that the work should begin not later than the 1st day of September, 1889, and be completed within twelve months from that date; that the Construction Company should buy such grounds as it might deem necessary for the use of said railroad company, for depot purposes, and pay for all rights-of-way remaining unsecured by the railroad company; that the Construction Company should build a depot of such dimensions and cost, and locate the same at such point and equip the road in such manner, as it might deem necessary for the best
753 interests of the railroad company, and to pay every nature of the expense incurred by the building of the road. In consideration for the building of such railroad, the Suburban Company agreed, in said contract to issue its first mortgage bonds upon that portion of its line above described, in the sum of $300,000.00, bearing six per cent interest, the bonds to be of such form and denomination, and to run such length of time, as said Stilwell or his assigns might designate; that of this issue of bonds the Suburban Company should place in escrow with the Trust Company $450,000.00 of the same, face value, along with $900,000.00, face value, of the stock of the company, to be delivered to said A. E. Stilwell, or his assigns, upon the faithful completion of said road, as provided in said contract (see copy of contract, Rec. 14-7124-'26). On the said day that said contract was entered into, Stilwell duly transferred and assigned it to the Missouri, Kansas & Texas Trust Company, the consideration recited in the assignment being $10,000.00 (Rec. 14-7126). According to Martin's testimony, the body of this assignment was in the handwriting of Robert B. Cone, an employee of the Trust Company, and the signature subscribed to said contract, as witness, was the signature of Robert B. Cone, and the signature to the assignment was that of A. E. Stilwell (Rec. 55-33706).

The Trust Company, as the assignee of said Stilwell, thereupon undertook to comply with all the terms of said contract imposed upon said Stilwell (Rec. 53-31743-'44).

Ratification of Stilwell Contract and Authorization of the Bonded Indebtedness of the Suburban Company.

At a Stockholders' meeting of the Suburban Company, held July 4, 1889, the Stilwell contract was reported to the stockholders by Mr. Martin and approved (Rec. 52-31240-'46). At said meeting, E. L. Martin as proxy, held 110 shares of the 155 shares then outstanding (Rec. 45-25416-25451). At said stockholders' meeting, it was provided that the Suburban Company issue its bonds to the extent of $500,000.00, for the purpose of liquidating the floating indebtedness of the company, and for the "purpose of building, completing and equipping its railroad from Second and Broadway to Cecil Station", the bonds to be 1000 in number, of $500.00, par value, each, with six per cent interest from April 1, 1890, first interest payable April 1, 1891, and after that to be payable semi-annually. All the bonds, to bear date July 1, 1889, and payable

to bearer on April 1, 1920, and, also, that a mortgage be executed and delivered by the Suburban Company to the Trust Company, as trustee, conveying to the trustee the right-of-way of the Suburban Company from Second and Broadway to Cecil Station, and
754 all the assets of the company then owned, or thereafter to be acquired, for the purpose of securing the payment of said bonds. It was, also, provided that $450,000.00, par value, of said bonds, and $900,000.00, par value, of the capital stock, be delivered to the Trust Company in escrow, to be held until the contract was fully completed or fulfilled, then to be delivered to him or his assigns (Rec. 52-31240-'46).

At a directors' meeting of the Suburban Company, held on May 31, 1889, it was provided that said stocks and bonds of the Suburban Company should be placed in escrow with the Trust Company, and hold by it, and then delivered to Stilwell or his assigns, upon the completion of the railroad under the terms of said contract, and that said stock was to be issued in the name of E. L. Martin, trustee, to be voted by him until the delivery thereof under the terms of said Stilwell contract (See Suburban minutes, Vol. 52-31238-'40). The plan, adopted by the Trust Company in promoting and financing the Suburban Company, was to cause the latter to issue a large amount of securities, consisting of bonds and stocks, to be used in securing money to construct the railroad, and for that purpose to organize as its agency a construction company, which, through the aid of sub-contractors, should construct the railroad of the company, and nominally take the securities of the Suburban Company in payment therefor (Rec. 53-31743-'44).

It is claimed by the complainants that it was a part of the plan of the Trust Company to cause the securities of the Suburban Company to be issued largely in excess in value of the cost of constructing the line of railroad of the Suburban Company, and to cause such securities to pass through the Trust Company (which would exact large amounts for its services, under the guise of commissions), and then to cause such securities to be distributed [*dinally*] among the stockholders and directors of the Construction Company, which was organized largely from the officers, directors and stockholders of the Trust Company.

For the cost of the road to the Construction Company, see Telfer's testimony, Rec. 17-8715-'18, showing cost not to exceed $292,000.00 paid Construction Company; for securities delivered, see Stilwell contract, Rec. 14-7124-'26.

It is shown by Willey's testimony (Rec. 1-138) that the Construction Company received $400,000.00, par value of Suburban bonds, and $600,000.00, par value, in Suburban Company stock. The rec-
755 ord stockholders of the Trust Company, on May 9, 1890, (being the date the Stilwell contract was declared completed) held 1,998 shares of the 3,000 shares of the Construction Company stock, and for which, later on, in 1890, they received the stock and bonds of the Belt Company.

Incorporation of the Kansas City Terminal Construction Co.

In pursuance of the duty and obligation cast upon the Trust Company by the Stilwell Contract, there was organized a corporation, called the Construction Company, for the purpose of building the Suburban Company's railroad (Rec. 53-31743-'44). The articles of association of the Construction Company were filed July 6, 1889, the capital stock being $300,000.00, divided into 3,000 shares of the par value of $100 each. One of the purposes of the incorporation was to build, construct and equip railroads, depots, station houses, machine shops, in the States of Missouri, Kansas and elsewhere, for other corporations, or persons, etc. The names of the incorporators and of the board of directors were largely persons interested in the Trust Company (Rec. 13-6967-'71). All the incorporation fees, including attorneys' fees, and other expenses, were advanced and paid by the Trust Company (Rec. 13-610).

At a meeting of the directors of the Construction Company, on December 2, 1889, "the question of extending the road from the point to which present contract was let to this company, to the junction with the Kansas City, Nevada & Fort Smith R. R. now in process of construction, were discussed, and the decision arrived at to recommend to the stockholders of this company, and to the stockholders of the Suburban Belt R. R. Co. that the bonded indebtedness of the R. R. Co. be increased to $750,000.00, and it is estimated that the additional $250,000.00 will complete the road to a point from which a profitable Suburban business can be secured and important connections made with other roads, particularly the Kansas City, Nevada & Fort Smith, which is dependent upon our road for terminal facilities. The right-of-way to our part of this was reported to have been already secured, and it is very important to push the work as rapidly as possible". (See Construction Company's minutes, Rec. 13-6980-'81.)

The $300,000.00, par value, of the Construction Company's stock, was paid in full by the subscribers to such capital stock (Rec. 53-32714; also Construction Company journal entry, Rec. 14-7179).

The Trust Company opened up subscription books for the stock of the Construction Company, and credited the amount of money so received upon its books with the Construction Company,
756 and which was paid out upon vouchers for various purposes of the Construction Company (Rec. 11-6109, 6116, 6155). The Trust Company's account with the Construction Company shows that it collected from various subscribers to the stock of the Construction Company $287,783.34, and disbursed the same amount (Rec. 45-25249 to 25300, and Vol. 11-6158).

Construction of First Division of Belt by Construction Company.

The Construction Company, shortly after the Stilwell contract had been entered into, began the construction of the Suburban Company's railroad between the points Broadway Street and Cecil

Station (Rec. 53-32714). After the Stilwell contract was entered into, there was a change of officers and directors of the Suburban Company. The officers and directors, on June 1, 1889, were, president, E. L. Martin; vice-president, L. R. Moore; treasurer, George W. McClelland, and secretary and general manager, S. F. Scott, and the directors were E. L. Martin, and others, as hereinbefore stated.

At meetings of the Suburban Company directors, held on July 25, 1889, December 2, 1889, and April 10, 1890, a large part of the old directors resigned their [*officers*] as directors, and their places were filled by officers of the Trust Company. At this time, the officers of the Suburban Company were as follows: E. L. Martin, president; A. E. Stilwell, vice-president; M. C. Curtis, treasurer; W. S. Taylor, Secretary; A. L. Howe, assistant secretary.

At this time, as disclosed by the stock ledger of the Suburban Company (Rec. 45-25588), there was standing in the name of E. L. Martin, trustee, 1,995 shares of Suburban stock, having been transferred to said Martin on May 5, 1890, from an old trustee account (see Rec. 45-25588, for shares on Suburban Company stock ledger).

Alleged Acceptance, in May, 1890, of Uncompleted Suburban Company's First Division and Facts Leading Up to May 9, 1890.

At a meeting of the stockholders of the Suburban Company, on April 10, 1890, there were represented 9,009 shares. At this meeting the bonded indebtedness of the Suburban Company was increased from $500,000.00 to $1,000,000.00, and a resolution offered by director John Kelly was duly adopted, which was to the effect that $50,000.00 in bonds, and $84,500.00, par value, of the stock of this company be [—] aside and delivered to L. P. Moore, as
757 trustee, with which to settle all claims of whatsoever nature that were standing against this company at the time the contract was entered into with the Kansas City Terminal Construction Company for the construction of a road from Broadway to Cecil Station (Rec. 52-31250). At the time of the adoption of this resolution, Martin held in his name as trustee, 9,000 shares of the Suburban Company stock, which he was authorized to vote until delivery to Stilwell of the stocks and bonds, called for in the contract with him (Rec. 52-31237 and Rec. 45-25588).

On April 10, 1890, Stilwell had standing in his own name one share of Suburban Company stock (Rec. 45-25582), E. J. Davison, A. L. Howe and N. C. Curtis, the other shareholders present at the meeting, had one share each standing in their names (Rec. 45-25588). This would account for 9004 of the 9009 shares present. The only other stock that could have been outstanding at that time, would be the stock called for in the articles of incorporation in favor of Martin, McClelland, Stumpf, Peltzer and others, a total of 155 shares, and as disclosed by the Suburban Company stock ledger (Rec. 45-25582), the stock issued to those persons *were* supposed to be cancelled in January, 1890.

At a directors' meeting of the Construction Company on May 9, 1890, there were present Martin, Stilwell, Curtis, Trimble, and Taylor, and Mr. Taylor, theretofore appointed as a committee to negotiate with the Suburban Company for the acceptance by it of the railroad, right-of-way, etc., reported by offering the following resolution:

"Whereas, this company has complied with the spirit of its agreement made with the Kansas City Suburban Belt Railroad Company for the construction of its double track belt railroad from Second and Broadway Streets to Cecil Station, although a portion of said railroad is not fully completed; therefore, be it resolved that the president appoint a committee of one member of this board to submit to said Kansas City Suburban Belt Railroad Company the following proposition, viz:

That this company will now deliver to the said railroad company all the right-of-way procured, road bed, railroad and materials, moneys and assets on hand, in the condition in which they now are, and will release the said railroad company from any liability to this company on account of any and all moneys paid out by this company for it: if the said railroad company will accept such right-of-way, road bed and materials, moneys and assets in the condition in which they now are in full satisfaction and fulfillment of this company's said contract, and will pay to this company the full
758 contract price provided for in said contract; and release this company from any further liability under said contract, and will assume and pay all this company's outstanding liabilities incurred on account of said railroad". (Rec. 13-6990-'91.)

Following said meeting of the directors of the Construction Company, a meeting of the stockholders of the Suburban Company was held on May 9, 1890. There were present Martin, Stilwell, Moore, Curtis, Taylor and Kelly; and at said meeting, Mr. Trimble stated that he was authorized by the Construction Company to make a proposition to the Suburban Company looking to the delivery and acceptance of the railroad, right-of-way, materials, moneys and assets of the Construction Company, to the Suburban Company, upon the terms stated in his proposition, which is embodied in the following resolution, offered by Mr. Stilwell:

"Whereas, the Construction Company has made this company the following proposition, viz: The said Construction Company will now deliver to this company all of the right-of-way now procured by it for this company's railroad, the road bed, the railroad now constructed, or in process of construction, and all material, moneys and assets which it now has on hand, and will release this company from any liability to it for any and all moneys paid out by it for this company; if this company will now accept said right-of-way, road bed, material, railroad, moneys, and assets in the condition in which they now are as and for the fulfillment of said Construction Company's contract with this company, and will pay to said Construction Company the full price and compensation which was agreed to be paid to it upon the fulfillment of said contract, and release said Construction Company from any and all further liability under and by

virtue of its said contract; and promise to assume and pay all of the liabilities of said Construction Company incurred on account of the building and equipping of this company's railroad; and, whereas, it appears to be to the best interest of this company to accept said propositions; now, therefore, be it resolved, that the said proposition be and the same is hereby accepted, and that the officers of this board be, and they are hereby authorized and empowered to receive and accept from the Kansas City Terminal Construction Company the right-of-way now procured, the road bed, and the railroad in its present condition, and material and assets and money now on hand, as and for a fulfillment of the contract of said Construction Company, in full satisfaction thereof; and that the officers of this board be, and they are hereby directed and empowered, to pay to the said Construction Company, or its assigns, the full contract price, which this company promised to pay for a fulfillment of this con-
759 tract; and the payment to be made in the bonds and stock of this company at the times, in the amount and in the manner promised and contracted to be paid; and to assume, on behalf of this company, and pay all of the outstanding liabilities of said Construction Company incurred in building and equipping this company's railroad; and that the officers of this board be, and they are hereby fully authorized and empowered to take all steps and do all things needful or convenient to carry out the spirit of this resolution and effectuate the acceptance of this proposition, and consummate satisfaction and cancellation of the said construction contract in the manner herein indicated."

The resolution, on motion of Mr. Moore, was unanimously adopted, and thereafter the resignation of George W. McClelland, and Conrad Stumpf were offered and accepted (Rec. 52 31259-761).

It was by these two sets of resolutions, shown in the Construction Company's minutes, and the Suburban Company's minutes, that the Suburban Company's first division was, as contended by complainants, accepted by the Suburban Company in its uncompleted state, in lieu of the complete performance of the Stillwell contract, and at this time, all the officers of the Construction Company, to-wit, Martin, president, Stilwater, vice-president, and Taylor secretary and treasurer, were all stockholders and directors of the Trust Company, and all of the directors of the Construction Company at that time were stockholders of the Trust Company, and were also directors of the Construction Company, excepting two. Of the six directors present at the Suburban Company's meeting, May 9, 1890, that acted upon the proposition of the Construction Company, five of them were either Trust Company directors or officers, or both, and all five were directors and stockholders of the Construction Company (Rec. 45-25248 to 25300, and Rec. 42-22472 to 22581).

A resolution was also adopted by the directors of the Suburban Company (Rec. 52-31255), calling for the setting aside and delivering to L. R. Moore, trustee, $50,000.00 in bonds, and 845 shares of stock, to settle all outstanding claims against the Suburban Company at the time the Stilwell contract was entered into. The acceptance of the Suburban Company's first division by that Company

from the Construction Company, was finally consummated at a directors' meeting on August 4, 1890, there being present directors, Martin, Stilwell, Waterall, Lucas, Curtis and Taylor, and Mr. Martin as president, reported "that the railroad company had taken possession of the properties of the Kansas City Terminal Construction Company, as set out in a resolution passed at the meeting held
760 on May 9, 1890, and that he had accepted the same as fulfillment of the construction contract, and had released the Construction Company from any further liability under said contract;" and thereupon his report was ratified and approved.

A resolution was also adopted, requesting the Trust Company to distribute the bonds and stocks of the Suburban Company, which it held in trust for the stockholders of the Construction Company, among those who are entitled to receive the same in proportion to their interest, and further, that the Trust Company requests the stockholders of the Construction Company to transfer and assign their stocks on the books of the company, to A. E. Stilwell, trustee for the Construction Company (Rec. 52-31269).

Of the Suburban Company directors present and ratifying the action of president Martin in releasing the Construction Company from further liability under said Stilwell contract, all of them were directors and stockholders of the Trust Company, and Martin, Stilwell and Curtis were officers of the Trust Company, and members of the executive committee (see list of Trust Company officers and directors, Rec. 11-5695; and list of Trust Company stockholders, Rec. 15-28944 to 29071, inclusive).

All of the Suburban directors present were directors of the Construction Company, and stockholders of the Construction Company, Martin, Stilwell and Taylor constituting the officers of the Construction Company (see construction Company minutes, Rec. 13-6989).

At the time of the adoption of said resolution by the Construction Company and the Suburban Company, the Suburban Company stock was held as follows: Trust Company, 2446 shares; Trust Company, trustee for C. E. Grannis, 554 shares; Trust Company, trustee 4000 shares; E. L. Martin, trustee 1000 shares; and one share each standing in the names of Stilwell, Taylor, Curtis, Howe and Davison, the whole aggregating 10,000 shares, and from which it appears that the Trust Company, for itself, as trustee, held 7000 shares of Suburban Company stock.

In respect to the physical condition of the first division of the Suburban Company's railroad on May 9, 1890, at the time the resolution was adopted, declaring that the Stilwell contract had been complied with, and the road was accepted as and for a full compliance thereof, E. L. Martin stated (Rec. 55-33707-08), that the plan set out in the articles of incorporation of the Suburban Company in general, contemplated the railroad scheme that the Suburban
761 incorporators had; and that the action of the Consolidated, Union and Suburban Companies, in the building of the first and second subdivisions of the Belt road, was in line with such plan, it being the intention of all the parties, including Stilwell and Martin, to eventually extend the Belt road around Kansas City, and that

that was the scheme in mind at the time of the Stilwell contract. Martin further stated (Rec. 55-33544 to 33645), that on May 9, 1890, when the Suburban Company's railroad was turned over to that company, it was not completed, and that certain rights-of-way for tracks, lands for sidings and yard purposes, and certain depot work, had to be provided for and done after that date; that one of the reasons why the road was turned over to the Suburban Company by the Construction Company in its incompleted state, was that the Construction Company had run out of funds; and thereafter, the Suburban Company took over the unfinished road and went ahead and completed it.

Witness Telfer stated that the Construction Company had no money in its treasury as early as May 2, 1890, but had an overdraft of $313.00 and that the Construction Company had expended its $300,000.00 of capital stock in building the road (Rec. 17-8708 to 8712, and 8989-'90), and had no other funds with which to complete the work.

As a brief history of the Belt affairs, it may be stated that, at the time E. L. Martin and others conceived the idea of having railroad terminals in the north end of Kansas City, and incorporated the Suburban Belt Company, the incorporators were the only stockholders, and all the property that the company had was its franchise to operate a railroad from Second and Wyandotte Streets to Cecil Station, a distance of six miles. Mr. Martin went east to finance the proposition, but, being unable to raise any money, he thereafter approached A. E. Stilwell, president of the Trust Company, and interested him in organizing a Construction Company, and getting subscribers to its capital stock, for the purpose of building the proposed railroad terminals. At this time, all the stock of the Suburban Company was standing in the name of E. L. Martin as trustee. Stilwell organized the Construction Company, which agreed to build said proposed railroad of six miles, which is known in the record as the "First Division of the Belt", in consideration as above stated, of $450,000.00 of the first mortgage bonds of the Belt Company, and $900,000.00 of the shares of its capital stock. When this contract was made, no director or officer of the Trust Company was a director or officer of the Belt Company, except E. L. Martin. The Construction Company built the first division of the Belt, and at that
762 time, $450,000.00, par value of the $1,000,000.00 bonded indebtedness, had been used in the building or construction, and leaving $550,000.00 of bonds in the treasury. The Construction Company was out of founds, having used, in the construction of the line, everything obtained from its subscribers to the capital stock, and at this juncture, in order that the Belt Company might continue its line six miles further to Brush Creek, the Construction Company bought the remaining $500,000 of bonds at 90c. on the dollar. At this time, in 1889 and 1890, when the Trust Company bought these bonds at 90c. on the dollar, receiving with them a stock bonus of 2178 shares of Belt stock, the second division of the Belt was built with the proceeds of the bond sales. Another corporation, called the Consolidated Company, was organized, with a view of extending the

railroad, from Second and Wyandotte Streets, to the packing houses in the west bottoms of Kansas City. It was a separate corporation, issuing its own capital stock and bonds, and all of which were sold to the Trust Company, or through the Trust Company to others, in 1890 and 1891. The Belt Company was still not a paying proposition, and those in control of it conceived the idea of extending its line of railroad so as to reach the stock yards, and the large industries in Kansas City, Kansas, and thereupon, the Union Terminal Railroad Company, a Kansas Corporation, was formed, which also issued its stocks and bonds, and, the Belt Company, pursuant to its statutory authority, contracted to build the Union Terminal line in consideration of its stocks and bonds which were turned over to the Belt, and by it sold to the Trust Company, or through the Trust Company to others. This was just prior to, or about the time, of the financial panic in 1893, and the success of Mr. Stilwell in the floatation of these securities was almost phenomenal. The $500,000.00 of Belt bonds remained in the Trust Company's hands unsold for about two and a half years, notwithstanding the most strenuous efforts on Stilwell's part, to dispose of them in the market, and at a time too, when the road was completed and in operation, and having a fairly good business. The Trust Company maintained offices in Philadelphia, New York, Amsterdam, Berlin and Paris, and almost forced the sale of the Belt securities, from time to time, and thereby furnishing it with the funds to prosecute its railroad building operations. In 1892, Stilwell and a group of capitalists associated with him, projected a trunk line of railroad from Kansas City to Port Arthur, in connection with a ship canal therefrom to the sea. At this time, the Belt had completed its line from Brush Creek to Argentine, and had built a number of spurs and extensions, and was
763 doing a good business. It was thought by the Belt directors that its earnings could be largely increased if some large transcontinental trunk line system could be induced to use the Belt terminals, and, in carrying out such idea, the Belt stockholders, at a stockholders' meeting, authorized the directors and Belt officers to enter into a contract for building the Connecting Company road, for a distance of 80 miles, from Kansas City to Pattonsburg, one of the main objects on the part of the Belt Company being to make the profits which would result to it as a contractor in the building of that road. The contract provided for the construction of the railroad by the Belt Company, in consideration of the stocks and bonds of the Connecting Company.

The original bill was filed September 6, 1900, six months after the Gulf road had been sold at foreclosure sale, and purchased by a committee of bondholders, and conveyed to the Southern Company, which was organized by the reorganization Committee, the plan of which provided for a refunding of the securities of the Belt and its constituent companies, which were to be deposited with the reorganization Committee, to hold as the agent of the Southern Company, which was to surrender its own stocks and bonds in lieu thereof, the details of the reorganization plan are fully discussed in the Master's report on the Southern Company's intervention.

The Cambria Steel Company, a judgment creditor of the Belt brought the original bill against defendants for the benefit of all Belt creditors who might wish to join therein. It was an action at law on a promissory note, dated in January, 1900, and upon which judgment was afterwards rendered against the Belt Company, and from which it appears that the Cambria Company was a subsequent creditor whose debt had arisen long after the dates of the transactions which are complained of in the second ancillary bill; and, so far as this record shows, the only other indebtedness against the Belt Company was on account of the deficiency judgment rendered in favor of the Provident Company, trustee in the Belt mortgage, that is, outside of the claims of the Trust Company against the Belt.

It is contended by respondent Trust Company that none of these transactions in the second ancillary bill can be attacked by a subsequent creditor, and that, inasmuch as the receiver stands in exactly the same attitude as the Belt Company, of which he is receiver, he has no greater rights than that company, and hence, if the Belt Company has by its action or conduct become estopped from seeking any relief, so also is its receiver estopped.

764 In Graham v. Railroad Company, 102 U. S., 149, it was held that where a solvent corporation, with no actual intent to defraud creditors, disposes of its lands for an inadequate consideration, or by a voluntary conveyance, the subsequent creditors cannot question the transaction, and also that where a corporation has waived or omitted its right to institute proceedings to recover lands of which it has been defrauded, such right does not inure to the benefit of subsequent creditors or purchasers, the only exception to the rule so laid down being where the alleged fraudulent transaction was done with the intent to defraud future creditors; that is, if in the case at bar, it could be shown that the Stilwell contract was an arrangement made by the Belt with a view of defrauding some future creditor of the Suburban Company, and that the transaction consummated amounted to a fraud, then a different case would be presented from the one at bar. It is nowhere claimed in the record that the transactions complained of were done for the purpose or with the intent to defraud any creditors; in fact, the theory of the bill is that fraud has been committed by the Trust Company for the purpose of defrauding the Belt, with a view of enriching the Trust Company, and not for the purpose of defrauding any existing or future creditors of the Belt Company.

In the case of Lawrence v. Greenup, 97 Fed., 906, a national bank had become insolvent, and passed into the hands of a receiver, who brought suit against certain stockholders, etc. The court held that, inasmuch as there was not shown any intention of defrauding creditors, and the dividend having been paid in good faith, the receiver could not question the transaction.

The theory of the ancillary bill in this case is predicated upon the alleged domination of the Trust Company over the Belt, that is, to the effect that the Trust Company was in absolute control over the Belt, and caused it to do the different things alleged in the bill.

The testimony of Francis A. Wright, expert accountant, who

testified in behalf of the Trust Company, discloses the following facts: (See Rec. Vol. —, p. 32395).

On January 1, 1890, the total outstanding capital stock of the Belt was 9155 shares, of which the Trust Company held none. On January 1, 1892, the total amount of stock issued was 15,000 shares of which the Trust Company held 2068 shares. On January 1, 1894, the total outstanding stock of the Belt Company was 26143 shares, of which the Trust Company held 1114 shares. On January 1, 1896, the total outstanding stock of the Belt Company was
765 47500 shares, of which 3924 shares were owned by the Trust Company, and 34436 shares were owned by the Dutch partnership. On January 1, 1898, the total outstanding stock of the Belt was 47500 shares, of which the Trust Company owned 987 shares, and the Dutch partnership 43574 shares.

The undisputed evidence discloses that as early as 1894, the control of the Belt Company was in the Dutch Syndicate, they owning 43500 out of a total of 47500 shares. During the time that these railroad companies had business transactions with the Trust Company, a vast number of transactions took place between them, and in the statement of the ledger account between the Trust Company and the Belt Company alone, there are over six thousand items, and, taking into consideration all the transactions that were had with the other companies, parties to this accounting, there must have been more than twice that number involved.

These records show that the first meeting of Suburban directors was held on January 15, 1887, at which officers were elected; another meeting on January 22, 1887, at which by-laws were adopted and that at a stockholders' meeting on May 31st, 1889, *and* the Stilwell contract was authorized all of the stockholders being present in person or by proxy, the object being to consider a resolution adopted by the directors, authorizing the president to enter into a contract with Stilwell for the formation of a construction company for the purpose of building a portion of the line of the Belt Railroad. Minutes of the directors' meetings were approved, and ordered spread upon the record.

Another stockholders' meeting was held July 24, 1889, all stockholders being present. Mr. Martin reported that he had entered into a contract with Mr. Stilwell, on behalf of the construction Company, for the building of the railroad from 2nd and Broadway to Cecil Station, on the terms named in the contract, and his report was accepted, and the contract made by him with Stilwell was approved, and the acts done by Martin in reference thereto were ratified. The directors were authorized to execute bonds to the amount of half a million dollars for the purpose of building and equipping the road, and to execute a mortgage to secure the bonds, and to deposit (450,000.00) of said bonds and 900,000 capital stock, full paid, in escrow with the said M. K. & T. Trust Company, to be held by it until completion of the Stilwell contract, and at which time the Trust Company was authorized to deliver the same
766 to Stilwell or his assignees, the stock to be issued in the name of E. L. Martin, trustee; and further, the directors, through

their officers, were directed and authorized to do any and all things which might be needful or convenient for the purpose of carrying out the Stilwell contract.

On July 25, 1889, it was ordered by the directors, in accordance with the resolution of the stockholders, that the company issue one half million in bonds, and its mortgage securing the same, and $900,000 of its capital stock, and deposit the same in escrow as provided in the resolution of the stockholders, and thereafter on December 2, 1889, a stockholders' meeting was called for the purpose of increasing the bonded indebtedness of the company from half a million to one million dollars, for the purpose of extending the railroad from Cecil Station to Brush Creek, and at which meeting 9000 shares of the Belt capital were represented, being all of the stock then outstanding. At a stockholders' meeting April 10, 1890, it was ordered that the company increase its bonded indebtedness to one million dollars, and that the half million in bonds theretofore issued, none of which had at that time been sold, but was still in the possession of the company, be recalled, and the mortgage securing same be released, and a new mortgage executed securing the million dollar issue.

It was at this meeting that $50,000.00 in bonds, and $84,500.00 of the stock of this company were set aside and delivered to L. R. Moore, trustee, with which he was to settle all claims standing against the company at the time the Stilwell contract was entered into with the Construction Company.

It is contended in the record that these $50,000.00 of bonds, and $84,500.00 of stock really went to the promoters of the company, that is, to the original incorporators. It appears in the record that at the time these bonds and stocks were delivered to L. R. Moore, trustee, all of the stockholders were present, and consented to what was done; 900,000 shares had been issued, but were then held in escrow, and could not be voted. On May 9, 1890, at a directors' meeting, Mr. Trimble, on behalf of the Construction Company, made a proposition to the Belt Directory, looking to the delivery and acceptance of the railroad right-of-way, material, moneys and assets of the Construction Company, to this company, upon the terms stated in his proposition, which was embodied in the foregoing resolution offered by Mr. Stilwell.

The next stockholders' meeting was on June 14, 1890, (Rec. p. 31262-265) to increase the capital stock from one million to
767 one and a half million dollars, which was done. On August 5th, 1890, there was a directors' meeting, and on March 31st, 1891, an executive committee's meeting, at which a stockholders' meeting, was called for May 15, 1891, to consider a proposition to sell the railroad to a new corporation, which should issue its bonds to build the proposed extension from 2nd and Wyandotte Streets to the West Bottoms.

The complete minutes of the Suburban Company, as it existed prior to the consolidation with the Consolidated Terminal, the minutes of the Consolidated Terminal, and the minutes of the new con-

solidated Companies, are found in Vol. 53, constituting one separate volume of the record.

An inspection of these minutes will disclose that at the stockholders' meeting on May 15, 1891, the Suburban stockholders authorized and directed the officers of the railroad to take the necessary steps to consolidate the Suburban Company with the Consolidated Company, and thereafter the minutes are continued in the same record book, under the name of the new corporation the Belt Company which was the result of that consolidation. By an inspection of these minute book records, there are disclosed a series of directors' meetings, and meetings of the executive committee of the Belt, at which were authorized many transactions between the Belt and Trust Company, these transactions being in the nature of authorizing sales of securities to the Trust Company, fixing the rate of compensation, fixing the amount of commission that the Trust Company was to receive for selling the bonds, also covering many transactions, which are the items in this ancillary bill as grounds of complaint, some of them taking place at directors' meetings and some at the stockholders' meeting held July 3, 1894, (Rec. 51-31358-'9), at which were represented 27,268 shares. The secretary was instructed to read to those present the minutes of the meetings of the Board of Directors and the executive committee, as shown by the record books, from July 26, 1892, to the date of the meeting, and which, having been read in compliance with said direction, each and all of the acts of the Board of Directors and executive committee, as shown by the minutes on the books of the company, were ratified and approved by the unanimous vote of all present. There was an express ratification of everything that had taken place at the meetings of the executive committee and the Board of Directors, from July 26, 1892, down to July 3, 1894.

At another meeting of the stockholders, held July 2, 1895, (shown in Vol. 52-31369-'70), the stock represented was 29,322 shares, and at said meeting the records of the proceedings of
768 the executive committee and of the directors of the Belt Company since the date of the last stockholders' annual meeting, were by said stockholders ratified and approved. Similar resolutions were adopted at subsequent stockholders' meetings. It also appears that at another stockholders' meeting, of February 11, 1893 (Rec. 52-31379; and following), the following resolution was adopted:

"On motion it was resolved that Article III of the By-Laws be repealed, and that a new section be enacted in lieu thereof, which provides that the superintendent, having in charge the movement of engines, switching, etc., shall be appointed by a permanent committee created and chosen by the stockholders at this meeting, and the duties of such person shall be defined and fixed by this committee, and shall hold office at the pleasure of the committee. Mr. De Goeijen continued to act as chairman. It was resolved that a permanent committee, composed of the following named five persons be appointed: J. De Goeijen, C. M. Titsingh, Jacques T. Nolthenius, A. E. Stilwell and E. L. Martin, shall have exclusive power

for the next thirty years to appoint a person or persons, who shall superintend the actual operations of this company's tracks and property; that, for the purpose of inducing the Connecting Company and the Gulf Company to enter into a long time contract with the Belt for the terminal facilities, all of the capital stock of the Union Company and Air Line, which is now owned and held by the Belt Company, be, and the same is hereby transferred to the members of said permanent committee, with full power to vote the said stock and control the corporate acts of the said U. T. and the said Air Line, for the next thirty years, and that the president of the company be directed to transfer the said stock to the said committee and unto their successors in office, and that the officers of the Belt Company be authorized to enter into long time contracts as per form stated in the resolution, for the use of the Belt terminal facilities, and fixing the compensation for such services; as a part of said contract the Belt Company agrees to keep and maintain for the next thirty years the said permanent committee. It is further resolved that no contract shall be made for the next thirty years between the Belt Company, and any other railroad company for the use of the Belt Company's terminal facilities, except with the approval of said permanent committee. 42-867 votes were cast in favor of said resolution."

The Trust Company, while defendant in this proceeding, is also seeking affirmative relief in this litigation. It is the holder, and was at the time this action was brought, of eight promissory
769 notes, aggregating with accrued interest nearly one half million dollars, and it also holds an open account of the Belt Company, which accrued after the execution of those notes. The Trust Company also holds another account against the Belt, which grew out of the payment by the Trust Company of a judgment, rendered against it in a suit brought by the First National Bank of Kansas City, on a promissory note for about $30,000.00, which the Trust Company had indorsed solely for the accommodation of the Belt Company, in order to provide it with necessary funds, and which judgment the Trust Company afterwards paid to the Bank. In this case, the complainants are seeking to set aside the notes held by the Trust Company, and are proceeding upon the theory that this is an open, unsettled account between the Trust Company and the Belt Company. Complainants seek to be allowed to offset the Trust Company demands by and with the alleged damages, resulting to the Belt Company in the transactions, which transpired long prior to the execution of the notes.

On January 1, 1898, it is proven that the Belt Company owed the Trust Company $526.40, represented by an open account which had been running between the two companies for a series of years, beginning about March 26, 1890. This debit balance of $526.40 was increased by various advances by the Trust Company, largely to the Belt Company, until on March 31, 1899, the Belt was indebted to the Trust Company in the sum of $360,000.00. Of these advancements, the larger part consisted of interest on the funded debt, and the cost of construction of the Connecting Railroad. The Trust

Company kept a separate account of the items arising from the construction of the Connecting Railroad, and also separate accounts with its constituent companies. This method of accounting for the Connecting road was used until February 17, 1899, at which time, the Trust Company transferred into the general account of the Belt a debit of $247,481.56, on account of debt due to the Trust Company from the Belt Company for the Construction of the Connecting Railroad, and this item of $247,481.56, constitutes the larger portion of the $360,000.00, which the Belt Company owed the Trust Company on March 31, 1899. The Belt Company, pursuant to authority of its Board of Directors, executed to the Trust Company seven notes—six for the sum of $50,000.00 each, and one for the sum of $50,000.00, or a total of $360,000.00, and the Trust Company gave the Belt Company credit on open account for these seven notes. After the execution of these notes to the Trust Company, all previous transactions were merged into the notes, and the notes now held by the Trust Company represent renewals and readjustments of the seven notes given by the Belt Company to the Trust Company on March 31, 1899, so that on that date the
770 open account was closed, with the exception of a credit balance of $50.83, which was carried in the open account.

On September 21, 1899, the Belt Company executed another note to the Trust Company for the sum of $23,056.49, which closed the open account, the debits and credits balancing one another. The open account commenced again on September 25, 1899, and continued until September 28, 1900, showing a balance due on that date from the Belt to the Trust Company, in open account, of $31,809.49, and to which should be added the amount paid by the Trust Company to the First National Bank on said judgment rendered against the Trust Company on account of the Belt note, indorsed by the Trust Company, for the accommodation of the Belt Company.

On January 1, 1898, the Belt Company was indebted to the Trust Company in the sum of only $526.40, as above stated which was a general ledger balance, and outside of that balance, whatever indebtedness the Belt Company owed the Trust Company was made up solely and exclusively of the transactions of the Belt Company, growing out of the building of the railroad of the Connecting Company, which was kept in a separate account, and none of the indebtedness, which was charged into these notes is represented by any of the transactions of which the complainants complain and ask relief in this case. By reference to the statement prepared by Willey, and known as Willey's exhibit No. 5, contained in Vol. 1 of the record it will be seen that it is a statement of the ledger account between the Trust Company and the Belt Company during the whole course of their business. The Trust Company made various advances to the Belt Company, on account of payrolls, construction work and other legitimate expenses, and, in that way, the Belt would become indebted to the Trust Company, and such indebtedness would be evidenced by a note, which would be credited to the Belt Company in open account. For instance, on page 13 of Willey's Exhibit 5, the following credits are made to the Belt Company: "By note of K. C.

Sub. Belt. R. R. dated Oct. 1, 1891, taken to balance account of Oct. 1, 1891 including charge for interest $513.57, and discount $775.14, $30,149.00." In other words, the Belt Company would give notes in partial payments of its indebtedness to the Trust Company, and in that way balance the account. In this case the complainants are seeking to go behind these notes from the very inception of the dealings between these two companies, and including notes paid and settled many years theretofore, and the question is presented in this case whether these old notes can be attacked in a proceeding of this kind, as well as the notes now existent. The Belt Company
771 had an auditor, so did the Trust Company, both of whom were competent, capable book-keepers. It stands admitted by the bill of complaint and the records in this cause, that these auditors made regular examinations of the accounts and approved and settled them. These exchanges of accounts were made not only monthly, but were made frequently, both daily and monthly. These companies had daily transactions on account of their intimate connections with each other. On the first of each month a charge was made by the Trust Company against the Belt of any interest on daily balances, or if the Belt had a deposit, a credit was given to the Trust Company of interest on daily balances. Whenever a charge was made against the Belt Company, or a credit given to it by the trust company, the Belt was contemporaneously therewith advised of the transaction, and, thereupon, the executive officers of the Belt would have proper entries extended at large upon the Belt books. In the vouchers there will be found on the first day of each and every month during the long period of their transactions, a voucher containing the computation made by the auditors of the two companies of the daily balances. The officers of each company knew at all times how the accounts stood, and on the first day of each month, the auditors would get together and check up the entries and strike a balance. In this way the books of the two companies were kept in accord during the entire comporate *like* of the Belt Company. Every month a financial statement was taken from the books of the Belt, showing the earnings, expenses, liabilities, assets, etc., and on the first of every quarter, a more detailed statement was made, showing the assets of the company, stocks and bonds, what the company owed, to whom, and all other necessary business information or detail. Annual reports, were also made in still further detail, showing the operations of the company, and the substance of its transactions during the previous year. All these things will fully appear by reference to the statements of the witness Neal S. Doran, for the Trust Company. These statements were put into the hands of the executive officers of the Belt Company, and the proofs show that they were sent to the stockholders or to persons representing the stockholders of the Belt. It is also shown that, as prescribed by the laws of the United States, the Belt Company also prepared annual statements for the Interstate Commerce Commission, which were made upon the prescribed forms, and complied with the Federal Laws. These annual statements may be found on file with the proper officer in Washington, sworn to by the officers of the Belt Company.

When the Construction Company turned over the road to the Belt Company, the transaction was a matter of public concern. At
772 the annual stockholders' meeting, reports were made to Mr. Martin, in more or less detail, though it is urged by the complainants that the reports were so gotten up that they did not contain the information which stockholders should have had in order to understand what had been done by the company.

System of Book Keeping.

In this connection it is important to consider the course of dealing between the Trust Company and these other companies, inasmuch as it is alleged by complainants that the frauds, perpetrated by the Trust Company, were not open, but were rather of a concealed nature.

The record shows that all of those companies employed the voucher system of book keeping. The accounting between the companies appears to have been very accurate and correct, and all of the data and information, upon which the complainants predict the right to an accounting, are shown on the books, both of the Belt Company and Trust Company. For every transaction that took place between those companies, a voucher advising as to the details of such transaction, was given by the Trust Company to the railroad company at the time, with the fullest details. The authority for every entry by the railroad company was in the shape of a letter from an executive officer, attached to a voucher, made up in the railroad company's office. If the Trust Company paid a bill, or a series of bills, for or on account of the railroad companies, the original bill, bearing the receipt of the party who got the money, passed to the railroad company's office and was there fastened to a formal voucher. All the transactions in the record are supported by a voucher, either cash or journal, and, in respect to the journal entries, in cases where the railroad company charged some account of its own, that voucher was made up with unusual fullness, and spread at large upon the books of the railroad company. From the testimony of all the expert accountants for the complainants and defendants, the master is convinced that, instead of their being any concealment on the part of either the Belt or the Trust Company, the entries made by both were unusually full of detail, for book entries, and were such as would either reasonably explain the transactions to others or put them on inquiry to find out what was meant by the entries, and from which it would seem, then, that the charge of concealed fraud could not be sustained by the proofs.

The exhibit in Vol. 44, prepared by accountant F. A. Wright, indicates clearly and explicitly just what the books of the railroad company shows with reference to these transactions, and for each
773 and every entry of charge or credit on the books of the Trust Company there is found on the books of the railroad company a corresponding entry, setting forth the transaction with clearness and fullness. Mr. Willey, in his exhibits from 1 to 5, made a

statement, showing in detail each and every item, which had ever been made a matter of open account between the Trust Company and each of the railroad companies, and their allied companies, beginning with the first item on March 18, 1890, and ending with the last item as shown in this account. In other words, in this Vol. 44, Mr. Wright has copied from the books of the railroad company each item and entry, shown in Willey's exhibits, representing the ledger account between the Trust Company and the railroad company, and in Wright's exhibit will be found, side by side, each item appearing on Willey's exhibit, and the corresponding entry on the books of the Belt Company. The object of Wright's exhibit was to show that nothing was concealed from the Belt Company, and that it had in its own office, and amongst its own files complete details of every transaction that took place between the two companies.

Attitude of Belt Stockholders and Bondholders.

The primary investors in the Belt properties, and who were specially active in putting through the organization plan, under which the Southern Company bought the Belt properties at foreclosure sale, were Stotesbury, Shipley, Smith, Merwin and others, who were bankers and bond and stock brokers, and men of affairs. It is evident from the record that all of these original stockholders and bond holders understood the Belt transactions, and there has never been any complaint on the part of any of them as to such transactions.

The complainants all seem to have arisen after the controversy between John W. Gates and associates, as against Stilwell, Martin and their followers, the culmination of such controversy being the institution of the Bierce case, in which a receiver was appointed for the Trust Company, and, about the same time the Cambria bill was filed in this case, the Cambria Steel Company holding the same character of collateral security for the payment of its debts as the collaterals held by the Trust Company.

It is contended by counsel for complainants that, before the stockholders of the Belt Company can be chargeable with laches or acquiescence, they must actually know of the transactions in question. It is answered by counsel for the Trust Company that each and all of the stockholders are not required to know, but it is sufficient as shown by the authorities, if a majority of them understood the
774 transactions. On January 1, 1898, the Dutch Syndicate owned 43500 out of a total of 47500 shares of the Belt stock, and they selected as their representatives J. De Goeijen and C. M. Titsingh, who made frequent trips to Kansas City. De Goeijen was not only here, frequently, but he remained here much of the time, and carefully looked after all Belt transactions. He went into the question of the floating debt of the Belt Company. He was, in fact, the leading and controlling man of the Belt Company. The testimony of Mr. Heynecker, a friend of De Goeijen, is that the latter employed an accountant to check over the books. Heynecker was the confidential agent of De Goeijen in Amsterdam, and familiar

with his affairs, and De Goeijen became thoroughly familiar with the Belt affairs, not only from information he got from the books, but also such as he obtained from officers of the company, with whom he was in constant correspondence. He was the largest individual stockholder of Belt securities, and had more of his money invested in the company than any other individual, and, hence, it cannot be assumed that he was a creature of the Trust Company, or that he conspired to rob or defraud his own company. At any rate he was the chosen representative of the Dutch stockholders, who really were the beneficial owners of the Belt road, and there is nothing in this record to show that he was an unworthy representative, but, whether he was or not, he was chosen by them to represent them in this country, and they certainly should be bound by his acts. In this connection, attention is called briefly to these facts: first, the corporate records of the Belt Company, and the authority for most of the transactions complained of, show that such transactions were expressly ratified by the Belt stockholders; second, they show that these transactions were not concealed from the Belt Company, or from its stockholders, and that they can all be found upon the books of the company by any one, who will take the trouble to look for them; and third, they show that, during the entire corporate life of the Belt Company, when dealings were going on between the Belt and Trust Company, not a single dissent was heard by any of the stockholders as to any transaction, old or new; and Fourth, it is shown that, as a matter of fact, the Trust Company did not have the control of the Belt Company, but that it was vested in the stockholders, who lived in Amsterdam and who elected the directors. These transactions, which are complained of, were executed, closed and finished transactions, and long since settled by those interested in them. The accounts between these companies were accurately kept, vouchers were exchanged daily and monthly in the mutual transactions passing between them, and matters of account
775 were settled by notes given from time to time, and the accounts closed up in that way.

If by reason of the community of directorship between the two corporations, the transactions in controversy should be set aside, it could hardly be said that the Belt Company was or [*in is*] a position to make restoration to the Trust Company for finding a market for its stocks and bonds, and disposing of the same, and otherwise make good the responsibilities incurred by the Trust Company, from time to time, while backing it during the active years of its corporate existence; or in the case of the Construction Company contract, made with the Belt Company, is or would the latter be willing to give back to the Construction Company the railroad which it received under said contract, even though it may be that it was not economically constructed.

It is evident that, if the Belt Company in 1892 had sought to avoid the contract, made with the Construction Company, that the Trust Company could not have gone on making advances to the Belt Company, loaning its money, etc. A party cannot avoid a contract where he has received all the fruits of it, and is unable to restore

or replace them. The act of accepting and receiving the fruits, is in itself in the nature of acquiesence or ratification.

4. The foregoing facts abundantly show that the Belt Company was, to all intents and purposes, managed and controlled by the Dutch bondholders, but through Martin and his associates, working in harmony with the Trust Company management, but not dominated and controlled by the Trust Company, as alleged in complainants' bill.

It is an undisputed fact in the case, that De Goeijen was the representative of the Dutch bondholders, and, with them, was largely interested in the Belt securities, as hereinbefore stated. The combined holdings of others in the Belt securities constituted but a small minority. DeGoeijen, in his frequent trips to Kansas City, inspected and kept in touch with the Belt properties and condition of affairs. The Belt was what might be deemed a parent company to the Consolidated, Union, Air Line and Connecting Companies.

In the sequence of facts, the Suburban Company was the beginning of the Belt system, organized, as before stated, by Martin Scott and others, who failing to secure sufficient funds to finance the proposition, invited Stilwell to take charge of their enterprise and which resulted in the making of the Stilwell contract. It is conclusively shown that substantially all of the capital stock of the Con-
776 struction Company was used in building the first division of the Belt, and, when such stock was depleted, arrangements were made through the same Construction Company, to build the second division of the Belt, as has been hereinbefore shown. The various transactions involved in the making of the Stilwell contract, the building of the Suburban road, its acceptance by the Suburban Company, the turning over of the stocks and bonds, and, in fact, all the important details respecting these transactions, received the approval of the stockholders and directors controlling these companies. The claim made by the complainants that the Trust Company so dominated the whole situation that it compelled or caused the Suburban Company to accept the road when it should not have done so, is not sustained by the proofs. Considering the fact that the Suburban Company had nothing but a franchise from Kansas City, and, at that time, with no immediate prospects of additional railroad connections it is not surprising that it had to make sacrifices in connection with the Stilwell contract, and the completion of the first division of the Belt. These were matters, however, solely and entirely within the business judgment of the parties then interested in the promotion and development of the Belt properties, and there is nothing in this record from which the Master feels justified in reaching the conclusion that the transactions of the Trust Company in controversy, in respect to the construction of the first and second divisions of the Belt, were inequitable or oppressive to the extent that they should be set aside.

Conclusions of the Master.

With respect to the series of claims which are predicated upon the contracts for construction made with the Belt and Air Line Companies by the Construction Company, and also in respect to the manner in which those contracts were fulfilled, it is the opinion of the Master that these claims — without substantial merit, for the following, among other reasons.

1. At the time these transactions took place, the sole and only stockholder of the Belt and Air Line Companies was the Construction Company, and the persons to whom it had caused certain shares to be issued for the purpose of qualifying them as directors and it would seem that, as to the manner in which the Construction Company saw fit to divide up its interest in the proprietorship of the company, and to represent it in its shares, considered only the Construction Company and its shareholders, and that, too, notwithstanding the identity of directorships among the companies involved.

777 McCracken v. Robinson (C. C. A.) 57 Fed., 375, s. c., 52 Fed., 726.
Coe v. R. R., 52 Fed., 531.
Barr v. R. R., 125 N. Y., 263.
U. P. R. R. v. Credit Mobilier, 135 Mass., 367.

2. There was no fraud practiced by the Construction Company on the railroad companies. Adopting the language of one of the cases, it was "practically in this way the promoters of the railroads placed a valuation upon the corporate properties and franchises which the contribution and expenditures of their money created; and the fact that they were created for an expenditure less than the par value of the aggregate issues of stocks and bonds does not affect the question at all."

Barr v. R. R., 125 N. Y., 263.
Robinson v. McCracken, 57 Fed., 375.

3. If, however, the arrangements and practices on the part of the Construction Company with the railroad companies had been corrupt and illegal, then complainants' remedy would have been against such company, or its stockholders, and not against the Trust Company, which was not a party to such arrangements, that is, unless under the proofs and the law of the case, it should be satisfactorily shown that the Trust Company dominated and controlled all these transactions in its own interest, and to the prejudice of the other companies involved.

4. There is nothing illegal or unlawful in a corporation issuing its unpaid shares, as professedly paid up, as a bonus to bondholders in order to market its bonds, or other securities, and, where a corporation cannot sell its bonds at par without giving away an equal amount of its stock, and the value of the bonds is no more than equal to the actual value of the bonds and stocks combined, then

the purchaser cannot be compelled by creditors of the corporation, or by its receiver, to pay the principal value of the stock.

Handley v. Stutz, 139 U. S., 417.
Coe v. R. R., 52 Fed., 531.
Christensen v. Eno, 106 N. Y., 97.

5. Substantially all of the claims set forth in the second ancillary bill are barred by the Statutes of limitations of Missouri (R. S. Mo., 1899, Section 6773-74-75). These statutes are known as the five and ten years statutes, and defendant invokes both in paragraph 118 of its answer to the ancillary bill, as follows:

778 "As to so much of said amended ancillary bill as seeks an account of the money, property or effects of the said Belt, Union, Air Line, Consolidated, Suburban, Kansas City Terminal Construction, Elevator, Improvement, Townsite or Northern Companies, coming into the hands of this defendant prior to the 6th day of September, 1895, or that seeks a satisfaction for or in respect of any money or property received by this defendant for or on account of any of the matters and things set forth in the said amended ancillary [*ail*] as having taken place or transpired prior to the said date, this defendant says that all of the said matters and things pretended to have transpired, and all of the said money, property and effects pretended to have been received by this defendant, if any such were received, transpired and were received by this defendant more than five years before the commencement of this action or any action whatsoever, and that if the said complainants in the said amended ancillary bill had any cause of action or suit against this defendant for or concerning any of the said matters, which this defendant does not admit, that such causes of action or suit did not accrue or arise within five(5)years before the *the* said amended ancillary bill or the said original bill herein was filed or this defendant was served with process, nor did this defendant at any time within five (5) years before the said bills were exhibited or process sued out against this defendant, promise or agree to come to any account or make satisfaction or agree to pay any sum or sums of money for or by reason of any of the said matters, nor was there any occasion for it so to do: and that by a certain act of the General Assembly of the State of Missouri, for the limitation of actions and suits at law, it was enacted as is shown by Sections 6773, 6774, and 6775, of the Revised Statutes of the State of Missouri, for the year 1889, as follows, to-wit:

SEC. 6673. "Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued."

SEC. 6774. "Within ten years: First, an action upon any writing, whether sealed or unsealed, for the payment of money or property; second, actions brought on any covenant of warranty contained in any deed of conveyance of land shall be brought within ten years next after there shall have been a final decision against the title of the covenantor in such deed, and actions on any covenant of seizin contained in any such deed shall be brought within ten years

779 after the cause of such action shall accrue; third, actions for relief, not herein provided for."

SEC. 6775. "Within five years: First, all action upon contracts, obligations or liabilities, express or implied, except those mentioned in Section 6774, and except judgments or decrees of a court of record, and except where a different time is herein limited; second, an action upon a liability created by a statute other than a penalty or forfeiture; third, an action for trespass on real estate; fourth, an action for taking, detaining, or injuring any goods or chattels, including actions for recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated; fifth, an action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party at any time within ten years, of the facts constituting the fraud."

The defendant states that the statutes have been in force during the whole time in which the said matters set forth in said amended ancillary bill are pretended to have transpired and ever since the said pretended cause of action are alleged to have accrued and this defendant pleads the several matters aforesaid in bar to so much of the said complainant's said demands as aforesaid and prays the judgment of this Honorable Court thereon."

The Complainant is not within the saving clause in the fifth subdivision of said section 6775, which provides that in actions for relief on the ground of fraud, the cause of action in such case is to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years of the facts constituting the fraud, because,

(*a*) There is no attempt made by complainants either in the bill or in the proofs, to bring themselves within such clause. Wood v. Carpenter, 101 U. S., 140; Kessler & Co. v. Ensley & Co., 123 Fed., 546:

(*b*) On the contrary, it is shown that the Belt stockholders knew of, and acquiesced in, the transactions complained of, and that the Belt Company, through which its receiver derives all of his rights, expressly ratified them;

(*c*) The proofs show that the transactions were not secret or concealed, but were of more or less public character, and full information concerning them *with* within easy reach of any party in interest. As stated by Judge Black, in Bent v. Priest, 86 Mo., 475,

780 "Much, we think, depends upon the fact whether the fraud is a secret or an open one. If the substantial facts constituting the fraud were open, it is believed under the equity rules the statutes of limitations would have applied at once, but if these facts were in any other nature concealed, and were unknown, it is believed the statutes would not begin to run until they were discovered, there being no want of diligence on the part of complainant."

Mr. Justice Swayne, speaking of the same point, in Wood v. Carpenter, 101 U. S., 140, says:

"Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry. There must be reasonable diligence, and, the means of knowledge are the same thing in effect as knowledge itself, and the

delay which has occurred must be shown to be consistent with the requisite diligence."

Foster v. R. R., 36 Fed., l. c., 637.
Swift v. Smith, 79 Fed. 709.

6. The complainants are not in position to invoke the rule that the statutes of limitations do not run in favor of a trustee against his cestui que trust, and that the Trust Company, in selling the securities issued by the various railroad companies for their account, stood in the relation of a trustee towards the Belt Company, for the following reasons,

(*a*) The Trust Company was not such a trustee as to prevent the running of the statute of limitations in its favor, in as much as the relationship created by the controverted transactions was that of an implied or constructive trust, and the rule invoked by complainants applies only to express trust.

Young v. Mercantile Trust Co., 140 Fed., 61.
Miles v. Vivian, 79 Fed., 848.
Kane v. Bloodgood, 7 Johns. Ch., 90.
Landés v. Saxton, 105 Mo., 486.
Robinson v. Hook, per Storry, J., 4 Mason, l. c., 152.

In Robinson v. Hook, supra, Judge Storry said:

"But as to cases of merely constructive trusts created by courts of equity, or cases which in a sense are treated for some purpose as implied trusts, to which, however, legal remedies are applicable, the doctrine cannot be admitted that the statute of limitations does not embrace them. If it were otherwise, there is scarcely a single case of bailment, or of moneys received to use, of factorage concerns, of general account, into whose service the doctrine might not be pressed."

781 (*b*) Even in cases of an express trust, the rule that neither time nor laches will bar the right to enforce the trust is subject to the exception that when the trust is disavowed by the trustee, or the trustee conducts himself in a manner wholly inconsistent with any admission of its further existence or means of knowing this, the case will be brought within the ordinary rules of limitations and laches.

Swift v. Smith, per Sanborn, J., 79 Fed., and cases cited.

In the case at bar, it is proven that the Trust Company rendered regular accounts of all sales of stocks and bonds of the different railroad companies involved in this accounting, and, in the ordinary course of business, proper entries were made upon the books of the railroad companies, as well as the Trust Company, and the usual papers and vouchers were systematically filed in evidence of such transactions. The principle has been stated in many of the authorities that the rendition of such accounts, under such circumstances, is wholly inconsistent with the further recognition of any trust, express or implied, with respect to the securities covered thereby.

28 A. & E. Enc. Law (2nd Ed.,) 1133-1135.

7. It was contended in the argument by complainants' counsel, that the statutes of limitations of Missouri have no application to this case and that courts of equity in the United States are not bound or controlled by the statutes of limitations of the several states in which they sit. The law, however, is to the contrary, the rule being concisely stated by the court in Miles v. Vivian, 79 Fed. l. c., 852, as follows:

"Statutes of limitations are equally obligatory upon the courts of equity and courts of law, in cases in which the jurisdiction is concurrent. In such cases courts of equity do not act so much in analogy to the statutes as in obedience to them. 2 Story Eq. Jur. (13th Ed.) 842. Although the ordinary chancery jurisdiction of the courts of the United States cannot be abridged by state statutes, they recognize those of the state in which the court is sitting, limiting the time for bringing suits, and adopt them, if they do not act in obedience to them. Coulson v. Walton, 9 Pet., 62; Harpending v. Dutch Church, 16 Pet., 455; Badger v. Badger, 2 Wall., 87-94; Clarke v. Boorman, 18 Wall., 493; Carroll v. Green, 92 U. S., 509; Kirby v. Railroad Co., 120 U. S., 130, 7 Sup. Ct., 430. Accordingly they will adjudge in cases over which there is a concurrent jurisdiction
782 by courts of law and equity, that lapse to be a bar in equity which would have constituted a bar if the action had been at law. Norris v. Haggin, 136 U. S., 391, 10 Sup. Ct., 942; Alsop v. Riker, 155 U. S., 448, 15 Sup. Ct., 162. In Boone County v. Burlington & M. R. R. Co., 139 U. S., 684, 11 Sup. Ct., 687, the rule was applied where the state statute barred an action for relief on the ground of fraud unless commenced within four years after the discovery of the fraud. Applying this rule to the present case, the six year statute of limitations, which has been pleaded by the defendant, would seem to bar the action. If it does not, the ten year statute applies. Hubbell v. Medbury, 53 N. Y., 98.

Independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights unreasonably long, and shows no excuse for having done so. Recent applications of the doctrine by the Supreme Court are found in Hanner v. Moulton, 138 U. S., 486, 11 Sup. Ct., 408; Richards v. Mackall, 124 U. S., 183, 8 Sup. Ct., 437; Hammond v. Hopkins, 143 U. S., 224, 12 Sup. Ct., 418; Galliher v. Cadwell, 145 U. S., 385, 12 Sup. Ct., 873; Lane & Bodley Co. v. Locke, 150 U. S., 193, 14 Sup. Ct., 78; Abraham v. Ordway, 158 U. S., 416, 15 Sup. Ct., 894."

8. It has been contended by complainants that the items involved in complainants' bill are saved from the effect of the statutes of limitations by reason of Section 4278, of the Revised Statutes of Missouri, 1899, which provides as follows:

"In an action brought to recover a balance due on a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item in the account on the adverse side."

The defendant, however, insists that the contention of complainants in that respect is without merit, for the reason that this is not a suit on a mutual, open and current account, in the statutory sense.

It is true that in its answer, the Trust Company prays judgment, not only upon the promissory notes of the Belt Company, held by it, but also upon an unpaid book account, the first item of which is dated September 25, 1899, and the last item September 25, 1900, the balance due being $31,809.49. This book account commences, then, September 25, 1899. The remainder of the account claimed in this action by the Trust Company, consists exclusively of promissory notes executed by the Belt Company in its favor, and which notes are renewals and readjustments of notes for sundry amounts, executed by the Belt Company on March 31, 1899, and in
783 part by notes executed long prior to that date; said notes being given by the Belt Company to the Trust Company in settlement of the balance shown to be due by the book accounts (Vol. 1-128). The effect of the complainants' contention is to ask the Court to ignore the settlement of these accounts by notes, to treat such notes as mere nullities, and to regard the book showing of the Belt and Trust Companies as opened, unsettled and mutual accounts. It affirmatively appears on the books of both companies (see Willey's exhibit, Vol. 1-238) that from the origin of the dealings between the Belt Company and the Trust Company on March 26, 1890, to the time of the termination of such dealings in 1900, a period of over ten years, there were frequent settlements by the Belt Company of the balances due from it to the Trust Company, either by payments of cash, or by the execution of promissory notes, the entries on their face reciting that the notes were given "to balance account"; and further, that such notes were not only given, but actually paid by the Belt Company at their maturity, in the ordinary course of its business relations with the Trust Company. The complainants, in their bill, seek to disregard not only the notes now held by the Trust Company, but all the notes given long before the present ones were executed, and paid many years ago, in the ordinary business transactions between the Belt and the Trust Company; in other words, the Belt receiver is attempting to get behind these notes given by the Belt Company in settlement of book balances, and long ago satisfactorily adjusted between the Belt and the Trust Company. For example, page 52 of the record (Willey's exhibit) shows that on October 1, 1891, the Belt owed the Trust Company, on open account, $30,149.00, and that on that day the Belt executed its promissory note of that amount to the Trust Company, in settlement of the balance, and that on October 21, 1891, the Trust Company, by entry on its books, gave the Belt credit for that note. When this note became due, it was paid in part, and a renewal note given for the part not paid (see item of January 20, 1892, Rec. p. 54); and afterwards this last note was paid in full in the ordinary course of business. The books of both companies disclose frequent instances of like nature (see Willey's exhibits in Vol. 1-57 et seq., and accountant Wright's literal copy of the book showing of both the Trust Company and the Belt Company set out in parallel columns, comprising Vol. 44 of the record).

The Master is of the opinion that counsel for defendant are right in their suggestion that the statute upon which complainant relies expressly refers solely to actions brought to recover a balance due

on a mutual, open and current account, and provides that in
784 such action, the cause of action should be deemed to have accrued from the date of the last item, and, further, that the statute has no application to stated or settled accounts, whether settled by note, cash or otherwise; and that clearly the recovery sought by the Trust Company upon the promissory notes held by it is not an action on a mutual, open and current account. In support of this view, the following authorities are cited:

"An open account is defined to be "One which is continuous or current, uninterrupted or unclosed by settlement or otherwise."

Cyc. of Law & Proc., Vol. 1, 363.

"An account stated is an agreement between persons who have had previous transactions, fixing the amount due in respect of such transactions."

Cyc. of Law & Proc., Vol. 1, 364.

"A settled account is one the balance of which, having been stated, is paid."

Cyc. of Law & Proc., Vol. 1, 364.

"A mutual account is terminated when a final balance is arrived at, which is to constitute an independent debt and on such a stated account the statute of limitations runs from its date."

So it appears that, when an account is stated and rendered, the statute of limitations begins to run against it from the date of such statement of account. Much more so does the statute run against such an account, when a note or other evidence of indebtedness is given by the party against whom the statement is rendered in settlement of the balance due. And it has been said:

"Where upon an accounting a party has given a note for the balance, or has allowed as an item of the account a note previously given by him, he cannot afterwards set up as a defense to the note matters fully within his knowledge at the time of the settlement."

1 Am. & Eng. Ency. of Law, 459 and case cited.

"An account stated is in the nature of a new promise or undertaking, and raises a new cause of action between the parties. In accordance with this principle it has been seen that a recovery may be had upon an account stated although there could be no recovery on the original debt."

1 Am. & Eng. Ency. of Law, 456.

785 Estes v. Hamilton Brown Shoe Company, 54 Mo. App., 543.

"Since the account stated is a new promise, the items of which the original cause of action was composed cannot be inquired into."

1 Am. & Eng. Ency. of Law, 456.

It would seem, then, that so far as affects the operation of the statute of limitations in this cause, there could hardly be an inquiry into the consideration of the notes now held by the Trust Company,

and if such is the case, that there could be no inquiry respecting the consideration of notes executed and paid by the Belt Company long prior to the existence of the principal notes.

The Master has, in his report on the intervention of the Southern Company, made special reference to the statutes of limitations as affecting the Trust Company in its relations with these other Companies, and also cited many of the leading authorities upon the subject, and to which reference is here made as a part of his conclusions on the limitations subject, as affecting the issues in this cause.

9. The fact that the Belt Company and the Trust Company had directors, a majority of whom were common to both companies, did not disable the Trust Company from loaning its money or credit to the Belt Company, nor from taking collateral security from the Belt Company to secure such indebtedness, and, before the Belt Company or its receiver, can rescind its action in giving such collateral security, payment of the debt is an essential pre-requisite.

Gould v. R. R., 52 Fed., 680.

10. By reason of the foregoing conclusions, respecting the law and the proofs in this cause, the Master is of the opinion, and so finds, that, (*a*) The Trust Company did not dominate and control the Belt Company, or any of the other companies involved in this controversy, as claimed by complainants in their bill; and, (*b*) that the statutes of limitations pleaded by defendant in its answer, are conclusive as to the transactions complained of in the bill, and occurring prior to November 20, 1896.

VI.

The De Goeijen $89,333.33 *Claim.*

In item (*n*) of paragraph 1, of the second ancillary bill, the complainants allege that on or about October 15, 1897, the Belt Company was embarrassed financially, and insolvent, had out-
786 standing mortgage notes for a large amount, its stock was depressed in value, and, by reason of these things, certain of the officers of the Trust and Belt Companies, and investors in Belt securities, became desirous of improving the Belt's financial condition, by cutting off its books certain bills payable, so as to improve its condition, and permit the declaration of a dividend; that an arrangement was made between certain Trust Company officers and J. DeGoeijen, Jr., by which the Trust Company assumed and agreed to pay certain real estate notes described in the bill, which included the amount now in controversy, and the amount of such items was by the Trust Company charged to the Belt Company on the books of the Trust Company, and the same appears as a debit to the Belt Company in the Trust Company's statement of account against the Belt; that, at the time of said transaction, and on or about October 15, 1897, pursuant to said plan, DeGoeijen purchased certain bonds belonging to the Belt Company, which were by the Trust Company credited upon its books to the Belt in an amount sufficiently large

to cover all of said notes, so that upon the Belt books, all of said bills payable had been eliminated, and the Belt Company was thereby enabled to make out and send to stockholders and financial publications a clean statement, showing an improved financial condition of its affairs; that, on or about the month of April, 1899, and after the appointment of receivers for the Gulf Company, the Trust Company had good reasons to believe, and did believe, that it would soon lose control of the Belt, and that other and independent directors and officers would be elected for the Belt, and thereupon, the Trust Company set about to relieve itself of its assumption and agreement to pay said notes aggregating $89,333.33 and made the claim that the credit therefore extended by it to the Belt on October 15, 1897, was on the understanding that the funds for such credit should be supplied by DeGoeijen, which he had failed to do, and, thereupon the Trust Company undertook, by an entry upon its own books, to relieve itself of said assumption and agreement, but failed and refused upon so doing, to credit the account of the Belt Company with said sum as it should have done; that, at that time, DeGoeijen was otherwise indebted to the Trust Company for a large sum, which he was unable to pay, or, by reason of their intimate financial relationship, the Trust Company was unable or unwilling to collect from him, and that thereupon it contrived the plan of causing the Belt Company to take over its worthless account against DeGoeijen, in lieu of crediting the Belt Company with such sum, as it should have done; that, at said time, the Trust Company knew
787 that the DeGoeijen account was worthless and uncollectible, and its action in causing said entries to be made was a fraudulent attempt to relieve itself of its assumption to pay said notes in the sum of $89,333.33; that, by reason of the premises, the Trust Company is estopped to deny that the credit it extended to the Belt Company, as above stated, was an absolute credit, and to say that it was a conditional one. Complainants claim that the charge of $89,333.33, appearing on the Trust Company account, should be eliminated therefrom, together with all charges of interest, and that the Belt Company should be credited with the same amount, and interest from October 15, 1897.

In paragraph 78 to 90, inclusive, of defendant's answer, admissions are made, respecting certain conveyances of the real estate therein described to Alfred L. Howe, treasurer of the Suburban Company, and W. S. Taylor, an officer of that company, and the execution of notes for the deferred payments thereon, and that the notes so executed by Taylor and Howe aggregated the principal sum of $89,333.33, and were secured by deed of trust upon said real estate, located at Second and Wyandotte Streets. It is denied that in October, 1897, the Belt Company was financially embarrassed or insolvent, or that its stock was depressed in value, or that it was desirous of manipulating its accounts, or that it did do so, or that any arrangement was made between any of the Trust Company officers and DeGoeijen, or between it and any other person, whereby it assumed to pay said real estate notes, which were a lien upon the property of the Belt Company, and including the notes

aggregating $89,333.33, or that the Trust Company at any time assumed and agreed to pay said notes, except upon the conditions and under the circumstances stated in its answer, but on the contrary, states that said notes were assumed by DeGoeijen. Defendant denies that in April, 1899, or at any other time, it had reason to believe, or believed, that it would lose control of the Belt Company, and states that at no time did it have control of the Belt Company; denies that it set about to relieve itself of any obligation to pay said $89,333.33, and states that at no time had it incurred any such obligation; denies that DeGoeijen was indebted to it in an amount in excess of said notes, or in any sum, or that he was unable to pay his obligations to defendant, or any other person, or that it caused the Belt Company to take over any account due the defendant from DeGoeijen, or that it knew that he was insolvent, and states that it had no account against him, and denies that it caused the Belt Company to make any entries on its books, or that the Belt Company or complainants, are entitled to any credit upon their indebtedness to defendant on account of said notes for $89,333.33, charged by the defendant to the Belt on October 15, 1897.

788 Defendant, further answering, states in substance, DeGoeijen, and associates, residents of Amsterdam, Holland, on October 15, 1897, were the owners of a large majority of the Belt stocks and bonds, and DeGoeijen, as the agent and representative of the Dutch investors, was chairman of a permanent executive committee appointed by the Belt stockholders, and with full discretionary power in the management of Belt affairs, and hence, interested in improving its financial condition, and for such purpose, came to Kansas City, in 1897, the Belt Company being then indebted to various persons, aggregating upwards of $100,000.00, on account of purchase money mortgage notes for terminal and depot purposes, and was also indebted on account of floating liabilities; that, prior to October 15, 1897, the Belt Company owned 483 second mortgage Connecting Company bonds, of the par value of $483,000.00, and 82 Union Company bonds, of the par value of $82,000.00, and that, by written contract, dated July 1, 1897, the Belt sold to DeGoeijen the said 483 bonds at 45 cents on the dollar, or a total of $217,350.00, and also said 82 bonds, at par, or $82,000.00, and DeGoeijen agreed to pay the Belt for all said bonds on or before December 1, 1897; that the Belt Company, on its part agreed out of the proceeds of said sale, to pay or cause to be paid all its real estate mortgage notes and floating debt; that, thereafter, at the request of the Belt Company and DeGoeijen, the defendant agreed that it would act as the fiscal agent of the Belt Company in the collection from DeGoeijen of the purchase price of said bonds, and see that the same was disbursed in accordance with the arrangement made between the Belt and DeGoeijen, and that at the time of the making of the arrangement between the Belt and DeGoeijen, the said 82 Union Company bonds, and 483 Connecting Company bonds, were not in the possession of the Belt, but had been pledged by it with financial institutions as collateral security for the payment of its obligations, and it was known to all parties to the trans-

action that it would be necessary for such obligations to be paid before said securities could be delivered to DeGoeijen, and, for that reason, the defendant company was delegated by DeGoeijen and the Belt Company to pay off and discharge said obligations out of the proceeds of said securities bought by DeGoeijen; that, pursuant to said arrangement, the defendant placed to the credit of the Belt Company, on its books, on October 15, 1897, the sum of $217,350.00 and $82,000.00, representing the purchase price of said bonds by DeGoeijen; that, as said bonds were released by the persons holding the same as collateral security, the defendant would send them to DeGoeijen, who, from time to time, made payments or ac-
789 count of his purchase of said bonds, and defendant applied the payments so made by him in the discharge of the floating debt of the Belt Company; and that, finally, all of such real estate notes and the floating debt, were paid out of such proceeds, down to $89,333.33, which amount was still unpaid at the time the receivers were appointed for the Belt Company; that it was distinctly understood between the Belt Company and DeGoeijen and defendant, that defendant should not be required to pay said real estate mortgage notes held by the Provident Company and aggregating $89,333.33, until and unless DeGoeijen should pay defendant in full for the Belt Company, for the bonds purchased by him from it, as above stated, and that DeGoeijen at no time paid to defendant the full amount of said bonds, being behind exactly the sum of $89,333.33; that defendant denies that it had any interest in said transaction except to collect from DeGoeijen, and apply the proceeds thereof, in accordance with the directions of the Belt Company and DeGoeijen, as already stated, and that it acted solely as the agent for the Belt and DeGoeijen and that it credited each of them with all the moneys received by it from DeGoeijen; that the Belt Company at all times treated DeGoeijen as its debtor, by reason of his failure to pay the depot mortgages, or the balance on the purchase price of the bonds, and from time to time at regular intervals, it rendered bills against him for the said $89,333.33, and for interest, which it, the Belt Company, had to pay from time to time to the Provident Company, on account of the depot mortgages; that even though DeGoeijen did not pay the full amount of the purchase price of said bonds to the Belt Company, through the medium of the defendant, yet that he did, in fact, pay the same to the receivers of the Belt Company, that is to say, that shortly after the Gulf Company went into the hands of receivers, in April, 1899, certain bondholders organized themselves into a committee of reorganization, assuming to act for and on behalf of the holders of the Gulf securities, who should join or participate with the Committee in the reorganization of the Gulf Company, and that a plan of reorganization was promulgated, and, as a part thereof, the Committee acquired all the stocks and bonds of the Belt and constituent companies, and also the right to adjust the floating indebtedness of the Gulf and the Belt Companies; that at the time the Gulf Company went into the hands of receivers, it was indebted to DeGoeijen in the sum of about $300,000.00, borrowed money, and for which he made a claim

against the Gulf receivers, and also against the reorganization Committee, and that, in the meantime, receivers were appointed for the Belt, pursuant to the reorganization plan, and the said Belt claim against DeGoeijen for $89,333.33, was referred to the Committee for adjustment, and that, thereupon, DeGoeijen and the
790 Committee entered into negotiations for a settlement of the mutual controversies pending between him and the Committee, acting on behalf of the Belt and Gulf Companies, and receivers; that a settlement was effected between DeGeoijen and the Committee, in which he was paid $150,000.00, in full settlement of the mutual demands existing between him and the Gulf and the Belt Companies, and the Committee, after taking into account as an offset, the said sum of $89,333.33; that the Belt Company and its receivers, having, by reason of such settlement, received full payment for the depot mortgages aggregating $89,333.33 are estopped to say that either DeGoeijen or defendant is indebted to them on account thereof, and that it was with the amount of money thus deducted by the Committee from DeGoeijen's claim, that the Belt receivers paid the Provident Company for said depot real estate mortgage notes.

In the answer of defendant, filed July 2, 1906, to the second ancillary bill, it has, in paragraph 4 thereof, supplemented the averments in paragraph 90 of its answer to the first ancillary bill, in which it makes more specific reference to the settlement between DeGoeijen and the reorganization Committee on behalf of the Gulf and Belt Companies, and their stockholders.

The facts in respect to this DeGoeijen matter, as they appear in the record, are so numerous that it is not deemed necessary to make specific references except to a few of them. In Johnson's testimony (Rec. 21-11242), he states that, at all times up to October 31, 1897, the Belt Company was insolvent, that the indebtedness on October 31, 1897, amounted to $380,000.00, after taking into account the advance of over $300,000.00 to the Belt by DeGoeijen and the Trust Company (Rec. 36-18979). As to the amount of notes outstanding, see the entries on Belt journals, appearing in Rec. 51-31007, consisting of $103,783.91 real estate notes, including the depot mortgages, and also $120,000.00, bills payable, appearing in Rec. 51-31011. Wilcox states that the Belt, on October 15, 1897, owned the Trust Company $45,000.00, was indebted to the banks $135,000.00, and something over $100,000.00 on real estate notes, which includes the $89,333.33 item (Rec. 34-18118); and that, when DeGoeijen came to Kansas City, in October, 1897, he was the representative of the Holland investors, and largely interested in the Belt Company (Rec. 34-18100); that it was desirous to make a better showing on the Belt books, in order to maintain the market for Belt securities. The matter was discussed between Stilwell and DeGoeijen and that Stilwell planned a series of transactions whereby the Belt would be supplied with funds, and from the proceeds of securities to
791 be donated by DeGoeijen, and from cash to be donated by him and the Trust Company, whereby the Belt indebtedness would be taken off the Belt books (Rec. 34-18101); that another

object in showing a better condition on the Belt books, was to place the company in condition to pay a dividend, and one was declared at the end of the year 1897, being a cash dividend, of which $65,-542.50 appears as a charge against the Belt Company in the Trust Company's account at page 117, Rec. 1, (Rec. 34-18254).

Doran, in his testimony, states that, from the donations of the Trust Company and De Goeijen to the Belt Company, amounting to $390,000.00, they were able to pay a cash dividend on the Belt stock amounting to $71,000.00; that one of De Goeijens objects in the October, 1897, transaction, was to declare a dividend, as it was thought that the declaration of such dividend would have a beneficial effect upon the stock market for Belt stock, and, had it not been for this $390,000.00, the financial condition of the Belt would not have warranted the declaration of the dividend (Rec. 51-30833 to 30842).

Johnson states that in June, 1896, De Goeijen subscribed, through the Belt, for 600 Connecting Company bonds at 45 cents on the dollar, amounting to $270,000.00 (Rec. 14-7794), and that in June, 1895, he paid his subscription for these bonds by delivering to the Belt Company 385-714/1000 first mortgage Gulf bonds (Rec. 14-7796), and that, in October, 1897, these second mortgage connecting bonds were donated by De Goeijen to the Belt (Rec. 14-7798), also De Goeijen's bill of sale for the bonds (Rec. 14-7800); that, after this gift to the Belt Company, the Trust Company purchased these 600 Connecting Company bonds from the Belt at 45 cents, also 82 Union Company bonds, at par, and gave the Belt Company credit, under date of October 15, 1897, as shown by Rec. 1-116, of the account, for these bonds so purchased, and thereupon sold 483 of said second mortgage Connecting Company bonds to De Goeijen at 45 cents, for which he was to pay the Trust Company in about three weeks; that under the same date, October 15, 1897, the Trust Company charged the Belt Company the $135,000.00 of bills payable owing by the Belt, also the $100,000.00 odd dollars of real estate notes above shown (Rec. 1-115) the same including said $89,-333.33 of depot mortgage notes; that the Trust Company, under date of October 15, 1897, gave the Belt Company a donation of $30,000.00 (see Trust Company journal voucher 12343, Rec. 7-3597), and, on the 20th day of October, 1897, De Goeijen gave the Belt Company a donation of $5,000.00, and the Trust Company an additional donation of $10,000.00 (Rec. 7-3623 and Rec. 1-116 and 117).

792 The entries upon the Trust Company books in relation to this transaction will be found in Rec. Vols. 49 and 34, and the vouchers in Vol. 7. On April 1, 1899, Trimble, Martin and Gillham were by the Circuit Court of Jackson County, Missouri, appointed receivers of the Gulf Company (Rec. 21-11312). It is shown by Wilcox's testimony (Rec. 34-18108-'11) that it was believed several weeks before April 1st, that the Gulf road would default in the payment of its interest, and that it was so closely allied with the Belt and associated lines that the bankruptcy of the one would probably involve the others. As shown by the Trust

Company's account upon the books of De Goeijen, Jr., account securities bought (Rec. 49-29957), the Trust Company, on March 31, 1899 being the day just preceding the appointment of receivers for the Gulf Company, charged back against the Belt Company the balance of $89,333.33, appearing on the books as due by De-Goeijen to the Trust Company. On April 4, 1899, Wilcox wrote to Doran that it would be necessary for him to take again upon his books this $89,333.33 of notes, and, in pursuance of such instructions, Belt voucher of date August 31, 1899, was issued taking back upon the Belt books these notes (see Wilcox's letter and Belt journal voucher, appearing in Rec. 34-18176 to 18181). Wilcox also states, in substance, (Rec. 34-18182 to 18187) that De Goeijen had been considerably embarrassed by reason of -- fact that he had furnished large sums to the Gulf road, which had gone into the receiver's hands, and it was not desired that his account should appear upon the Trust Company's books, after that receivership, as it was regarded as a slow account, and might be of long standing before it could reasonably be collected, and, for that reason, it was deemed advisable to take it from the Trust Company's books and place it upon the Belt books, as it was desired to have the Trust Company's accounts make as good showing as possible, as it was well known that the Trust Company had financed the Gulf Company, which had become embarrassed.

Some of the events leading up to a settlement by the Southern Company with the Arkansas Construction Company and De Goeijen are as follows: De Goeijen, in 1899, filed an intervening petition against the Gulf Company for $280,000.00, alleged to have been advanced by him for the Gulf, of which approximately $104,000.00 went to the Trust Company to reimburse it for funds that it had advanced to the Gulf (see De Goeijen intervening petition, Rec. 50-30330, and his amended petition in Rec. 50-30345).

In March, 1900, the Arkansas Construction Company also filed an intervening petition in connection with the Gulf receivership, claiming large sums due them for construction work upon
793 the Gulf road (Rec. 50-30362 to 30374). It is claimed by complainants that the memorandum attached to the minutes of the reorganization Committee in 1900 (Rec. 41-22331), discloses that after an informal discussion of the personal claims of De Goeijen account, it was expressed as the opinion of the Committee that the sum of $150,000.00 "be paid him in full settlement of his personal claims against the Gulf and its terminal companies, and that the reorganization Committee obtained from the Belt Company a release to DeGoeijen of the claim of $89,333.33, and that the payment above shall be made after the agreement of arbitration of the Arkansas Construction Company claims has been signed by all parties, and that this suggestion be referred to the Kansas City Southern Railway Company, with the recommendation that such assent be given by the Kansas City Southern Railway Company, and it being understood that the above suggestion should be submitted to the Kansas City Southern Railway Company, and they advise the reorganization Committee of the action taken."

At this time, as shown by De Goeijen's letter, appearing in Rec. 56-34467 to 34473, the De Goeijen claims amounted to $407,478.00; of which $280,000.00 was covered by the intervening petition above cited.

On July 11, 1900, or the day after the meeting of the reorganization Committee, just above quoted, the Chairman of the Committee, William F. Harrity wrote Harriman, Chairman of the executive committee of the Kansas City Southern, concerning suggestions of the reorganization Committee, as expressed by the minutes just above cited. See letter appearing in Rec. 56-34455-'6.

On July 12, 1900, at a meeting of the executive committee of the Southern Company, the suggestions of the reorganization Committee were agreed to, and provided, as shown by the minutes "this action was taken with the understanding that the agreement, in its form, to arbitrate the claims of the Arkansas Construction Company against the P. & G. Railroad Company, and the arbitrators selected shall be satisfactory to this committee" (see copy of the minutes of the executive committee of the Kansas City Southern Railway Company, Rec. 56-34462-¼-½).

It thus seems that the proposed settlement suggested by the organization Committee as to the release of De Goeijen by the Belt of the $89,333.33, and to which the Southern Company agreed, was upon the condition that the arbitration and the arbitrators should be satisfactory to it. It appears from letters in Rec. 56-34475 to
794 34486, that the arbitration was not satisfactory to the Southern Company, and that it protested to the Provident Company the payment of the $150,000.00, then on deposit with that company, to meet the claims of DeGoeijen, according to the compromise adjustment, and, further, that the Southern Company filed a bill of injunction against the Provident Company and the reorganization Committee, asking for an order restraining the payment to De Goeijen of the $150,000.00 (see copy of bill Rec. 57-35039 to 35087).

Mr. Sielcken, in his testimony (Rec. 57-34617 to 34667), states that in June, 1902, there was a settlement of the claims of the Arkansas Construction Company and De Goeijen, whereby the Southern Company was to pay De Goeijen $150,000.00 for his claims, and to pay the Arkansas Construction Company $350,000.00 for its claims; that this agreement for a settlement of such claims was reached between Harriman and Sielcken in the early part of June, 1902, and that, during their discussions, nothing was said about the claim of $89,333.33 against De Goeijen; that the memorandum of the meeting of July 10, 1900, of the reorganization Committee was not referred to in the negotiations, that De Goeijen was a very large stockholder in the Arkansas Construction Company, and its claims and his were considered one in these negotiations, and that the $150,000.00 on deposit with the Provident Company was available for settling the controversy, and the question was as to how much more, in addition to the $150,000.00, was to be paid; that, during the negotiations, Harriman distinctly stated that he wanted to have all the litigation finished, and that after the

agreement was reached, it was left to the attorneys to prepare the necessary contract papers. The contract so drawn up as the result of these negotiations between Sielcken and Harriman appear- in Rec. 50-30388 to 30401, inclusive, of date June 16, 1902, and is signed by Arkansas Construction Company, by E. L. Martin, president, by the Kansas City Southern Railway Company, and by J. De Joeigen, by Heynecker, his attorney in fact. At a meeting of the executive committee of the Southern Company on June 13, 1902, Sielcken and Harriman being present, a draft of the agreement just referred to was submitted to the executive committee, and was approved (see minutes of Southern Company executive Committee, Rec. 56-34462-¾).

Heynecker, in his testimony (Rec. 50-30381), states that the settlement of the De Goeijen claim was made by Sielcken, representing De Goeijen, and Harriman, representing the Southern Company.

795 Certain book entries respecting this matter may be found in the record, as follows: Rec. 56-34229, 34339, 34244, 34342, 34264.

It was contended, by complainants' counsel, upon the argument of this case before the Master, that the proposed settlement with De Goeijen, provided for in the minutes of the reorganization Committee, of July 10, 1900, was abandoned by reason of the failure of the proposed arbitration agreement, and the fact that the arbitrators did not meet with the approval of the Southern Company, and, in lieu of this proposed agreement, the other agreement of June, 1902, was entered into, wherein Sielcken, represented De Goeijen, and Harriman the Southern Company, and by which De Goeijen received $150,000.00 in settlement of his $280,000.00 Pittsburg & Gulf claims and including the $89,333.33 due from De Goeijen on account of the securities purchased by him.

It is apparent from the foregoing statement of facts that the Trust Company, the Belt Company and De Goeijen all desired to bring about a better condition of Belt affairs, so as to pay off a large part of the liabilities, and make the Belt securities more saleable upon the market. After a rather careful consideration of all these records pertaining to this matter, the Master has been unable to see any reason why the Trust Company should have unconditionally assumed and agreed to pay this large amount of indebtedness, for which it was not primarily liable. It was obviously for the best interest of the Belt Company, and, incidently, of the Trust Company, that some arrangement should be made by which the Belt securities could be more easily handled, and the money raised with which to pay off the liabilities. De Goeijen, as the representative of the Dutch bondholders, was more deeply interested than any other investor, and hence, it was natural that negotiations looking to that end should be had with him. It seems from the evidence that he had been largely instrumental in and connected with the contract by which the Belt Company had agreed to build the Connecting Company railroad, and in consideration of which the Belt was to receive the Connecting Company securities, and it

was by reason of this contract and the operations thereunder, that the Belt became deeply involved. He had already made a subscription for the second mortgage bonds of the Connecting Company, and when he came over to this country, he made the deal hereinbefore stated, by which he turned over to the Belt, on account of his subscription, 385 Gulf bonds, which, at the subscription price of 45 cents on the dollar, equalled $217,000.00, the price of the bonds,
so that the Gulf bonds passed into the treasury of the Belt
796 Company, and De Goeijen became entitled to his 600 Connecting Company bonds; thereupon, pursuant to his plan for relieving the financial condition of the Belt, he turned around and made a donation and bill of sale to the Belt Company of these 600 bonds, so that the Belt Company thereby acquired De Goeijen's 385 Gulf bonds, and also the 600 Connecting Company second mortgage bonds. The proper bill of sale was made to effectuate the purposes of the parties at the time. The Trust Company, it seems, also at that time bought from the Belt 117 of the second mortgage Connecting Company bonds. De Goeijen then bought from the Belt Company 82 Union Company bonds at par, or $82,000.00, and bought 483 second mortgage Connecting Company bonds at 45 cents on the dollar, and for both of which he agreed to pay the Belt Company on or before December 1, 1897, and thereupon the Belt Company made an entry upon its books, showing the gift that had been made to it by De Goeijen of the 600 Connecting Company second mortgage bonds, which were again sold to him and to the Trust Company, as above stated.

In the testimony of F. B. Wilcox, one of the participants in the De Goeijen claim, it appears that the floating indebtedness of the Belt Company consisted of promissory notes, which had been rediscounted at Philadelphia, and that these very securities which De Goeijen had bought, especially the 82 Union Company bonds, had been pledged by the Belt Company as collateral to its indebtedness. It was not deemed necessary at the time that these securities should be immediately taken up and turned over to De Goeijen, and, in view of the fact that the notes and mortgages which the Belt Company had given would have to be paid out of the proceeds of the bonds Which De Goeijen had purchased, it became necessary for somebody to act in the capacity of an agent or trustee, to get these securities, see to the payment of the indebtedness for which they were pledged, then send them to De Goeijen and collect the purchase price from him; in other words, to make proper payments to the pledgees of these collaterals, so as to obtain the collaterals, and then comply with the contract made with De Goeijen by the Belt Company.

On October 15, 1897, it appears from Willey's exhibit that there is a Trust Company entry, which is "to credit by sale of 600 second mortgage bonds, Kansas City & Northern Connecting, at 45c., $270,000," and a like credit for the 82 Union Company bonds on the same date.

The Trust Company also charge the Belt Company various real estate notes, including said $89,333.33 in question. Mr. Wilcox

formerly an officeer of the Trust Company, was asked to
797 explain the entries on the Trust Company's books, and answered that they were made to "simplify" book-keeping; and, in answer to the question whether there was any arrangement made whereby the Trust Company had agreed to *to* pay off these notes aggregating $89,333.33, or had assumed them, his answer was as follows: "The agreement was that the Trust Company should pay those notes only as and when De Goeijen remitted the money for that purpose, and paid for the securities he had bought." No other witness in the case testifies to a different condition of things, and when their testimony is analyzed, in view of those facts which are undisputed in the record, there is very little difference, if any, between the statements of the witnesses. Wilcox, assigns as a reason why these notes got on the books of the Trust Company, that the Trust Company had been delegated by De Goeijen and the Belt Company to pay off the debts in Philadelphia, with the proceeds of the securities sold to De Goeijen, get the collateral behind such bonds, forward the same to De Goeijen and collect from him, and with the proceeds so collected, pay off the floating debts of the company.

It is undisputed that the remittances made by De Goeijen, from time to time, to the Trust Company, reduced the total liability down to $89,333.33, which amount remained at a stand-still for some time, though De Goeijen was repeatedly requested, both by the Trust and Belt Companies, to pay the same, but in as much as the notes were held by the Provident Company, and were extended along, and the payment of them postponed for the time being, rather by the acquiescence of the parties, it finally reached the stage where the Trust Company notified the Belt Company that it had better take back the securities upon their own books, and credit mortgages payable with these various amounts, and charge De Goeijen's account, and they were then entered upon the books of the Belt Company, August 31, 1899.

The contention of the defendant is, in substance, that this De Goeijen debt was never the obligation of the defendant, and that its duties in the premises were of a ministerial character, in carrying out the arrangement between De Goeijen and the Belt Company, and that at all times, De Goeijen treated it as his own obligation, and so did his representative Heynecker, and further, that the Belt Company made demands upon De Goeijen to pay, and collected the interest month after month upon the depot mortgages from him,
and never did make any demand upon the Trust Company
798 to pay the $89,333.33 or any part of it. It appears that this De Goeijen claim is not contained in the original bill, or in the first ancillary bill, and that its first appearance in this case is in the second ancillary bill, in 1905.

Conclusions of the Master.

The Master is satisfied, from all the evidence in the record, that the Trust Company did not unconditionally and absolutely assume the payment of these notes out of its own funds, but acted as the

mutual agent of De Goeijen, and the Belt Company, and in a ministerial way only; and further, that it was under no legal obligation to pay these notes except as and when De Goeijen furnished the funds for that purpose, and, in arriving at such conclusions, the Master makes references to the testimony of Wilcox, Vol. 34-18116 to 18191, inclusive; Heynecker, Vol. 50-30251 et seq.; Martin, Vol. 53-32775 et seq.; Doran, Vol. 51-30708 et seq.; for bills of sale, book entries, etc., see Vol. 14-7790 to 7802.

The Belt Company, having regularly collected interest on these notes from De Goeijen (Rec. 50-30317), and having shown on its books and on the stated financial reports of the company, that this item of $89,333.33 was due from De Goeijen (Vol. 51-30785), and De Goeijen having at all times recognized the obligation, and the Belt Company and its receiver, having, through the reorganization Committee, collected or made a settlement of some kind with De Goeijen in reference to the matter, it would seem that the complainant is not in condition to now assert that the Trust Company is its debtor on account of said item of $89,333.33, for, in doing the things last mentioned, the Belt Company has placed a construction upon the transaction which shows that it treated De Goeijen as its debtor, and not the Trust Company.

It has been urged with much force by counsel for the Trust Company, that, by reason of the fact that this claim first appears in the second ancillary bill, filed in March, 1905, the complainants have caused the Trust Company to forego any remedy which it might have had against De Goeijen, in the event that the Belt Company had insisted upon defendant's liability for the De Goeijen indebtedness, and in such event, if it was entitled to hold the Trust Company liable therefor, it should have been a party to the transaction between the reorganization Committee and the Southern Company and De Goeijen, by which this claim was disposed of.

The Master is convinced that the contention of the complainants that neither they nor the Southern Company are bound by the agreement made by Harriman, representing the Southern Com-
799 pany, and Sielcken, representing De Goeijen, is not well grounded, for it is evident from the whole transaction that the Southern Company, as the successor of the Gulf and Belt systems, intended to release, and did release, De Goeijen from the payment of said $89,333.33, and that, as the result of the adjustment of this claim between the reorganization Committee, the Southern Company, the Provident Company, and De Goeijen, on June 6, 1902, the latter was fully released from all further claim on account of the depot mortgages aggregating $89,333.33, and that, in the accounting between the parties at the time, the claims which De Goeijen and the Arkansas Construction Company had against the same interests, were also settled.

These releases are executed by the Kansas City Southern, the reorganization Committee, and the Provident Life & Trust Company and will be found in Vol. 50-30385 of the Record, and should be read in connection with the depositions of McDougal Hawkes, W. V. Rowe and Thomas L. Chadbourne, in Vol. 57.

It may properly be suggested, in this connection, as showing the interest of the parties, and the conclusiveness of the transaction entered into, that, at the time it executed the release to De Goeijen, the Southern Company was the sole stockholder and bondholder, of the Belt Company, and had become the purchaser of all the property and rights, legal and equitable, of the Belt Company, at the foreclosure sale.

Stuart R. Knott, then president of these companies, and who signed the release on behalf of the Southern, was one of the then receivers of the Belt, and a complainant in this cause. The reorganization Committee, when it signed the release, was then engaged in liquidating the affairs of the Belt Company, pursuant to authority conferred by the reorganization plan, which is hereinafter fully discussed in the Master's report upon the intervening petition of the Southern Company, and in connection with the liability of that Company to the Trust Company for the floating indebtedness of the Belt Company. The reorganization Committee had been more or less pursuing De Goeijen on this 89,333.33 claim most of the time since it was organized, and a settlement had been agreed upon about July 10, 1900 (Rec. 50-30385). The Provident Company, when it executed its release, was the depository of the reorganization Committee, and had been the holder of the notes in question, and was the judgment creditor in the deficiency judgment rendered against the Belt Company in the foreclosure suit.

800 In this connection, see the correspondence between the Committee and De Goeijen, (Vol. 56-34465 to 34468).

The Master is of the opinion, and so finds, that the charge of $89,333.33 should not be eliminated from the Trust Company's statement of account against the Belt Company.

VII.

Commissions, Trustees' Fees and Bonuses, Received by the Trust Company from the Suburban and Belt Companies, on Account of Services Rendered by Trust Company for Them, and Other Companies Controlled by the Trust Company.

In paragraphs 2, 3 and 4, of the second ancillary bill, the complainants allege that upon the organization of the Suburban, Consolidated, Union, Belt, Air Line, and Connecting Companies, the Trust Company caused them, respectively, to issue their stock and bonds, and undertook to dispose of the same, in some instances purchasing such stocks and bonds outright, and in other cases disposing of them to others, and, in connection therewith, it is charged by the complainants that the Trust Company made large and exorbitant charges to the Suburban and Belt Companies, under the guise of commissions, for its services so rendered in and about the sale of such securities. It is further alleged in the bill that at the time the Trust Company was so handling said securities, it absolutely dominated and controlled said companies, and was using them, and each

of them, as instrumentalities or dummies, for its own benefit or profit; that, by reason of the fiduciary relation existing between the Trust Company and said companies, the Trust Company did not have the right in law to charge them any commissions whatever, for the sale or handling of their securities, or for anything done, or services performed, for said companies, and that all contracts made between the Trust Company and said companies, providing for commissions, trustees' fees and bonuses for its services, as aforesaid, were unlawful, inequitable and oppressive; and finally, that all such charges contained in the statement of the Trust Company, should be eliminated therefrom, or should be credited, with interest thereon, to the Belt Company; and further, that in respect to all charges for commissions, not appearing upon said statement, the Belt Company should be entitled to a credit from the Trust Company, with interest thereon from the date of the payment thereof, and, also, for the value of all the stocks and bonds appropriated by the Trust Company, with interest thereon.

801 In the references herein made to the record, respecting the commissions, trustee fees and bonuses, received by the Trust Company, on account of its services, as above stated, the Master has adopted the subdivisions appearing in the bill, and under each subdivision will indicate the book and page of the record at which these items, respectively, may be found, but reserving, however, his conclusions as to the liability of the Trust Company therefor until later on, when these items, with others, will be grouped in a general finding.

1. Commissions.

(*a*) In the statement of the Trust Company (referred to in the bill as the "pretended statement" of the Trust Company", the following commission charges are made against the Belt Company, to-wit: August 8, 1890, $15,000.00; December 22, 1894, $4,000.00 October 10, 1894, $1,250.00; July 29, 1897, $1.58; February 8, 1899, $75.00; April 6, 1894, $22.50; November 20, 1895, $62.50.

The $15,000.00 item appears in Rec. 1-38, the Trust Company Journal Voucher 39, Rec. 4-1130. This charge is for 3% commission paid to the Trust Company on 500 Suburban Company bonds purchased by the Trust Company in August, 1890 (Rec. 17-8974; Suburban Company's minutes, Rec. 52-31257, authorizing the company's president and secretary to dispose of the bonds; also minutes of the Trust Company, executive committee, August 2, 1890, Rec. 11-5715, showing purchase of bonds and 3% commission).

The $4,000.00 item appears in Rec. 1-90, and is for commission [*on*] One Dollar, per share, on 4,000 shares of Suburban Stock purchased by the Trust Company from the Belt Company (see Belt voucher, Rec. 5-2664; minutes, Ex. Com., Sub. Co., Rec. 52-31366).

The $1,250.00 item appears in Rec. 1-67, Trust Company journal voucher 4870, Rec. 5-2532, and appears to be for a commission paid for a loan of $25,000.00 to the Belt Company by the Continental Trust Company (see Trust Company debit slip, and Belt voucher, Rec. 31-16448). There is some doubt as to the meaning of the

record entries as to this item, but it would seem that this commission was paid by the Trust Company to the Continental Trust Company, and that the Belt Company simply reimbursed the Trust Company for it, in which case, it is conceded by complainants that it would not be a proper charge in the bill as against the Trust Company.

The item of $1.58 appears in Rec. 1-113, and is a 5% commission to the Trust Company by the Belt, for the sale of a fractional Gulf bond belonging to the Belt Company.

802 The $75.00 charge appears in Rec. 1-126, and is for one-fourth of one per cent commission on $30,000.00 Belt coupons, charged by the Trust Company against the Belt Company (Rec. 23-12548).

The $22.50 charge appears in Rec. 1-79, being a brokerage of one-fourth of one per cent commission on account of a Belt note discounted by the Trust Company (Rec. 31-16275).

The item of $62.50 appears in Rec. 1-97, and is for one-fourth of one per cent commission on Belt note for $25,000.00, renewed by Central National Bank.

(*b*) The Trust Company, on or about November 27, 1891, charges the Belt Company $1,000.00, as a commission, in connection with the Belt Company, and, it is alleged in the bill, does not appear on the Trust Company's statement of account. It is admitted by the complainants, since the bill was filed, that this item was for a commission received for the sale of 1,000 shares of Suburban Company stock belonging to E. L. Martin, and should not be included in the accounting in this cause.

(*c*) In the Trust Company's statement, the following charges are made, in connection with the Consolidated Company:

Oct. 26, 1891, $522.50; April 4, 1892, $6,000.00; October 26, 1891, $30,000.00; December 17, 1891, $6,000.00; October 27, 1891, $402.50; October 26, 1891, $120.00; November 13, 1891, $320.00; November 2, 1891, $150.00; November 2, 1891, $80.00; November 12, 1891, $1,182.50; November 16, 1891, $463.18; November 21, 1891, $750.00; November 23, 1891, $4,455.00; December 4, 1891, $24.00; December 7, 1891, $24.00; December 19, 1891, $300.00; January 9, 1892, $30.00; January 12, 1892, $300.00; January 13, 1892, $750.00; February 11, 1892, $90.00; February 26, 1892, $60.00; February 29, 1892, $225.00; March 11, 1892, $30.00; March 19, 1892, $60.00; March 19, 1892, $750.00; April 6, 1892, $2,802.60; April 12, 1892, $1,200.00; July 13, 1892, $240.00; August 2, 1898, $46.88; February 8, 1899, $46.00.

For all the items in the Subdivision (*c*), see Johnson's Exhibit 941, Rec. 21-11343 to 11351, showing his exhibit on commissions received by the Trust Company, and refer to the column of cash, under the heading "Consolidated Terminal Railway Company".

The item of $522.50 appears in Rec. 1-10, being for two items for $402.50 and $120.00, and is for 3% commission on sale of Consolidated Company bonds (Trust Company journal voucher 1057, 1058, Rec. 3-567 and 568).

803 The $6000.00 item appears in Rec. 1-14, and is a 12% commission to the Trust Company for disposing of Consoli-

dated Terminal bonds for $50,000.00 (Trust Company journal voucher 1405, Rec. 3-794).

The $30,000.00 item appears in Rec. 1-10, and is for commissions obtained by the Trust Company from the Consolidated Company as shown by the body of journal voucher 1052, Rec. 3,570, and "on account of trustees' services, in securing franchises and on account of all other services, including fee for placing bonds amounting to $50,000.00", which was approved by Consolidated Company, as shown by directors' meeting, under date October 27, 1891, in Rec. 52-31479, and at which meeting a resolution was duly adopted, authorizing the president of the Consolidated Company to pay to the Trust Company as full payment of its claim for all services rendered that company, in assisting in its promotion and negotiation of its stocks and bonds, a sum equal to 12% net of all the first issue of the Company's bonds, etc.

The $6000.00 item appears in Rec. 1-11, and is for the balance of fee due the Trust Company for all services to October 27, 1891, including the placing of the $500,000.00 worth of Consolidated bonds (Trust Company journal voucher 1144, Rec. 39-21582).

The $320.00 item appears in Rec. 1-11, and is for 5% and 3% commission, paid for disposing of Consolidated bonds (Rec. 3-590).

The $150.00 item appears in Rec. 1-11, and is for a 3% commission on Consolidated bonds disposed of by the Trust Company (Trust Company cash voucher 5164, Rec. 3-573).

The $80.00 item appears in Rec. 1-11, being 8/10 of one per cent commission on Consolidated bonds (Trust Company cash voucher 5167, Rec. 3-577).

The $1182.50 charge appears in Rec. 1-11, and is for a commission on sale of Consolidated bonds (Trust Company cash voucher 5233, Rec. 3-588).

The $463.18 item appears in Rec. 1-11, and is for commissions on subscriptions to Consolidated bonds (Trust Company cash voucher 5249, Rec. 3-592).

The $750.00 item appears in Rec. 1-11, and is for 3% commission on subscription to Consolidated bonds (Trust Company cash voucher 5268, Rec. 3-596).

The $4455.00 item appears in Rec. 1-11, and is for 3% commission to W. & P. Smith, on subscription on $148,500.00 Con-
804 solidated bonds (Trust Co. cash voucher 5271, Rec. 3-598).

The two items of $24.00 each in Rec. 1-11, are both on account of a commission of 2-4/10% on subscription to Consolidated bonds (Trust Company journal vouchers 1128 and 1133, Rec. 3-601 and 604).

The $300.00 item, of date December 19, 1891, appears in Rec. 1-11, and is for 3% commission on subscription to Consolidated bonds (Trust Company cash voucher 5458, Rec. 3-615).

The $30.00 item of January 9, 1892, appears in Rec. 1-12, and is for commission on subscription of J. R. Jude (Trust Company journal voucher 1203, Rec. 3-629).

The $300.00 item of January 12, 1892, appears in Rec. 1-12, and

is for 3% commission on subscription to Consolidated bonds (Trust Company journal voucher 1209, Rec. 3-630).

The $750.00 item appears in Rec. 1-15, and is for 3% commission on $25,000.00 worth of Consolidated bonds (Trust Company cash voucher 5746, Rec. 3-670).

The $90.00 item appears in Rec. 1-13 and is for 3% commission on subscription of Virginia C. Perry for $3000.00 Consolidated bonds (Rec. 26-13836).

The $60.00 item appears in Rec. 1-13, and is for 3% commission on Consolidated bonds paid to March, Merwin & Lemmon.

The $225.00 item appears in Rec. 1-13, and seems to be for 3% commission on subscription to Consolidated bonds, paid to W. & P. Smith.

The $30.00 item of March 11, 1892, appears in Rec. 1-13, and is for 3% commission on subscription to consolidated bonds to W. & P. Smith.

The $60.00 item of March 19, 1892, appears in Rec. 1-13, and is for 3% commission on subscription to Consolidated bonds (Trust Company cash voucher 6140, Rec. 3-700).

The $750.00 item of March 19, 1892, appears in Rec. 1-13, and is for 3% commission on subscription to Consolidated bonds (Trust Company cash voucher 6148, Rec. 3-699).

The $2802.80 item appears in Rec. 1-13, and is for 4% commission to Hyde & Jackson, on subscription to $70,000.00 Consolidated bonds (Trust Company cash voucher 6270, Rec. 3-706).

805 The $1200.00 item appears in Rec. 1-14, and is for 4% cash commission paid to Hyde & Jackson, on subscription to $30,000.00 Consolidated bonds (Rec. 26-13916).

The $240.00 item appears in Rec. 1-15, and is for 3% commission on subscription to Consolidated bonds (Rec. 26-14014).

The two items of $46.88 each, appear in Rec. 1-121 and 126 and are each for commission charged by the Trust Company for paying for Consolidated Company coupons (Trust Company vouchers 14998, Rec. 7-3846, and 17112, Rec. 8-4047).

(*d*) It is charged that the Trust Company took and appropriated to its own use, the stock and bonds of the Consolidated Company, as commissions, as follows:

December 17, 1891, 1000 shares, of the value of $32,220.00 December 17, 1891, 30 bonds of the value of $25,410.00; March 17, 1892, 240 shares of the value of $7732.00; July, 1892, 3100 shares of the value of $103,333.33.

The item of $32,220.00, is on account of 1000 shares of the Consolidated Company stock, par value of $100 each, at $32.52 per share, entered on the Trust Company books at $32,522.23 (Johnson's Exhibit 841, Rec. 21-11343, under heading (Consolidated Terminal Railway Company"; also Trust Company's journal voucher 1181, Rec. 39-21559). Complainants, in their bill, make claim for 3100 shares of the Consolidated stock, 1000 shares of which was taken on December 17, 1891, thus leaving 2100 shares of the entry on Consolidated Company's books, showing the 3100 shares taken by the Trust Company. It is claimed that the Trust Company

placed a value of $32.50 each on the 1000 shares, as above stated, and the complainants place a value of $32.22 per share on the 2100 shares, making a total of $67,662.00 see Johnson's testimony, Rec. 15, 8129 to 8134).

The items of $25,410.00 and $7732.00 are on account of 30 Consolidated bonds, and 240 shares of Consolidated stock (see Johnson's Exhibit 841, Rec. 21-11343, under column of "first mortgage bonds" and "shares of stock", under the heading "Consolidated Terminal Railway Company", and Trust Company journal voucher 1148, Rec. 39-21560), the body of which shows that the Trust Company received 30 of the Consolidated bonds and 240 shares of stock, as the fee of the Trust Company for obtaining the franchise of the Consolidated Company, and all other fees and expenses up to October 27, 1891, including the placing of $500,000.00 worth of Consolidated Company bonds.

806 (*e*) In the Trust Company's statement, the following charges are made to the Belt Company, as commissions, in connection with the Union Terminal Company:

December 31, 1892, $500.00; January 13, 1893, $7500.00; January 23, 1893, $3200.00; January 26, 1893, $15,000.00; April 5, 1893, $6250.00; September 16, 1898, $50.00; October 6, 1898, $100.00; October 18, 1896, $50.00; January 18, 1899, $231.25; January 18, 1899, $277.50; February 17, 1899, $230.00; August 2, 1898, $90.63; February 8, 1899, $117.00.

In connection with the foregoing items, see Johnson's Exhibit 841, Rec. 21-11343-'44, under columns headed "cash", of heading "Union Terminal R. R. Co."

The $500.00 item is admittedly an error.

The $7500.00 item appears in Rec. 1-22, and is for 2-1/2% commission to the Trust Company, on 300 Union Terminal bonds (Trust Company journal voucher 2259, Rec. 3-883).

The $3200.00 item appears in Rec. 1-23, and is for 2½% commission on 128 Union Terminal bonds (Trust Company journal voucher 2314, Rec. 3-933).

The $15,000.00 item appears in Rec. 1-23, and is for balance of commission due Trust Company, as agreed upon, for negotiating sale of securities, etc. (Trust Company journal voucher 2358, Rec. 3-886).

The $6250.00 item appears in Rec. 1-62, and is for 2½% commission paid the Trust Company on 250 Union Terminal bonds, purchased from the Belt Company by the Trust Company (Trust Company journal voucher 2887, Rec. 5-1971).

The $50.00 item of September 16, 1898, appears in Rec. 1-122, and is for one half of one per cent commission on sale of 10 Union Terminal bonds (Trust Company journal voucher 15532, Rec. 7-3911).

The $100.00 item appears in Rec. 1-123, and is for one half of one per cent commission to the Trust Company for the sale of 20 Union Terminal bonds (Trust Company journal voucher 15790, Rec. 7-3944).

The $50.00 item of October 18, 1898, appears in Rec. 1-123, and

is for one-half of one per cent commission to the Trust Company for the sale of 10 Union Terminal bonds (Trust Company journal voucher 15905, Rec. 7-3951).

The $231.25 item is for 5% commission to the Trust Company on the selling price, $4625.00, (appearing in Rec. 1-125),
807 of 5 Union Terminal bonds (Trust Company journal voucher 16907, Rec. 8-4030).

The $277.50 item appears in Rec. 1-125, being 5% commission to the Trust Company, on selling price, $5550.00, of six Union Terminal bonds (Trust Company journal voucher 16931, Rec. 8-4036).

The $230.00 item appears in Rec. 1-126, and is for commission paid to Drexel & Company, on Union Terminal bonds (Trust Company journal voucher 17190, Rec. 8-4062).

The $90.63 item appears in Rec. 1-123, being fee of one-fourth of one per cent to Trust Company, covering payment of 1450 Union Terminal coupons (Trust Company journal voucher 14999, Rec. 7, 3874).

The $117.00 item appears in Rec. 1-126, being fee covering payments of 1872 Union Terminal coupons (Trust Company journal voucher 1712, Rec. 8-4047).

(*f*) The Trust Company charged the Belt Company as commissions, in connection with the Union Company, the following sums, which do not appear on the Trust Company statement, to-wit:

September 26, 1892, $4400.00; October 7, 1892, $500.00; November 10, 1892, $800.00; December 31, 1892, $550.00; January 7, 1893, $250.00.

It is claimed by the complainants that the $4400.00 item is omitted from Willey's Trust Company account, as appears by Ingel's Exhibit 38, in Vol. 49, which shows the items on the Trust Company ledger in account with the Belt Company, which were omitted from Willey's Trust Company account against it; this, $4400.00 being a 2½% commission to the Trust Company on subscription of 176 Union Terminal bonds; see also Trust Company journal voucher 1833, Rec. 49-29425, covering this charge, and entry on Trust Company cash book, showing receipt of $17,600.00, of which the $4400.00 was a part (Rec. 49-29426, and Belt voucher 46, in Rec. 21-11506, showing receipt of the $17,600.00 by the Trust Company).

The $500.00 item should be $550.00, and is explained in said Ingel's Exhibit 38, being a 2½% commission to the Trust Company on account of 22 Union Terminal bonds (Trust Company journal voucher 1862, Rec. 49-29427, covering this charge; also entry on Trust Company cash book, showing receipt of $22,200.00, Rec. 49-29428, and Belt voucher 1892, in Rec. 21-11508, showing receipt of this $2200.00 by the Trust Company).

808 The items of $800.00, $550.00 and $250.00 are all for 2½% commission on Union Terminal bonds, and are similar to the items last mentioned, as will appear by reference to Ingel's Exhibit 38, and the following records: Trust Company journal voucher 1992, Rec. 4-29429, entry, Trust Company cash book, Rec. 49-29430, and Belt voucher 6, Rec. 21-11510; Trust Company jour-

nal voucher 2217, Rec. 49-29442, entry, Trust Company cash book in Rec. 49-29443, and Belt voucher 47, in Rec. 21-11512; Trust Company journal voucher 2243, in Rec. 49-29444, entry on Trust Company cash book in Rec. 49-29445, and Belt voucher 13, in Rec. 21-11514.

The [complain-ts] claim that they are entitled to a credit upon the Trust Company's statement for these omitted items, aggregating $6550.00, and set out in this Subdivision (*f*), together with interest thereon, at 6%.

(*g*) It is charged that the Trust Company took, appropriated and converted to its own use, under the guise of commissions, 300 shares of the Union Company stock, of the alleged value of $9864.00, which does not appear upon the Trust Company statement. The facts in regard to this item will appear in Johnson's Exhibit 841, Rec. 21-11343 to 11551, under columns of "shares of stock", under the heading "Union Terminal R. R. Co.", and under date of November 27, 1893, and also Trust Company journal voucher 676, Rec. 49-21572, the voucher showing that the Trust Company, in connection with the purchase of 31 Union Company bonds at 80c., from the Belt Company, took these 300 shares as commission. In column No. 1, of said Johnson's Exhibit, at page 11343, the value of these shares is placed at $32.88 per share.

(*h*) It is charged that the Trust Company took, appropriated and converted to its own use, under the guise of commissions for services rendered, the following stocks and bonds of the Union Company: October 21, 1892, 60 bonds of the alleged value of $54,000.00, and 1500 shares of stock of the alleged value of $49,320.00.

According to the statement of Johnson, Rec. 14-7308, there was an agreement between the Union Company and the Belt Company, and Stilwell, Trustee, on August 24, 1892, by which the Belt Company and Stilwell, agreed to build the Union Company railroad for 690 Union Company bonds, and that there should be issued to Stilwell 19955 shares of fully paid stock, the remaining 45 shares having been issued to the first Board of Directors of the Company (Rec. 11-6042, and Rec. 15-7871). As shown by the Belt books, the entire capital stock of 20,000 shares of the Union Company,
809 came to the Belt Company for building the Union railroad, and was carried on the Belt books at $15.00 per share. Without tracing this transaction through the records it appears that the foregoing bonds and shares of stock were taken by the Trust Company for its services in procuring the franchise and right-of-way, and building and constructing the Union railroad.

(*i*) It is charged that the Trust Company took, without consideration, and converted to its own use, 1000 shares of Union Company stock, of the value of $32,880.00. This item is very similar to the preceding one. As shown by entry on Belt voucher, Rec. 14 7311, under date of May, 1893, the Belt Company claimed to own the entire 20,000 shares of the Union Company's stock, and which were used in connection with the promotion and building of the Union railroad.

(*j*) It is alleged that in the Trust Company's statement, there are

the following charges to the Belt Company, in the nature of commissions, in connection with the Air Line:

March 17, 1892, $520.00; June 20, 1892, $50.00; July 6, 1892, $700.

The $520.00 item appears in the account of the Trust Company against the Air Line, Rec. 1-26, and is for 5% commission on the selling price, $10,400.00, of 13 Air Line bonds, sold by the Trust Company, the proceeds of which were taken by the Trust Company to wipe out the debt due it from the Construction Company, in building the Air Line (Rec. 36-19023-'24).

The $50.00 item is an error, and is not to be considered.

The $700.00 item appears in the Trust Company's account with the Air Line (Rec. 1-27) and Trust Company journal voucher 1573, Rec. 3-987), and is a 5% commission, on the par value of 15 Air Line bonds, bought by the Trust Company of the Air Line.

(*k*) It is alleged that the Trust Company appropriated and converted to its own use, on or about December 19, 1891, 13 mortgage bonds of the Air Line, of the value of $11,193.00, and 500 shares of stock of the Air Line, of the value of $15,950.00, for which no credit was given to the Belt Company in the Trust Company's statement of account. It appears from the statement of Willey, in his exhibit, at pages 193-194, Rec. 1, that these 13 bonds and 500 shares of stock were taken by the Trust Company from the Air Line for commission and services in securing franchises, right-of-way, etc.

(*l*) It is charged that the Trust Company took and appropriated to its own use, in the year 1892, 500 shares of Air Line stock,
810 of the value of $15,950.00. On June 1, 1891, 500 shares of Air Line stock was issued to A. E. Stilwell, trustee (Rec. 45-25137 to 25141), and he distributed between June 1, 1891, and April 29, 1892, this stock to 93 persons, all of whom were either directors, officers, stockholders, or employees of the Trust Company, except A. L. Howe. Willey, in Rec. 1-197, says these 500 shares of stock were "delivered to A. E. Stilwell, trustee, for promotion, and issued through him as trustee." In Trust Company journal voucher 1181, Rec. 11-5385, the Company under date of December 31, 1891, placed a value of $16,261.11 upon said 500 shares of Air Line stock.

(*m*) In February, 1895, it is alleged that the Trust Company took and converted to its own use, under the guise of commissions and services in connection with the Air Line, 80 shares of stock of the East Kansas City Land Company, the property of the Belt Company, and of the value of $8000.00. As shown by Johnson's testimony (Rec. 17-8715), the Construction Company owned this stock on May 7, 1890, and transferred it to the Suburban Company on that day. It was carried as an asset of the Suburban Company until February, 1895, at which time the proper entries were made to the effect that the stock had been turned over, in 1891, to the M. K. & T. Trust Company, as a part of its commission for services for promoting the Air Line. It appears, by Trust Company journal voucher 1181, Rec. 11-5835, under date of December 31, 1891, that the Trust Company had already taken this stock for commission, though there is some doubt as to whether it was taken as commis-

sion on account of services rendered the Air Line or the Suburban Company.

(*n*) It is charged that in the Trust Company's statement, the Belt Company is charged with the following amounts, under the guise of commissions, in connection with the Connecting Company, to-wit:

July 19, 1896, $400.00; July 29, 1896, $400.00; October 1, 1896, $50.00; December 10, 1896, $8250; December 10, 1896, $3012.00; December 23, 1897, $50,000.00; December 23, 1897, $15791.50; December 23, 1897, $1250.00, February 9, 1898, $300.00; September 8, 1898, $950.00; December 27, 1898, $250.00; May 23, 1899, $62.50.

The two $400.00 items, dated in July, in error, appear in the record as in August, and will be found in the Trust Company's account against the Belt Constructing, in Rec. 1-145, both being for 2% commission allowed the London office of Kuehne, Loeb
811 & Company, agents, on the sale of 20 bonds of the Connecting Company.

The $50.00 item is an error and need not be considered.

The two items of $8250.00 and $3012.00 appear in the Trust Company's account against the Belt Constructing, Rec. 1-146, being a 5% commission for the sale of 165 Connecting Company bonds, but including under commissions, averaging from one half of one per cent to 3%.

The items of $50,000.00, $15,791.55 and $1250.00, appear in the Trust Company's account against the Belt Constructing, in Rec. 1-151, and it seems that $50,000.00 was charged by the Trust Company against the Belt Company on a sale of 1500 Connecting Company bonds, made by the Trust Company for the Belt, also under commissions paid on same of $15,791.55 and $1250.00. The history of this particular transaction will more fully appear in the Trust Company journal voucher 12899, Rec. 39-21577.

The $250.00 item appears in Trust Company's account against the Belt Constructing, Rec. 1-153, and is for 5% commission paid by the Trust Company to Winthrop Smith on the sale of 5 bonds (Trust Company journal voucher 13346 (Rec. 10-5192).

The $300.00 item appears in Trust Company account against the Belt Constructing, Rec. 1-154, and is for one half of one per cent commission paid to Waterall by the Trust Company for the sale of 60 Connecting Company bonds, the amount being charged to the Belt Company (Rec. 39-21580, Trust Company journal voucher 14420).

The $950.00 item appears in Trust Company's account with the Belt Constructing, Rec. 1-158, and is apparently for 5% commission charged against the Belt Company on account of the sale of Connecting Company bonds (Trust Company journal voucher 15431, Rec. 39-21586).

The $250.00 item appears in Rec. 1-161, and is a 5% commission paid to W. H. Lucas on the sale of 5 Connecting Company bonds, the Commission being charged by the Trust Company to the Belt Constructing.

The $62.50 item appears in the Trust Company's account against the Belt Company, Rec. 1-131, and is for a commission of one fourth of one per cent, charged by the Trust Company against the Belt for the renewal of a Belt Constructing note for $25,000.00 (Trust Company voucher 17959, Rec. 39-21623).

812 In this connection, the complainants call attention to the fact that in this paragraph, the Trust Company frequently credited the Belt Company for the first mortgage Connecting Company bonds purchased by it at the rate of $75.00 per bond, whereas, the subscription contracts of the Connecting bonds, a copy of which is set out in Vol. 13-5071, shows that the bonds were subscribed for at the rate of $80.00 per bond.

2. It is not possible to include within this report a clear and detailed statement as to all the transactions between the Trust Company and the Belt Company, in reference to commissions, trustees' fees, bonuses, interest, or in respect to the purchase or sale of bonds, that is, without extending the length of this report to several thousand pages; and, in view of the conclusions reached by the Master in respect to the absence of the dominating control by the Trust Company over the Belt and it-adjunct companies, as claimed by complainants in their bill, it is not deemed necessary to attempt to explain in full all the complicated transactions appearing in this voluminous record.

The idea which runs throughout the bill is that the securities of the Belt Company, and its constituent companies, were sold either through or to the Trust Company, and were bought either by the Trust Company direct, or sold by it to investors, on account of the Belt or its constituent companies, and that, by reason of the services performed by the Trust Company, these charges, in the nature of commissions, trustees' fees, bonuses, etc., were made by the Trust Company, and collected of the Belt Company or its adjunct or allied companies; the purposes of the bill apparently being to charge the Trust Company with the amount of all such commissions, fees, etc., or benefits received by it on account of the purchase or sale [*or*] the securities, upon the theory that the Trust Company was acting in a fiduciary relation to the Belt and the other companies, and that it controlled them to such extent, that all such transactions were of such character that, if not tainted by fraud, they should be strictly scrutinized, and opened up for all proper inquiry into their merits, regardless of the fact that the statute of limitations of this State has unquestionably run against practically each and all of the transactions complained of, unless the operation of such statute has been delayed or postponed by reason either of the alleged dominatory control of the Trust Company, or by reason of the fact that there existed such a fiduciary trust relation on the part of the Trust Company to the Belt and its adjunct companies, as should prevent

813 the Trust Company from asserting or maintaining the plea of the statute of limitations in bar of the transactions in controversy.

It appears on the face of the bill, that these trustees' fees, commissions, bonuses, etc., were received mostly in the year 1890 and

in 1893, and they all appear to have been received by the Trust Company on account of services rendered by it in respect to matters for which the charges are made. There may rightly be a difference of opinion as to whether such charges were reasonable at all times, and, entering into the determination of that question, the circumstances and conditions, financial and otherwise, of the parties involved and their enterprises, must necessarily have to be considered, for it is quite evident from the proofs in this cause, that the services rendered and discharged, from time to time, by the Trust Company, in connection with the disposition of the securities of the Belt and other companies, were not of the ordinary commission broker character, but, on the contrary, were in the nature of the active and persistent exploitation of the securities, which meant, in the case at bar, a more or less active concern in all of the business affairs of the different companies, whose securities were offered for sale, as has heretofore been more fully explained.

The question in respect to the trust relation, if any, between the Trust Company and the Belt and the other companies, will be hereafter more fully discussed, but, for the present, it may be said that such relation would be no more than an implied trust certainly not an express one, and, as against an implied trust the statute of limitations would run.

If the Master thought that there was any occasion for doing so, he would make a close examination of all the facts and circumstances connected with the services of the Trust Company in respect to the sale and disposition of the securities of the various companies involved in this accounting, and then state to the Court his conclusions. It has occurred to him, that after so many years of apparent acquiescence on the part of the Belt Company, and others interested, in respect to the charges made from time to time by the Trust Company in the transactions complained of, it will be exceedingly difficult, in the absence of actual fraud, to present and state facts which would justify the setting aside and avoiding all such transactions, for the purpose of having a re-accounting between the companies interested.

3. Interest.

814 In the 5th paragraph of the bill, the complainants allege that upon the incorporation of the Suburban, Consolidated, Union, Air Line and Connecting Companies, the Trust Company began the practice of loaning money to them, taking their promissory notes therefor and charging the loans to the Belt Company; that, as the moneys were advanced, from time to time, the charges were made to the Belt Company in open account, and the securities of these companies were either bought or sold by the Trust Company for them, and the proceeds credited to the account of the Belt, and further, that interest was computed on daily balances, and if the balance was in favor of the Belt Company, an allowance was made of interest on the average daily balance for the current month, at the rate of 2% per annum but if the balance was in favor of the Trust Company, then interest would be charged at the rate of 7%. It was alleged that the amount of such interest was included in the

daily balances for the subsequent month, and also in the promissory notes, which were taken from time to time, and in that manner the interest exacted by the Trust Company was compounded upon daily balances. These items are in subdivisions (*a*) to (*k*), inclusive, in said paragraph 5, and are of the same general nature.

As already stated, in connection with commissions, trustees' fees, etc., the Master will not go into a detailed explanation of each item of interest. The testimony does show that the Trust Company charged the Belt Company 7% and sometimes 6%, interest on daily balances, and also on overdraft that the Belt owed to the Trust Company, but that when the Belt Company had a balance with the Trust Company, the latter was only allowed 2%, and, that at the first of each month, that balance went into open account.

It appears in the record that several of the bank presidents of Kansas City, among whom were Mr. J. F. Downing, and Dr. W. S. Woods, testified that the custom of the Trust Company in respect to the interest matter, was the usual custom prevailing in Kansas City, and that all the banks charged a high rate of interest on the overdrafts for the reason that they were undesirable, and the banks meant to discourage their customers in overdrawing.

It will be observed by referring to the items of interest that they are mostly in 1892 and 1893, though there are a few items occurring in 1896, 1897 and 1899, and totalling a large amount. At the conslusions of said paragraph 5, it will be seen that the complainants seek to fasten the liability upon the Trust Company for these interest items on the ground that it was the promoter of the com-
815 panies involved, dominated and controlled them, and occupied a fiduciary relation to them, and by reason of such things, the Trust Company did not have the right to charge these other companies any interest whatever upon daily balances, or otherwise, and hence, complainants ask that all such items contained in, or merged into, the items contained in the Trust Company's statement of account against the Belt Company, should be eliminated therefrom, with proper interest thereon.

For the reasons heretofore stated, in respect to the Trust Company's relations to the Belt Company, the Master is of the opinion that under the statements in the bill as to these interest items and the admitted facts in relation thereto, the complainants are not entitled to have eliminated from the Trust Company account the interest items in controversy.

VIII.

Paragraphs 6 to 29.

Building Department.

1. Complainants charge that the Trust Company, during the period beginning with the year 1892, and down to 1900, maintained what was called its building department, which consisted of a limited number of employees, whose duty it was to make contracts

for such building or construction work as the Trust Company might desire to have done to carry out its enterprises in connection with its auxiliary companies, including the Belt, Consolidated, Union, Air Line, Elevator and Amusement Companies, that all of the work done for said companies could and should have been done by the companies respectively, but that the Trust Company contrived the scheme of its building department, in order that work of that character might be done by the Trust Company, and large and exorbitant charges made therefor, from which the Trust Company might reap a large profit, by causing the Belt Company to pay not only the cost of such work, and material, but also large sums in addition thereto under the guise of superintendence; that the aforesaid plan was carried out to the extent that a large amount of work was done by the building department for the companies named, and the Trust Company caused the Belt Company not only to pay the cost thereof, but from 10% to 15% additional, under the guise of superintendence so charged by the Trust Company to the Belt, with the dates on which the charges were made, and the amount of each charge, is shown under the heading of "superintendence" on Exhibit 2, attached to the bill, and aggregates the sum of $40,456.32; that of said sum, 50% was clear profit to the Trust Company; that the Trust Company charged to the Belt Company the said sum of $40,-
816 456.32, and the same appears upon the pretended statement presented by the Trust Company, that by reason of the relation of the Trust Company to all said companies, it did not have the right in law to charge said companies any sum whatever for superintendence, in excess of the actual cost thereof, and did not have the right to profit out of such transactions; wherefore the complainants ask that all of such profits arising from such transactions be eliminated from the pretended statement, and that the Belt Company should be credited upon said account with the amounts so eliminated, including interest thereon.

The Trust Company, in paragraph 94 of its answer admits that one of the features of its business was to supervise or conduct building operations, and for such purposes it maintained a building department; but denies that it made exorbitant or unreasonable charges for the work done by it, and states that it maintained a large and expensive staff of employees for the purpose of carrying on its work, and that it made no charges for such work except such as were fair and reasonable. The Trust Company, beginning in 1892, maintained a building department down to the year 1900, the objects being to make contracts for the building and construction work which the Trust Company might desire to have done in carrying out its various enterprises. H. C. Lindsley, head of the construction department, stated that the business performed by the building department was general building and construction operations, mainly for the companies in which the Trust Company was interested, and also for the Trust Company itself; that the building also extended to railroad construction, such as the erection of buildings, depots, terminal work for railroads and all kinds of building construction; that the company's usual commission for such work consisted of 10% to

15% on the gross amount expended in the work, the items sometimes taking the form of part commission, part for superintendence and architect's services, and in addition to that a per cent charged upon the actual labor furnished. (Rec. 34-18023-'030; 18062-'067). There was some testimony by Architect Chamberlain to the effect that the charges made by the building company were unreasonable and exorbitant (Rec. 56-34136-34145).

After a review of the facts in relation to the object of the Trust Company in the establishment of a building department, and the character of the transactions conducted by that department, the Master is of the opinion that, while it is possible that some of the charges for the work done may have been higher than it was necessary to pay for the same work on the outside, yet the conduct of such
817 business was a matter for the judgment of the Trust Company in its dealings with the various companies in which it was interested, and, in the absence of fraud or domination in such dealings, there would seem to be no good reason why the accounts of the building department in respect to the transactions in controversy should not stand, and, hence, the finding will be against the elimination from the Trust Company's statement of the alleged profits of that company from the transactions in controversy.

Amusement Company.

2. Complainants charge that, in the year 1895, the Trust Company, under the pretense of increasing the earnings of the Air Line, caused the incorporation of the Amusement Company, and the establishment and exploitation of Fairmount Park, and, in so doing, the Trust Company caused to be expended by the Air Line, and by the Belt Company, large sums of money, and the acquisition of a large tract of land near the railroad of the Air Line, near Kansas City and Independence, and the construction of buildings thereon, and the adaptation of said grounds for the purposes of a public park; that the moneys so furnished by the Air Line, as aforesaid, were afterwards, by the direction of the Trust Company, charged to, and assumed by, the Belt Company, so that ultimately all the expenses in connection with the exploitation of Fairmount Park were charged to the Belt Company, and the various items making the aggregate thereof appear as debits to the Belt Company upon the pretended statement presented by the Trust Company; that the result of the organization and operation of Fairmount Park, was a net loss of $293,303.68, all of which the Belt Company was required by the Trust Company to stand; that the scheme of Fairmount Park was a financial failure, and the Trust Company knew, or should have known, that it would be such failure, and the conduct of the Trust Company, in causing the Belt Company to organize and carry on said enterprise, and to stand the loss arising therefrom, was and is inequitable, unjust and oppressive, and the Trust Company should be required to stand said loss itself, and the amount of such loss should be eliminated from the charges against the Belt Company, or, that if possible to identify the various items going to make up the defi-

ciency, then the amount of such loss, together with interest thereon, should be credited upon said pretended statement.

In paragraph 95 of its answer to paragraph 7 of the second ancillary bill, the defendant Trust Company denies that it caused the incorporation of the Amusement Company, and states that
818 said Amusement Company was caused to be organized by the Belt Company and the Air Line, for the purpose of creating passenger traffic, for those companies. It denies that it caused said companies to expend large sums of money, or any money, in the acquisition and improvement of Fairmount Park; but states that any money invested for that purpose was so invested by said companies for their own proper benefit and in the ordinary course of business; that the establishment and maintenance of said part resulted in creating extraordinary passenger traffic for the Belt Company and the Air Line and they received the benefit of such traffic. In June, 1895, (Rec. 16-9342-9344) Fairmount Amusement Company, with a capital stock of $2500.00, was incorporated for the purpose of taking over the operation of Fairmount Park. Thereafter the Amusement Company continued the operation of the park (Rec. 53-32735; Rec. 16-8327-8415).

In May, 1892, a lease was entered into between Cusenbary and the Air Line for fifty acres of land in Jackson County, Missouri, to be used for a private park *of* a health resort. After leasing the land the Air Line commenced making improvements on the same and charged the expenses to an account called "Cusenbary Park", which was afterwards changed to "Fairmount Park" (Rec. 16-8327-8329; and 8413-8415). It is charged by the complainants that the Trust Company caused the Air Line and Belt Company to expend large sums of money in the acquisition of a large tract of land near the railroad of the Air Line between Kansas City and Independence, and in the construction of buildings thereon, and the adaptation of such grounds for public park purposes; and further that the money so furnished by the Air Line was afterward, by the direction of the Trust Company, charged to and assumed by the Belt Company, so that the whole expense of the exploitation of the park was finally turned on the Belt Company the various items of which make the aggregate which appears as debits to the Belt Company, upon the Trust Company's statement. See Wilcox's testimony (Rec. 34-18066-'67; and 18207), wherein he states that the Air Line furnished the funds that went into the Amusement Company and the properties at Fairmount Park, and further that the moneys sunk in Fairmount Park were furnished by the Trust Company, when it was not earned by the Air Line, and was charged by the Trust Company to the Belt Company or Air Line, but, it all finally resulted in the Belt advancing the money to the Air Line and having a debit against it, and the Air Line then advancing it to the Fairmount Amusement Company in turn. The titles to the real estate known as Fair-
819 mount Park were originally taken in the name of the State Realty Company, and then later on transferred to the Central Improvement Company (Rec. 25-13308; Rec. 19-9626; Rec. 34-19040). There is considerable testimony in the record in respect to

the interest that Mr. Stilwell and the Trust Company took in the exploitation of development of Fairmount Park, but for reasons heretofore stated, in respect to the alleged domination of the Trust Company it is not deemed necessary to make further reference to such facts. (See Pickering's testimony, Rec. 35-18856-'860; Rec. 40-21980-'987; Rec. 55-33962-'984; and 34003-(125). As shown by Johnson's testimony (Rec. 16-8384-8405) it appears that the total loss and expenditures in connection with the Park Amusement Company amounted to $294,631.22 of which the Air Line and Belt provided $277,431.22; of this amount $179,496.58 was expended for improvements, of which $83,776.59 was labor and materials furnished by the Trust Company, upon which they secured from the railroads and Amusement Company $7,716.00, as a 10% commission to the building department. Of this grand total of loss and expenditures $113,014.07 represents the loss from operation from June 1892, to February 28, 1900 (Rec. 16-8400). The contention of the complainants is that the Trust Company knew, or should have known, that the Fairmount Park venture would be a failure, and, for that reason, that it ought to stand the loss arising therefrom, but no good reason is shown why such should be the case.

The finding of the master will be for defendant.

3. In paragraph 8 the items in controversy relate to a series of claims growing out of the incorporation of the Missouri Elevator and Terminal Company, hereinafter called the "Elevator Company". The allegations of the bill are, in effect, that the Trust Company caused the incorporation of the Eevator Company, and, after such incorporation, caused the Elevator Company to build elevators and to operate them and to incur certain obligations in respect to them, as stated in items (*a*), (*b*), (*c*), (*d*) and (*e*) appearing in paragraph 8.

The master does not deem it necessary to make reference to all of the facts appearing of record concerning these various items, as all of them are barred by the statute of limitations, and, as heretofore stated, it is not shown that the Trust Company dominated and controlled the Elevator Company and the Belt Company in the manner and to the extent claimed in this paragraph.

Without intending to make detailed or accurate reference to the record entries respecting those items, it may be stated, in a general way, that one of the chief sources of revenue of the
820 Belt Company was the switching charges it received from time to time for handling cars to and from the elevators referred to in this paragraph.

At the outset the Elevator Company was organized as an independent corporation and continued to be such. These elevators were, however, built, in the first instance, with moneys advanced by the Trust Company. Afterward the Elevator Company, by mortgaging its properties, secured certain amounts, a part of which went toward reimbursement of the Trust Company, but there was a balance left still due to the Trust Company. It seems to have been the original intention that upon the completion of the elevators, the Elevator Company should deed its properties to the Belt

Company; but afterwards that arrangement was changed and, instead of deeding such properties to the Belt Company, the Belt Company acquired all of the outstanding stock of the Elevator Company and assumed all of its indebtedness, and the Belt Company then took charge of the elevators, rented them, ran its cars to and from them, and in that way received large revenues from the operation of the elevators.

It is not claimed that there was any fraudulent purpose on the part of the Trust Company in advancing money to the Elevator Company for the construction of its elevators, nor is it claimed that such money did not go into the actual construction of these elevators. The complaint in this paragraph is that the Trust Company caused the Belt Company to assume the Elevator Company's indebtedness, in other words, domination and control is involved here, as in most of the items contained in the bill.

The master sees no reason why the facts in relation to the items contained in paragraph 8 distinguish the elevator transaction from the others, in which it is alleged that the Trust Company dominated and controlled the Belt Company in the doing of the things complained of. The Belt Company was interested, in a business way, as above stated, in the operation of these elevators, and there was good reason why it assumed the indebtedness against the Elevator Company, and so far as concerns the Trust Company, the master is of the opinion that the alleged cause of action stated in this paragraph is without merit, and the finding will be for the defendant.

Connecting Company.

3-1/2. Complainants, in the 9th and 10th paragraphs of the bill, state that, in the year 1895, the Trust Company caused to be incorporated a railroad corporation, called the Kansas City & Northern Connecting Railroad Company, herein referred to as
821 the Connecting Company, for the purpose of constructing a line of railroad from Kansas City, Missouri, to Pattonsburg, Missouri, in order to connect with the railroads at that point running easterly to Chicago, Illinois, and northwardly to Council Bluffs, Iowa; that, in the same year the Trust Company caused the Belt Company to enter into a contract with the Connecting Company, by the terms of which the Belt undertook to acquire the right of way, and to construct the railroad of the Connecting Company between the points mentioned, and, in consideration of which, the Connecting Company agreed to issue and deliver its stocks and bonds to the Belt Company; that in so constructing said railroad, and securing the right of way therefor, the Belt Company was caused to expend large sums of money for right of way, material and construction, and the stocks and bonds of the Connecting Company were wholly inadequate to reimburse the Belt for the money so expended, so that there resulted a large loss to the Belt Company, amounting to the sum of $116,644.53, and all of which said deficiency was by the Trust Company charged to the

Belt Company, and the items thereof appear upon the statement presented by the Trust Company, as charges against the Belt Company.

Complainants state that the action of the Trust Company in so requiring the Belt Company to enter into said contract, and construct said railroad, resulting as above stated, in said loss, was wrongful, oppressive and done solely for the benefit of the Trust Company, that it might profit from the handling of the securities of the Connecting Company, which under said contract would be received nominally by the Belt Company, but in reality by the Trust Company; that the Trust Company knew, or should have known, that the venture would result in a large loss to the Belt Company, which in equity should not be borne by it, but should be eliminated from said statement, together with interest thereon, or if the same cannot be identified, then that a credit therefor should be given on said statement.

(2) That, on January 1, 1897, July 1, 1897, January 1, 1898, and July 1, 1898, there fell due certain coupons upon the bonds of the Connecting Company outstanding in the hands of various holders, and which were the obligations of said Connecting Company, and not in any manner, the obligations, either direct or contingent, of the Belt Company.

(*a*) That when said coupons became due, at the dates mentioned, the Connecting Company was without funds to pay them, and the Trust Company, in order to bolster up and protect the Connecting Company's credit, and prevent a default in the payment
822 of its interest, did take up and pay said coupons in the amounts, and on the dates stated in the bill, and aggregating $56,025.67, the dates of said payments running from January 18, 1897, to July 28, 1898.

(*b*) That the Trust Company, by reason of its domination and control over the Belt Company, caused the Belt to pay from its funds the sum of $9125, on account of the interest upon certain bonds of the Connecting Company, falling due as aforesaid, and all said payments being in the month October, 1897, and to the persons and in the amounts mentioned in the bill, and none of which payments appear on the pretended statement furnished by the Trust Company.

(*c*) That all the foregoing payments were charged by the Trust Company to the Belt Company in the statement of account, except the item of $9125, in the amounts and at the dates above set forth, and there is also charged to the Belt Company, in said statement, interest upon said payment of $30,850.00, amounting to $167.95 and also the amount of $77.13, as commission or brokerage for paying said coupons; that the said charges made by the Trust Company against the Belt Company, and entered on said pretended statements, including said $9125, are unlawful, inequitable and were caused to be paid by the Belt Company, or made arbitrarily by the Trust Company, without reason or excuse, but for the pretended reason that the claim of the Trust Company, arising out

of its payment of said interest could not be collected from the Connecting Company, because of its financial inability to make said payments, and the Belt Company being in better financial condition, could be made to pay same by charging it to the account of the Belt; that said payments were unlawful and unjust, and as a result of the coercion and domination of the Trust Company, and not by reason of any liability on the part of the Belt Company, and hence complainants asks that it receive a credit for the amount thereof, with interest from its dates of payment, at the rate of 6% per annum.

(*d*) That, on or about July 31, 1898, the Belt Company was the owner of first mortgage bonds of the Connecting Company, and also of 314 coupons attached thereto, which were then due, and were the direct obligation of the Connecting Company, due and payable to the Belt Company, said bonds being at the time in the control of the Trust Company; that the Trust Company, on or about said date, wrongfully caused the coupons, amounting in value to the sum of $7850, to be taken from said bonds, and cancelled as having been paid, and denied and still denies
823 to the Belt Company the right to said coupons or the interest thereon; that said act of the Trust Company was wrongfully and inequitable, and operated to deprive the Belt Company of said $7850, and interest thereon, at 6%, and that the Trust Company should account to the Belt for said sum, which has been omitted from its said pretended statement.

(*e*) That in the statement presented by the Trust Company against the Belt, the following charges appear September 1, 1893, $700, February 28, 1894, $6800, March 1, 1894, $700, August 30, 1894, $6800, September 1, 1894, $700, February 26, 1895, $6800, March 1, 1895, $700, August 31, 1895, $6800, December 31, 1895, $700, February 27, 1896, $6800, March 2, 1896, $700, August 27, 1896, $6800, September 1, 1896, $700, February 26, 1897, $6800, February 27, 1897, $700, August 26, 1897, $6800, August 28, 1897, $700, February 26, 1898, $6450, March 1, 1898, $1050, August 29, 1898, $6450, August 31, 1898, $1050, March 1, 1899, $6450, March 1, 1899, $1050; it is alleged that all of said charges were made against the Belt Company on account of interest on the first mortgage bonds of the Air Line, which were alleged by the Trust Company to have been paid by it to the holders of the coupons evidencing the same, including the Trust Company; that the Belt Company had not assumed or become liable to pay the interest on said Air Line bonds and was not in any way liable therefor; that the action of the Trust Company in making said charges to the Belt Company was not warranted, and was solely by reason of its domination over the Belt Company, and hence that said charges should be eliminated from the statement of the Trust Company account.

In paragraph 97 of its answer, the Trust Company denied that it caused the incorporation of the Connecting Company, and states in effect that all the transactions had by the Belt Company in connection with the Connecting Company were voluntarily entered

into by the Belt Company at the instance of its stockholders, officers and directors, and that they were entered into for its sole benefit and profit, and that defendant should not be chargeable, either in law or equity, with any loss which resulted from such transactions. Defendant admitted that it paid certain interest coupons due on the bonds of the Connecting Company and charged the same to the Belt Company, but stated that it was done at the special instance and request and for the benefit of the Belt Company, and that at the time this was done the Belt Company had in its treasury large blocks of the securities, both stocks and bonds of the Connecting Company, which it had received in payment for constructing the railroad of that company, and that the Belt Com-
824 pany was at that time endeavoring to dispose of said securities through the defendant Trust Company; that it was to the interest of the Belt Company to obtain as large a price as possible for said securities and that it would have been disastrous to it for a default to have been allowed to occur in the payment of interest due on the bonds of the Connecting Company, and that for the purpose of preventing such default, and also preventing a depreciation of the value of the Connecting Company's securities, the Belt Company, for a short period, advanced, through the defendant, certain monies for the benefit of the Connecting Company and itself, for the payment of interest accruing on the Connecting Company bonds. Defendant denies that it caused the Belt Company to pay any such interest but states that it was done by the Belt Company for its own purposes, and that the defendant made no payments whatever on any interest on the Belt Bonds except at the request of the Belt Company; and further, that all charges made against the Belt Company by the defendant in this connection were made with its full knowledge, approval and consent.

Defendant further answering stated that the Connecting Company began operating on or about July 1, 1898, and that on July 31, 1898, certain interest became due on its first mortgage bonds which had been delivered to the Belt Company in payment for the latter's services in and about the construction of the Connecting Company railroad; that at the times the interest became due the Connecting Company had just begun to operate its road and was not at that time in financial condition to pay its fixed charges, and the Belt Company, being the holder and owner of a large amount of the Connecting Company bonds, by virtue of its construction contract and for the purpose of enhancing the value of such securities, requested the defendant, to whom said bonds had been delivered by the Belt Company for disposition, to cancel the interest coupons attached to the Connecting Company bonds becoming due on July 31, 1898; that pursuant to such request of the Belt Company this defendant did cancel said 314 coupons mentioned in the ancillary bill, and that it was done at the solicitation and with the full knowledge of the Belt Company, which should be estopped from now complaining thereof.

During the year 1895, the Connecting Company was incorporated

for the purpose of constructing a line of railroad from Kansas City, Missouri, to Pattonsburg, Missouri, in order to connect with railroads at that point running to Chicago, Illinois, and to Council Bluffs, Iowa.

825 In the year 1896, the Belt Company entered into a contract with the Connecting Company by the terms of which the Belt undertook to acquire the right of way and to construct the railroad of the Connecting Company between the points above mentioned, in consideration of which the Connecting Company agreed to execute and deliver its bonds and stocks to the Belt Company.

On June 30, 1896, as shown by Belt Constructing the Northern Journal voucher (rec. 24, pages 12860 to 12953) the balance of the account of the Connecting Company of $14,045.38 was transferred from the Connecting Company to the Belt Company, and by the Trust Company charged against the Belt Constructing account. This Belt voucher appears at page 12953, the balance of the pages cited being taken up by receipts given to the Trust Company by various parties for moneys expended in behalf of the Connecting Company.

The Trust Company account with the Connecting Company, appearing in rec. 47, at page 28480 shows, under date July 22, 1896, a credit to the Construction Company of, "By all expenditures made by the Trust Company to 6-30-96 charged to K. C. Sub. Belt R. R. Co., $13,905.83" and "By all expenditures made by Trust Company from 6-30-96 to date charged to K. C. S. B. R. R. Co. 239.55, making a total charge to the Belt of $14,045.38", which agrees with Belt Constructing Journal voucher above cited.

By referring to pages 141 to 144 of Rec. 1, also rec. 47, pages 28468-28480, account of Trust Company with the Northern Connecting Company, it will be seen that the items that go to make up this $14,045.38 so charged by the Trust Company against the Belt Constructing, consists of costs of incorporation, engineering expenses, supplies, pay-rolls, telegrams, stationery, the costs of notice of stockholders' meetings, etc., of the Connecting Company paid by the Trust Company, and by the Trust Company charged to the Connecting Company; the various items commencing in May, 1895, and running to July, 1896, being the time for the transfer to the Belt Constructing. From page 145 of the account of the Trust Company against the Belt Constructing, the various expenditures made by the Trust Company were charged by them to the Belt Constructing the Northern Railroad.

The testimony of Neal S. Doran on this subject will be found in rec. 51, pages 31089 to 31091; and among other things he states that the railroad of the Connecting Company was built as a connecting link to the Gulf Railroad Company, and formed a connecting link between the Gulf and the Omaha & St. Louis

826 and the Omaha Kansas City & Eastern railroads. As shown by Johnson's testimony, (rec. 16, pages 8254 and 8255) the loss to the Belt Company in connection with the Connecting Company was $116,644.53, but it is difficult to point out in the record the items constituting such loss.

On January 1, 1897, July 1, 1897, Janaury 1, 1898, and July 1, 1898, there fell due certain coupons upon bonds of the Connecting Company outstanding in the hands of various holders, including the Trust Company, which coupons were obligations of the Connecting Company and were not the obligations of the Belt Company. The payments made by the Trust Company from January 1, 1897, to July 28, 1898, and charged to the Belt line amount to $56,025.67 as stated in subdivision (*a*) of this paragraph, the items appearing on page 63 of the bill. The various entries in the record going to make up the nine transactions in controversy need not be here specifically mentioned or referred to except in a general way. When these coupons became due on the dates mentioned, the Connecting Company was without funds to pay them, and the Trust Company, in order to bolster up and protect the credit of the Connecting Company and prevent a default in the payment of the interest, took up and paid certain of these coupons and charged the same to the Belt Company. (See Rec. 1, pages 144, 148, 156, 157, Trust Company Journal voucher 9823; rec. 10 pages 4918, 4919, Trust Co. Journal Voucher 11456; rec. 10 pages 4980, 4981; Trust Co. Journal Voucher 11634; rec. 10 pages 4988, 4989, 5145, 5146, 5394, 5935).

It seems from the record entries that inasmuch as the railroad of the Connecting Company was not completed by the Belt Company until July 1, 1898, or after the interest on the first mortgage bonds of the Connecting Company matured on that date, it was arranged between the two companies so that an entry would be made to the effect that the face amount of the 1234 coupons held by investors and aggregating $30,850, should be paid, and that the other 314 coupons then in the possession of the Suburban Company Constructing and Northern road, should be cancelled by the Belt Company and turned over to the Connecting Company to be pasted in their coupon books; these two lots of coupons making 1548 outstanding at that time. It appears, from Journal Voucher 14922 in the record, this transaction was authorized by a letter of A. E. Stilwell, president of the Trust Company. The Wilcox letter, with Stilwell's answer to it, attached to Journal Voucher 14922 appears in Record 10 at page 5394, (See Wilcox testimony, record 34, pages 18069 to 18077). Mr. Wilcox in his testimony states that the Connecting Company was not in a position
827 to pay the interest on these bonds, and that the Trust Company owned a lot of the Connecting securities at that time (Rec. 34, page 18376 to 18377); that these payments of the Connecting Company interest occurring prior to July 1, 1898, were charged to the Belt Company on the theory that when the Connecting Company railroad was completed the Company would not be in physical condition to start in business to earn the amount of income that was expected when it first commenced operations, and that inasmuch as the Trust Company could not expect to be reimbursed from the Connecting Company for some time, these charges were made to the Belt Company, which was then in funds.

Mr. Wilcox further stated that it was the policy of the Trust Company during the construction period, to have the company constructing the road to stand the interest charges, and that the Belt Company never opposed that policy. (Rec. 34, pp. 18093-18094). It is not thought necessary to refer to the record entries as to the interest payments made either by the Trust Company or the Belt Company in the subdivision of paragraph 10, as there seems to be no dispute as to the amounts, being paid at the times and by the parties mentioned in the bill, the only question being as to the liability of the Belt.

It will be observed that it is charged that the Trust Company, through its domination, caused the Belt Company to enter into a contract with the Connecting Company to build its line in consideration of its stocks, bonds, etc. The contract between the Belt and Connecting Companies was authorized by the stockholders and was expressly ratified by the Board of Directors and by the stockholders. It is also charged that the Trust Company knew, or should have known that the venture would result in large loss to the Belt Company and that the amount of such loss, so sustained by the Belt Company, should be charged up against the Trust Company; in other words, the effect of such a contention would be that the Belt Company would have a right to speculate upon the chance of making a loss or profit by the building of the road, and if a profit was made it would go to the Belt, but if a loss was incurred it should be charged to the Trust Company. It goes without saying that that would be an unreasonable kind of transaction for these companies to indulge in. In respect to the letter written by Stilwell to Wilcox containing a direction as to whether or not the amounts paid out by the Trust Company on account of these coupons should be charged to the Belt Company, or to the Connecting Company, it is of course well known that the Connecting Company was properly liable for the interest on these bonds, but at the same time the Belt Company had expended a vast sum of money in and about the construction of the railroad for the Connecting Company and was greatly
828 interested in the securities of the Connecting Company and in preserving the credit and standing of that company. Up to this time it seems that the Connecting Company had either not commenced to operate its road or had just commenced, when a large number of these interest payments were made direct by the Belt Company; at any rate the Connecting Company was not in financial condition to pay the interest on these bonds and the contingency arose which had to be met in the mutual interest of the Connecting Company and the Belt Company, and, to a certain extent, of the Trust Company which had been instrumental in selling the securities of both the Belt and Connecting Companies; hence, it was natural and right that Mr. Stilwell should have stepped into the breach and, through the Trust Company, assisted in helping both the Belt and the Connecting Company to adjust these interest coupon obligations.

Under the proofs, the Master is clearly of the opinion, and so finds, that there is no liability, on the part of the Trust Company

as to any of the matters complained about in paragraphs 9 and 10 of the bill.

4. In paragraph 11 of the bill it is charged in substance that on or about September 25, 1893, the Belt Company was the owner of 200 second mortgage bonds of the par value of $1,000 each, issued by the Air Line and secured upon its property, and, further, that the Belt Company on that date also owned 2500 shares of the par value of $100 each, issued by the Union Company; that on September 25, 1893, a written contract was made between the Belt and Trust Companies reciting that the Belt was the owner of said 200 second mortgage Air Line bonds, subject to the interest of the Trust Company as trustee in 30 bonds aggregating the principal sum of $30,000 and held in trust by the Trust Company by virtue of a mortgage given by the Air Line of date March 1, 1893; and further reciting that the Belt Company was desirous of selling and disposing of all its said bonds and said 2500 shares of Union Company stock for the purpose of raising money with which to properly extend, equip and maintain and operate its road and meet its obligations, and that the Trust Company had agreed to purchase said bonds and stock at the sum of $150,000, and the earned interest on the bonds, that is, at 75% of the face value of the principal of the bonds and the accrued interest, and to be paid for on or before eighteen months from the date of the contract. It is further alleged that the Trust Company gave the Belt Company credit for 130 of said bonds in the aggregate sum of $97,500, but that it failed to purchase and pay for the remaining 70 second mortgage bonds, as provided in the contract, as they were found to be worthless and could
829 not be sold upon the market. It is charged by the complainant that the Trust Company then devised a plan or scheme to re-sell and unload the remaining bonds upon the Belt Company, and in order to carry out such plan caused the Belt to enter into an agreement rescinding said contract of September 25, 1893, and releasing the Trust Company from its obligation to take the remaining 70 bonds; and in further consummation of such fraudulent purpose that the Trust Company caused entries to be made upon its books, and also upon the books of the Belt Company, charging the Belt as and for a return of said 130 bonds purchased by the Trust Company at $750 each, and aggregating $97,500. The claimants ask that they be allowed a credit upon the Trust Company account for said sum of $52,500, the contract price of the 70 bonds with interest, or in case the court should find that the contract was duly rescinded, then complainant asks for a credit of $62,500 on account of said 2500 shares of Union stock retained by the Trust Company. Complainant also claims that the action of the Trust Company in charging the Belt Company with the return of said 130 bonds in the sum of $97,500, was unlawful and inequitable, and that the item should be eliminated from the Trust Company account.

In paragraphs 99, 100 and 102 of its answer, the defendant states in substance that the payment of the second mortgage Air Line bonds in controversy had been guaranteed by the Belt Company before September 25, 1893, when the written contract was made be-

tween the Belt and the defendant whereby defendant purchased said bonds at the price of 75 cents on the dollar, or $750 for each bond; that in pursuance to the contract it received from the Belt 130 of said bonds and 2500 shares of Union Company stock; that the Belt Company, after the guaranteeing of said bonds and finding out that the earnings, present and prospective, of the Air Line were not sufficient to justify the Belt Company in negotiating said second mortgage bonds and thereby increasing the fixed charges of the Belt Company, which had guaranteed said bonds, it endeavored to find a way to retire said bonds and thereby rid itself of further liability; that thereupon the Belt failed to make further delivery to the defendant of the remaining 70 bonds and it was agreed between defendant and the Belt Company that defendant would return to the Belt all of the 130 bonds theretofore purchased by defendant of the Belt, which was done and the bonds returned to the treasury of the Air Line Company, in consideration of the Belt being relieved by the
830 Air Line of its guarantee thereon. Defendant further states that at the time the bonds were surrendered, under the circumstances mentioned, the Trust Company released the Belt Company upon condition that the Trust Company should retain said 2500 shares of the Union Stock, which defendant did. Defendant denies that said Air Line bonds were worthless on the market, but states that by reason of the written guaranty of the Belt Company which they bore, they were regarded as good obligations; and further, that the arrangement made by which the Air Line second mortgage bonds were returned to its treasury was at the solicitation and request of the Belt Company and for its interest and benefit. The contract of September 25, 1893, appears in Record 15 at pages 7990 to 7992.

It appears from the minutes of the Trust Company's executive committee that it was deemed advisable and for the best interest of the Company to sell to the Belt Railroad Company these second mortgage bonds for the sum of 75% of their face value. Without taking time to recite all the different entries upon the subject, it appears that the bonds were re-bought by the Belt from the Trust Company. It will be noted that the basis of this claim is that the Trust Company caused the Belt Company to do the things about which the complaints are made, in other words, it is another case of alleged denomination of the Belt by the Trust Company.

It occurs to the Master, from an examination of the record entries, that the facts may be reasonably stated, as follows:

That in 1893 the Trust Company bought said second mortgage Air Line bonds from the Belt Company, which had obtained them from the Air — Company in consideration of guaranteeing them, which it did, and thereby the Belt Company became legally liable for every dollar, principal and interest, of those second mortgage bonds. It is shown in the record that the property of the Air Line was incumbered by a prior mortgage of $300,000, the bonds for which were outstanding and the interest thereon had to be met. The Belt Company was the owner of the capital stock of the Air Line and in control of it and operating it, and by reason of its stock ownership was paying the interest on the bonded debt, and other

charges of operation. It was subsequently found out that, from a business standpoint, the Belt Company made a mistake in guaranteeing the second mortgage Air Line bonds, inasmuch as it added that much additional interest charge on the Belt Company, and on that account, by authority of its stockholders at a stockholders' meeting, the Belt Company asked for a cancellation of its arrangement with the Trust Company, which consented, and thereupon the Air Line bonds were surrendered and the obligations of the
831 Trust Company to the Belt Company, and of the Belt Company to the Air Line, were all released and discharged. This stockholders' meeting was held on or about July 7, 1896, the stockholders present representing 31751. Mr. Martin, president of the Belt Company, presented an annual report, which was set out in the minutes, and in which he refers to the condition of the company, its bonded debt, number of loaded and unloaded cars handled, equipment on hand, &c.; in his report he says "the above shows the fixed interest charge $167,500. We have in the treasury $700,000 Union Terminal bonds for such future use as may appear judicious. The Board of Directors deem it wise to cancel the $200,000 Air Line bonds and have so ordered, thus reducing the fixed interest charge $10,000 per annum." This stockholders' meeting was largely attended, and the record of it does not disclose any dissent or objection to what was done. When said 200 second mortgage Air Line bonds were purchased, the 2500 shares of Union Company stock went with the purchase, but it seems when it was rescinded the trust company retained this stock, claiming that it was an element of profit in the deal and did not belong to the Belt Company.

There is nothing peculiar to the facts of this transaction which distinguish it from the others in this bill grounded upon the domination and control of the Trust Company, and, in view of the facts as the Master understands them from the pleadings and the record, he sees no reason why the prayer of the complainant should be granted.

5. In paragraph number 12 of the Bill it is recited that the Trust Company caused the Air Line to enter into a contract with it for the construction, equipment and completion of the Air Line's railroad, and that thereunder the Construction Company was to receive the stocks and bonds of the Air Line in certain amounts fixed in the contract; that the Construction Company entered upon the construction of the road, but before it was completed the Trust Company caused the Air Line and the Construction Company to go through the form of an agreement by the terms of which the Air Line was to accept the then partially completed railroad as and for full compliance with the contract, and to turn over to the Construction Company the securities provided in the contract to be turned over upon the completion of the road; and that it was further provided that the Air Line should assume all the liabilities of the Construction Company and succeed to and take over all of its assets, and that this plan was carried out and the uncompleted railroad was turned over to the Air Line and the securities were delivered to the Trust Com-

pany, and the Air Line assumed the liabilities and took over
832 the assets of the Construction Company.

It is also charged in subdivisions *a*, *b*, and *c* of this paragraph that by reason of this domination of the Trust Company the Belt Company suffered certain damages in the respects mentioned in said subdivisions, and complainants ask that the charges therein enumerated be eliminated from the Trust Company's statement, and the proper credits given therefor, with interest.

The cause of action stated in this paragraph is very much on the same footing as that of the Stilwell Terminal Construction Contract in relation to the building of the first division of the Belt Line, and the propositions of law applicable to that are also applicable to this.

The Master adheres to the opinion already stated, that the proofs in this cause do not show that the Trust Company exercised domination and control over either the Belt Company or the Air Line, and hence that the basis of the charges in this paragraph is not sustained. It also appears that the items themselves are barred by the statute of limitations. For these reasons it is not deemed necessary to make an extended statement from the record as to the facts underlying the items mentioned herein.

6. In the 13th paragraph it is alleged that the contract was entered into between the West Kansas City Land Company and the Consolidated Company, under the terms of which the Land Company agreed to sell to the Consolidated Company a strip of land 28 feet in width over and across certain land in Kansas City, Jackson County, Missouri, for a consideration of $10,000, of which amount $4,000 was to be paid upon the delivery of a warranty deed and the balance in three years thereafter; that while the contract was in the name of the Consolidated Company it was really for the benefit of the Belt Company, which paid the $4,000; that thereafter the Belt Company gave its note to the West Kansas City Land Company for $5,600, being the balance of the purchase price of the land, and the Trust Company guaranteed the payment of the note and interest to the Land Company, and took from the Belt Company the sum of $5600, in cash and retained the same as a special deposit to cover its liability on said note and agreed to pay interest thereon at the rate of 6% per annum; that afterwards the Belt Company was compelled by order of the Court to pay said note and interest amounting to $7910.32, and thereupon the Trust Company became liable to refund to Complainants the said sum of $5600 deposited
833 with it, and interest thereon, but that the Trust Company failed and refused to do so. It is further stated that said $5600 appears on the Trust Company account as a charge against the Belt under date November 28, 1892, and that it should be expunged therefrom and credit given to the Belt Company for said $5600 and interest thereon at the rate of 6% per annum from November 28, 1892. This claim is supported by the proofs and should be allowed in favor of the complainants.

7. In paragraph 14, it is alleged that on or about November, 1899, a judgment in the sum of $5000 was rendered against the Belt Company in a suit of one Zumwalt to recover for personal injuries sus-

tained by him; that the Belt Company appealed to the Supreme Court of Missouri, first giving an appeal bond as required by law; that the Trust Company signed said appeal bond as surety, by request the Belt Company deposited with it $5000 to cover its liability as surety thereon; that said judgment was reversed without being remanded, and thereupon the liability of the Trust Company as such surety ceased, but notwithstanding that fact the Trust Company has refused to account for, or pay over to the complainants the said sum of $5000 with interest thereon; hence the complainants claim they are entitled to be credited in the account between the Belt and Trust Company with $5000 with interest thereon from November 29, 1899. The proof in this cause sustains this claim and it should be allowed in favor of the complainants.

8. In Paragraph 15 of the Bill it is charged that it is a habit of the Trust Company in the disposition of the stocks and bonds of the Belt Company and the other companies involved in this accounting, to make sales of such stocks and bonds as the Trust Company should decide upon, and when such sales had been made to then credit the Belt Company with a less amount, representing to the Belt that the sale so made by the Trust Company had been made at and for a much less price than the amount at which the sale has been actually made; that in other instances the Trust Company would have an opportunity to make an advantageous sale of the stocks and bonds and with that end in view would cause the Belt Company to go through the form of selling such stocks and bonds to the Trust Company, which would thereafter consummate the sale in contemplation; or that the Trust Company would cause the Belt to go through the form of selling stocks and bonds to the Trust Company at a price much less than their value and then shortly thereafter sell these same stocks and bonds at a much greater price; in other words that the Trust Company derived large profits from such
834 transactions, which were alleged to exceed the sum of $250,000. The attention of the Master has not been called, either in the briefs or by way of argument, to any facts tending to materially sustain the charges made in this paragraph. He recalls one instance in which Stilwell, then in London, instructed the Trust Company to buy some Belt shares at 18 cents, which he sold at 20 cents on the dollar. There was no commission charged on the transaction, and the profit to the Trust Company was perhaps $400 on the sale of $4000 of stock. The finding will be against the complainants on this paragraph.

9. In paragraphs 16, 17 and 18, it is charged in substance that, through the domination of the Trust Company, the Belt Company, though insolvent, was caused to declare three certain dividends to its stockholders in the sums respectively of $17,087.40 on November 1, 1893, $26,205.28 on May 1, 1894, and $71,250.00 on November 1897; that two of said dividends were declared in stock and one of them in money. It is difficult to understand upon what theory complainants seek to make the Trust Company liable on account of dividends alleged to have been paid to the stockholders of the Belt Company, among which the Trust Company happened to be one;

it is true that the Trust Company was a large holder in the stock of the Belt Company, and presumably interested in obtaining dividends on said stock, but at the same time the dividends were declared by the directors of the Belt Company, and the stockholders received the benefits of such dividends and retained them.

The finding of the Master will be against the complainants as to the charges in these paragraphs for the reasons; First, it is not shown that the Trust Company exercised domination and control over the directors of the Belt at the time that these dividends were ordered; and, Second: that under the admitted facts the complainants have no cause of action against the Trust Company.

10. In Paragraph 19, it is charged that after the incorporation of Union Company, the Trust Company caused it to execute bonds in the sum of [$2,000,000,000] and to secure the same upon its property then owned and thereafter to be acquired. That it was provided in said mortgage that the proceeds of all these bonds, except 150 reserved for interest paying purposes, shou'd be used in the construction and equipment of the company's railroad; that after the railroad had been constructed, the Trust Company caused the Union Company to deliver to the Belt Company, and also caused
835 the Belt Company to deliver to the Trust Company, 1160 of said Union Company bonds of the par value of $1,160,000 and a cash value of $1,044,000; that although the Trust Company was the trustee in said mortgage and knew of the authorized purpose for which said bonds could be used, it wrongfully sold them to investors and used the proceeds thereof to credit to the account of the Belt Company, the debit side of which was greatly augmented by the conduct of the Trust Company in making to the Belt Company excessive and exorbitant charges for services, interest and commissions; that the said bonds so wrongfully put afloat by the Trust Company, drew interest at the rate of 5% per annum, and the Belt Company which had been theretofore required by the Trust Company to guarantee said bonds, was thereafter required and compelled by the Trust Company to pay interest in large amounts upon said bonds, in the amount of $432,000; that the conduct of the Trust Company was wrongful and in violation of its trust, and resulted in imposing upon the Belt Company the unnecessary burden of interest payments which appear as charges to the Belt Company in the Trust Company statement of account with it. The complainants ask that there be eliminated from the Trust Company statement all such charges of interest.

The dealings of the Trust Company with the Union Company and the relations generally between the Trust Company, Union Company, and Belt Company in respect to the Union Company mortgage securing its bonded indebtedness, and other matters arising thereout, are fully considered by the Master in that part of his report on the intervention of the Southern Company, entitled Subdivision XIII, "As to the claim of Intervenor for $773,246 for damages to the bondholders arising from misconduct of the Trust Company as co-trustee in the Union Company mortgage." The conclusions there reached by the Master are adverse to the contention of the com-

plainants, and the same finding is now made as to Paragraph 19.

11. In paragraph 20 of the bill, complainants state that, on or about April 28, 1892, the Trust Company sold to one Caroline A. Perkins, three Consolidated Company bonds for $2,550.00, which were the property of the Belt Company, but that the Trust Company had wrongfully refused to pay said proceeds to the Belt, or to account in any way for the bonds, and for that reason, the Belt Company is entitled to a credit of $2,550.00, as of the date April 28, 1892, with interest thereon.

The Trust Company has been unable to account for these bonds, or their proceeds, though it was understood that the transaction took place in 1892.

836 In view of the great number of transactions which have occurred between the Trust and Belt Companies, it is, perhaps, not surprising, that this item has not been satisfactorily explained by the Trust Company. The statute of limitations has been interposed, which will operate as a defense to the Trust Company, and bar a recovery of the claim.

12. In Paragraph 21, complainants state that, on or about December 12, 1895, the Trust Company charged against the Belt Company, the sum of $5,000.00, and credited to Arkansas lands; that the charge was fictitious and fraudulent, and that said sum was not then, or at any other time advanced by the Trust Company for the Belt, and that the Belt received no benefit or consideration therefrom, and hence, that the same ought to be eliminated from the Trust Company's statement of account, and the Belt credited, with interest thereon, from the time that the charge was made.

This $5,000.00 charge appears in the Trust Company's account with the Belt, under date of December 18, 1895, being for "advanced for right-of-way, Union Terminal R. R. $5,000.00," and is supported by Trust Company journal voucher 6945, appearing in Rec. 6-3041.

Wilcox, in his testimony (Rec. 34-18262-'63) states that this $5,000.00 charged to the Belt was credited on the Trust Company books to the account of the Arkansas R. R. lands, but does not know whether it was used for something that the Belt was interested in, that there is no credit shown on Willey's exhibit for the return of this amount, and that there were no Arkansas railroad lands along the line of the Union Terminal, or anywhere near it.

Martin, in his testimony (Rec. 55-33757 to 33771), states that he never heard of any Arkansas lands on the right-of-way of the Union Terminal, nor does he know of any expense to the amount of $5,000.00 that had any reference to Arkansas lands in connection with the right-of-way or with the Union Terminal. There seems to be rather an inference, from the testimony, that this $5,000.00 was connected, in some way, with the obtaining of an ordinance in respect to the extension of the Union Company's railroad to the Stock Yards, the Belt having contracted, under date of May 28, 1894, with the Union Company to build the extension for 150 Union Company bonds, as shown by Wilcox's letter, setting out the contract (Rec. 36-19230).

The complainants suggest that, in as much as this $5,000.00 was probably used for improper purposes with the Kansas City, Kansas council, for passing the franchise, that complainants are en-
837 titled to have it eliminated from the Trust Company account.

In the confused condition of the record, the finding of the Master will be against the contention of complainants on the merits, and also on the statute of limitations, which has been pleaded as a bar to the claim.

In items (*b*) and (*c*), of paragraph 21, complainants state that, in the Trust Company account, there are made certain charges and credits, which will appear by reference to the bill; that said charges represent payments made by the Trust Company to itself or others, on account of 450 Union Terminal coupons, due August 1, 1899, owned or claimed to be owned by the Trust Company; that the amounts of said coupons have heretofore been paid in cash to the Trust Company, so that the Trust Company has been paid twice in respect to said coupons, and that, consequently, the charges made in items (*b*) and (*c*) are unauthorized and invalid, and should be eliminated from the Trust Company statement of account.

In paragraph 109, the defendant, in its answer, states that the charges referred to in paragraph 21 of the bill, as having been made against the Belt Company, were on account of money advanced for that company by the Trust Company, and with its knowledge, consent and approval at the time of the advancement, and hence, that said charges are proper charges.

The statement in item (*b*) is simply that the charges and credits therein mentioned, appear on the Trust Company account. By reference to the record, it appears that these items of charges and credits, found in the Trust Company's account against the Belt (Rec. 1-135 to 137) are made in connection with the payment of 1527 Union Terminal coupons by the Trust Company, due August 1, 1899.

By reference to Willey's testimony and letter to Black, receiver of the Trust Company (Rec. 11-5860 to 5893), it will be seen that $38,175.00, of the charges set out in item (*b*) represents 1527 Union Company coupons due August 1, 1899. Ingels, in his testimony (Rec. 48-28742-'44), states that these charges and credits set out in item (*b*) do not appear upon the Belt books nor do the Belt books show any record of any money drawn, on De Goeijen, or any money received from him to be used in payment of Union Company coupons due August 1, 1899, nor is there anything on the books to show the receipt of the $40,000.00 mentioned. As further explanatory of this item, see letters of Wilcox to Howe and Doran, September 21, and Sep-
tember 30, 1899, appearing in Rec. 36-19121-'23 inclusive;
838 also Doran's letters to Willey, of January 10 and January 27, 1900, Rec. 53-33966 and 34055. Mr. Witzleben, foreign exchange clerk at the National Bank of Commerce, testified (Rec. 53-31780 to 31792) that these various drafts appear to have been the drafts of the Belt Company. According to Willey's letter to

Receiver Black, above cited, these various drafts took up 1527 of the 2,000 Union Company coupons that were due August 1, 1899, and required the expenditure of $38,175.00. The total amount of the credit for the draft of 100,000 florins, or $39,437.50, as shown by Wilcox's letter (Rec. 36-19121), were placed to the credit of the Trust Company at the [—] Commerce, for the purpose of paying Union Company coupons due August 1, 1899. The difference of $1,262.50, is not satisfactorily accounted for in the record.

If the Master properly understands the meaning of this transaction, it is that, on August 1, 1899, the Union Terminal interest became due on its bonded debt, and J. De Goeijen agreed to provide the funds to pay it. He authorized the Belt Company to draw upon him for $40,000.00. The Belt Company did draw on him for that amount, and the Trust Company indorsed the draft for the accommodation of the Belt. With the proceeds of the draft, these coupons were secured by the Trust Company to be held by it as collateral security to this indebtedness from the Belt Company to the Trust Company. When the draft, however, was presented to De Goeijen for payment, he paid it with the proceeds of another draft, the transaction taking somewhat the form of draft kiting, the draft in each instance, being drawn by the Belt Company, and when it became due, the Trust Company had to pay it, and hold the coupons as collateral. Mr. Witzleben, foreign exchange teller of the National Bank of Commerce, produced his books when he testified, which showed the entries, the drawer, payee, and the indorser, and that the drawer of each of the drafts was the Belt Company, and the Trust Company was merely the indorser. The Trust Company had to pay the draft, and charged it up to the account of the Belt Company.

In respect to the charges made by the Trust Company against the Belt Company in item (*c*) of paragraph 21, it appears that in the Trust Company's statement of account, certain items, aggregating $11,500.00 are charged therein against the Belt Company on account of past due Union Company coupons, and that these items were in July, 1900, paid by the reorganization Committee, as evidenced by a letter written by Mark Hubbert, treasurer of the Trust Company, directed to Mr. Asa S. Wing, vice-president, Philadelphia, in which Hubert acknowledge receipt of a check
839 for $11,250.00 in payment of Union Terminal coupons due August 1, 1899.

Mr. Willey (Rec. 55-33632 to 33677) states that, in reference to his letter to Judge Black, appearing in Rec. 11-5872 to 5883, that the equivalent of the $43,000.00 therein mentioned, represented money that the Trust Company used to take up 1527 Union Terminal coupons due August 1, 1899, which coupons the company then held; and also that, in July, 1900, Mark Hubbert, treasurer of the Trust Company, received from the reorganization Committee $11,250.00 in payment of 450 additional coupons (being other coupons than the 1527), these 450 coupons belonging to the Trust Company; and further that the letter of Mark Hubbert correctly recites the facts. This Hubbert letter appears in Rec. 55-33637, and is on the

letter-head of the Trust Company, dated July 14, 1900; and from all of which it is seen that $11,250.00 of the $11,500.00, charged in the Trust Company account against the Belt Company, was paid to the Trust Company in cash by the reorganization Committee in July, 1900. The 1527 coupons covered by the $40,000.00 item set out in item (*b*) of paragraph 21, plus the 450 coupons paid by the reorganization Committee to the Trust Company, make up the total of 1977 out of 2000 Union Terminal coupons outstanding and due August 1, 1899. The Belt vouchers, appearing in Rec. 33-17964 to 17983, show the payment of Trust Company drafts to the amount of $650.00 on account of 2000 Union Terminal coupons due August 1, 1899, and this, with the 1527 and 450 coupons, makes a total of 2003 coupons, which is an error of 3 coupons. It is not shown by the record how this error occurred.

Under this showing, the Master finds that the complainants are entitled to a credit upon the statement of account presented by the Trust Company for said $11,250.00, together with interest thereon at 6%, from July 14, 1900.

In item (*d*), of paragraph 21, it is stated that the Belt Company is charged in the Trust Company account with $770.77, being the costs of a certain replevin suit on account of steel rails. These cost items arose out of a certain replevin suit brought by the Trust Company against the Belt Company, to recover from the Belt certain rails formerly owned by it, and claimed by the Trust Company to have been transferred to them at a Belt directors' meeting of February 1, 1900 (Rec. 52-21429 to 21432). The Trust Company, in April, 1900, filed a replevin suit against the Belt Company to recover these rails, alleged to have been transferred by the Belt Company.

The $300.00 item is for premium paid on the Trust Company
840 bond given in this replevin suit, and complainants contend that it is not a proper charge to be made against the Belt. The other items going to make up the $770.77, are charges made in connection with the alleged disposition of the rails by the Trust Company, which complainants also contend are not proper charges to be made against them, and hence they ask that such charges be eliminated from the statement of account presented by the Trust Company, together with interest at 6% from the date of the charging.

These rails were delivered by the Belt to the Trust Company as collateral security for its indebtedness, and it was the duty of the Trust Company to preserve the security and utilize it to the best advantage, so as to make the proceeds of the rails pay as much of the Belt indebtedness as possible. While it is true that these outlays of costs were not made at the special instance or request of the Belt Company, and were not authorized by it, yet the duty developed upon the Trust Company to utilize the rails to the best advantage in paying its claim against the Belt.

Entertaining some doubt as to whether this claim of $770.77 should be eliminated from the statement of account, the finding will be against the complainants.

13. In paragraph 22 of the bill, the complainants allege that

in the year 1892, the Trust Company caused the incorporation of the Fruit Auction Company, the incorporators being A. E. Stilwell, A. A. Mosher, E. L. Martin and W. S. Taylor; that the articles of incorporation recited that half of the capital stock, to-wit, $75,000.00, had been paid up in lawful money of the United States, when, in fact, no part of it had been paid up; that the Trust Company caused said Fruit Auction Company to engage in the business of selling fresh fruits in Kansas City, and after the business had been conducted for a few months, it went out of business, owing the Trust Company a large sum of money, that thereupon, in order to recoup its losses in that respect, the Trust Company appropriated to its own use 286 shares of stock of the Union Company, belonging to the Belt Company of the value of $6,292.00, and used the same to wipe out the debt owing to the Trust Company by the Fruit Auction Company. Complainants allege that the taking of said stock by appropriation under the circumstances, was wrongful, and was without consideration and hence, ask that a credit therefor, with interest, be given the Belt Company on the account of the Trust Company.

841 The defendant, in paragraph 22 of its answer denies that it caused the incorporation of the Fruit Auction Company, and states that such company was organized at the instance and request of the Belt Company, and for its benefit, and for the purpose of increasing the freight traffic on the line of the Belt railroad, and that, for such purpose, the Fruit Auction Company established a warehouse and trading room on the line of the Belt Company, at which commission merchants, and dealers in produce and fruit, conducted an exchange, and that shipments of fruit and produce were received at said exchange by means of the railroad of the Belt Company, and in that way the Belt Company derived a large revenue from the diversion of shipments of fruit and produce from other railroad lines to the Belt Line, and that, at the request of the Belt Company, the defendant advanced money to the Fruit Auction Company, and, to reimburse defendant for such advancements, for the benefit of the Belt Company, and not otherwise, the latter transferred to this defendant 286 shares of stock, but defendant denies that such stock was of the value of $6,290.00, and states that it had little, if any value, at that time.

In December, 1892, the Fruit Auction Company was organized with a capital stock of $75,000.00 (Rec. 34-18244-'47), the articles reciting that the stock had been in good faith subscribed, and more than one-half paid up in money, and was in the custody of the board of directors. The directors and incorporators of the Fruit Auction Company were officers and directors and members of the executive committee of the Trust Company (Rec. 11-5697). The Trust Company paid the incorporation expenses (Rec. 47-28731). As shown by Wilcox's testimony (Rec. 34-18247), no money was paid in on the capital stock of the Fruit Auction Company, and such moneys as it did receive, *was* advanced by the Trust Company and charged to it, excepting such money as it might have made during the short time it was in business. The company held a daily

auction of fruit and produce at the warehouse building at 2nd and Main Streets, and for several months did an extensive business, but afterwards abandoned it (Rec. 34-18396). It became indebted to the Trust Company, and the matter was closed up, charging it to the Belt Company, and taking from the Belt Company, Union Terminal stock for the amount of such indebtedness. This stock was after wards sold and the Trust Company got the benefit of the proceeds. As shown by Doran's letter (Rec. 55-33949), the Belt Company paid to the Fruit Auction Company a commission of 50c. per car for each car of fruit handled by the Fruit Auction Company. The balance of $6,292.00 due the Trust Company from
842 the Fruit Auction Company, largely represented by Fruit Auction Company notes to the Trust Company, was taken out of the Trust Company's expense account in February, 1894, by the Trust Company receiving from the Belt Company 286 shares of Union Terminal stock belonging to the Belt Company. Trust Company journal vouchers, appearing in Record 38-21169, shows that $5,000.00 of this $6,292.00 was evidenced by the notes of the Fruit Auction Company given to the Trust Company, from which it appears that the Trust Company took from the Belt Company 286 shares of Union Company stock, for the purpose of settling the Fruit Auction Company notes aggregating $5,000.00, and also settling any balance on open account due the Trust Company from the Fruit Auction Company.

It may be that the beginning of the Fruit Auction Company was brought about by Mr. Stilwell, or others connected with the Trust and Belt Companies, but unquestionably the object in inaugurating the fruit auction business was to create traffic for the Belt railroad, and in that sense the Fruit Auction Company was a Belt concern. Now, whether the Belt Company was unduly influenced to aid the Fruit Auction Company by reason of the profits which it may have supposed would result from carrying on the fruit auction business at a point near the line of its railroad, is a matter of no importance to this inquiry. It is now evident that those interested in behalf of the Belt and the Trust company, were mistaken in this fruit auction venture, as it did not turn out profitably. That fact, however, cannot be determinative of the question whether the loss following the venture should fall upon either or both the Belt and Trust Company. It seems that an arrangement was made between the managements of the two companies, by which the 286 shares were turned over to the Trust Company under the circumstances above stated.

The basis of the charge in this paragraph is that the Trust Company dominated the Belt Company in this transaction, and the decision of the Master upon that proposition will be the same as heretofore, and his finding will be against the claim of the complainants.

Loss St. J. & G. I. Stock.

14. In the 23rd paragraph of the bill it is alleged that in the account of the Trust Company against the Belt Company, under date

of September 13th, 1898, there is a charge against the Belt of $2,500.00 for moneys represented to be paid by the Trust Company in unlawful stock transactions in the stock of the St. Joseph and Grand Island Railroad Company, purchased as a speculation on margins, alleged to have been carried on account of the Belt
843 Company; and in the same account, under date of September 15th, 1898, there appears also a charge of $2,000.00, and, on the 9th day of December, 1898, another charge of $2,000.00 for a similar unlawful transaction in margins in stock of the same railroad company, alleged to have been for the account of the Belt Company; that said transactions were unlawful, beyond the corporate power of either the Trust Company or the Belt Company, and that it is inequitable and unfair that said transactions and the loss resulting therefrom in the sum of $5,989.50 should be charged against the said Belt Company; that said entries are incorrect and should be expunged from the Trust Company's account and credit allowed the Belt Company thereon for the amount of said sum and interest.

In paragraph 111 of defendant's answer, it is alleged that the charges against the Belt Company, carried in paragraph 23 of the bill, were made because the defendant Trust Company, on the dates therein mentioned, and at the request of the Belt Company, paid drafts aggregating the sum of $6,500.00, which should have been drawn on the Belt Company. The defendant further states that if the Belt Company lost any money in speculations, there is no reason, in law or in equity, why the defendant should pay such losses; that all of said charges were fully known, ratified and acquiesced in by the Belt Company, its officers and directors, and complainants are now estopped from questioning the same.

Without taking the time to refer to all of the book entries in regard to these stock speculations, it appears from the testimony of Wilcox, in speaking of these transactions, (Rec. 34-18405-406) that these charges in the Trust Company account, appearing at pages 122 and 124 of Record 1, were margins on 500 shares of the St. Joseph and Grand Island Railroad Company; that Stilwell and Maryin were active in handling the transactions, and that the stock was bought at that time because of the association of Martin and Stilwell with the officers of the St. Joseph and Grand Island (Rec. 34-18430-'431); that Martin and Stilwell were together in this deal and between them ordered the stock purchased, 500 shares being purchased on the Belt account and 500 shares on Stilwell's account (Rec. 34-18248-'250). Wilcox further states that the deal resulted in a loss and that he understands that all of the margins were wiped out; that this deal was had about the time that negotiations were pending looking to bringing the Grand Island Road into Kansas City over the Belt terminals.

For the total loss on these transactions, see Johnson's testimony,
844 (Rec. 21-10821-'832) showing a total loss to the Belt Company of $5,989.50, and the complainants claim that they are entitled to have that amount eliminated from the Trust Company's account of the $6,500.00 charged therein on account

of the marginal stock transactions, together with credit thereon at six per cent interest.

It appears from the record that Mr. Martin was the President and active in control of the Belt Company, and that Mr. Stilwell was the President and active in control of the Trust Company, and that they were having certain negotiations with the management of the St. Joseph and Grand Island Railroad Company, looking to a business proposition by which that company would use the Belt terminals, and it is, perhaps, a fair presumption, from all the surroundings of this matter, that Stilwell and Martin mistakenly entered into the stock speculation deal, believing, as is usually the case, that they had a tip and a sure thing. Mr. Stilwell speculated on his own account, and it is contended that the transaction by Mr. Martin was on account of the Belt Company. A loss occurred and now the complainants seek to shift such loss on to the Trust Company. The record cannot, of course, disclose whether, in case, there had been a profit on the transaction to the Belt, that there would have been any complaint as to the transaction that Mr. Martin conducted for its interests. Be that as it may, regardless of the question of the alleged domination and control of the Trust Company over the Belt, the master is satisfied that under the facts in this case there is no sufficient proof to justify a finding of liability on the part of the Trust Company for the loss complained of; and, hence, the finding of the master will be in favor of the defendant Trust Company.

15. In paragraphs 24 and 25 of the bill, it is charged that the Trust Company did, on or about September, 1890, take, appropriate and convert to its own use $499,000.00 par value of the capital stock of the Belt Company, of the actual value at that time of $166,333.33, for which the Trust Company has failed to account in its statement of account against the Belt Company, or otherwise; and further that on or about the year 1892 the Trust Company took, appropriated and converted to its own use 2455 shares of the capital stock of the Union Company, of the par value of $245,000.00, and of the actual value of $49,100.00, for which the Trust Company has failed to account on its statement of account against the Belt Company; and for both of said sums of $166,333.33 and $49,100.00, with interest thereon from the dates mentioned, the complainants allege that they should be credited upon the Trust Company's statement of account against the Belt Company.

845 In paragraph 112 of the defendant's answer to the bill, defendant denies that it at any time appropriated or converted any of the stock of the Belt Company or the Union Company or any other company.

The item of 4,990 shares of Belt stock is of the same nature as that heretofore mentioned in item (*b*) of paragraph 1, and the item of 2,455 shares of Union stock is of the same nature as that heretofore mentioned in items (*h*) and (*i*) in paragraph 2 of this bill. The conclusion reached as to this class of items will answer the purpose of a separate finding by the Master in respect to the Belt and Union stocks in these paragraphs 24 and 25.

16. In paragraph 26 complainants state that the Trust Company caused to be constructed the railroad of the Air Line and used, for that purpose, the Construction Company, and caused the Air Line to enter into a contract with the Construction Company for the completion of the Air Line railroad; that under the terms of said contract the Construction Company was to receive $300,000.00 par value of the Air Line stock and $300,000.00 par value of the first mortgage Air Line bonds; that the Construction Company entered upon the construction of such railroad, but before it was fully completed, the Trust Company caused the Air Line and the Construction Company to go through the form of an agreement, by which the Air Line was to accept the then partially completed railroad, as for a full compliance with the contract, and was to turn over to the Construction Company the securities provided for in said contract, to be turned over upon the completion of the road, and that thereupon the railroad was turned over to the Air Line and the securities above mentioned, which had at all times remained in the custody of the Trust Company, were by it appropriated to its own use; that the actual cost to the Trust Company of the construction of the Air Line was $170,747.29, and that the Trust Company realized from the construction of said Air Line a profit of $129,252.71; and further, that by reason of the relation of the parties, it was unjust and inequitable that the Trust Company should retain said profits, or any of them; but, on the contrary, it should be required to account therefor to the Belt Company, and hence, complainants ask that they be allowed a credit for that amount, with interest, upon the Trust Company's statement of account against the Belt Company.

In paragraph 113 of the answer defendant Trust Company states, in substance, that it had already, in the former parts of its
846 answer, fully answered the charges made in said paragraph 26; that it denies that the Trust Company constructed the Air Line, but states that the road was constructed by the Construction Company; that when the Construction Company delivered the road to the Air Line in the year 1892, the Construction Company turned over to the Air Line all of the books of accounts, showing in detail all of the costs of the Air Line, and those books have ever since been in the possession of the Air Line and Belt Companies, and their receivers, and all of the circumstances surrounding the transactions of said Air Line and the costs thereof were fully known to the stockholders and directors of the Air Line and Belt Companies at the time that the railroad was accepted from the Construction Company, and hence, the complainants are now estopped from complaining of the result of such contract. Defendant denies that it made any profit on the construction contract, for it had nothing to do with it, except as a banking institution, selling the stocks and bonds received by the Construction Company in payment of its work, and for which stocks and bonds defendant has fully accounted many years ago.

The charges made in this paragraph 26 stand upon about the same footing as those in respect to paragraph 12 and in connection with the construction of the first division of the Belt. The conclu-

sion reached by the master [is] respect to the effect of the construction contracts under which the Air Line and the first Belt Division were built has already been stated and it is unnecessary [—] go over the same matter again. In the absence of the alleged domination and control by the Trust Company over either the Belt or Air Line corporations, the facts alleged in paragraph 26, even if true, would not constitute a cause of action against the Trust Company, and then again the statute of limitations, plead in bar by defendant, would be effective, even if any such cause of action ever existed.

The finding of the master will be against the contention of the complainants and in favor of the defendant Trust Company as to the matters contained in this paragraph 26.

17. In paragraph 27 the complainants state that, in connection with the contract between the Belt Company and the Connecting Company, and as a part of the obligation assumed by the Belt Company to procure the right of way for the railroad of the Connecting Company, the Belt Company was caused by the Trust Company to purchase and acquire certain lands along the line of said railroad, in addition to the right of way, and to take the title thereto in
847 a corporation which the Trust Company caused to be organized under the laws of Missouri, called the "Northern Townsite Company", hereinafter referred to as the "Townsite Company"; that the Trust Company caused the Belt Company to advance to the Townsite Company, and also to advance for the purchase of lands which were conveyed to the Townsite Company, the sum of $46,463.75, and that all the lands now held by the Townsite Company were purchased with money so caused to be furnished by the Belt Company; that the greater portion of said lands still stands in the name of the Townsite Company, but portions thereof have been sold and the proceeds are now held by Edward F. Swinney, receiver of the Townsite Company and likewise receiver of the Belt Company; that the Trust Company furnished to the Townsite Company the sum of $6,288.57.

The complainants seek to have the properties now standing in the name of the Townsite Company conveyed to them, as the property of the Belt Company, and also to have the moneys arising from the sale of such lands turned over to them, together with all other assets of the Townsite Company, or to have a credit upon the Trust Company's statement for the amount of moneys so furnished by the Belt, with interest thereon from the dates they were furnished. A claim is also made for a commission collected by the Trust Company, amounting to $1,085.00, as being an unlawful and improper charge, by reason of the relation of the companies to each other.

In paragraphs 114 and 115 of its answer, defendant, in effect, denies that it dominated or controlled the Townsite Company, or that it caused the Belt Company to have the title to any of its lands taken in the name of the Townsite Company, and defendant says that whatever was done in respect to those matters between the Belt and the Townsite Companies was wholly for the convenience and accommodation of the Belt Company, and not for the benefit of the Trust Company.

The Townsite Company was incorporated under the laws of Missouri (Rec. 16-8483), the incorporation expenses, amounting to $314.82, having been advanced by the Trust Company and charged to the Belt Constructing.

For a full discussion of the Townsite matter, see Johnson's testimony (Rec. 16-5417-8599); for the property purchased, title to which was taken by the Townsite Company, see Johnson's testimony (Rec. 16-8443).

The Townsite Company and its receivers, by virtue of the sale of a portion of the land purchased, had on hand June 10,
848 1905, the sum of $1,056.48. It is the contention of the complainants that upon the payment to the Trust Company of $6,720.07, advanced by the Trust Company to the Townsite Company, they are entitled to have the property now standing in the name of the Townsite Company conveyed to them, and also to have the moneys in the hands of the Townsite Company or its receivers, arising from the sale or rentals of land, together with any other assets of the Townsite Company, growing out of the moneys furnished by the Belt, transferred to them.

The complainants, in their intervening petition in this case, have set up specifically some claim as to the lands, the title to which was vested in the Townsite Company, and the finding of the master in that matter will answer for his finding under this paragraph. So far as concerns the commission of $1,085.00, paid to the Trust Company, the master sees nothing in the relations of the Trust Company and the Belt and Townsite Companies which should preclude the former from charging and receiving said commission.

18. In paragraph 28 complainants seek to have an item of $2,054.50, with interest from November 19, 1891, eliminated from the Trust Company's statement of account against the Belt Company, or that a credit therefor should be allowed the Belt Company for such amount and interest.

The facts relating to this matter are somewhat complicated and, inasmuch as the item itself is clearly covered by the statute of limitations, the master will not go into any further examination of it.

19. In paragraph 29 it is charged that the Trust Company, on or about July 1st, 1898, caused the Belt Company to lease from the Second Improvement Company certain real estate mentioned therein, at a rental of $100.00 per month, and on the same day caused the Belt Company to lease said lands, so leased from said Improvement Company, to the Wells Fargo Express Company, for $25.00 per month; that said land was not necessary for the right of way or for the operation of the Belt Company; but, nevertheless, the Trust Company so dominated and controlled the Belt Company as to cause it to make the lease. Wherefore, the complainants seek to have the Trust Company's account credited with $1,350.00, the alleged loss to the Belt Company on account of such lease.

Inasmuch as it is not shown that the Trust Company dominated and controlled the Belt Company to the extent and in the manner alleged, the finding of the master will be the same upon this
849 item as upon others of like nature, that is, adverse to the claim of the complainants.

Prayer of the Bill.

20. The prayer of the complainants' second ancillary bill is to the effect;

(*a*) That an accounting be taken of the various transactions and dealings between the Trust Company and the Belt Company, or by the Trust Company for the benefit of and as trustee and agent for the Belt Company, and, that in taking such accounting, all claims and demands alleged to be held by the Trust Company against the Belt where the Trust Company used the Belt as an instrumentality or agency for its own benefit, be charged against the Trust Company, and that it be held liable for all loss incurred or claimed to have been incurred by the Belt Company;

(*b*) That the notes given by the Belt Company to the Trust Company be decreed to have been executed in a fraudulent manner and for fraudulent purposes and without consideration, and, that the same may be directed by the court to be surrendered up and canceled, and, further that each and all of the stocks and bonds and other securities delivered to the Trust Company in the manner recited in the bill may be ordered surrendered and delivered up to the Belt Company, or reassigned to it, and

(*c*) That all of the properties purchased with the money of the Belt Company and belonging in equity to it, the title to which is held in any other companies, may be required by the court's decree to be conveyed to the Belt Company, or its receiver for it.

In the Matter of the Claims of the KANSAS CITY SOUTHERN RAILWAY COMPANY in its Amended Intervening Petition.

I.

General Statement.

On February 27, 1905, during the taking of testimony in this cause, and nearly four and a half years after the receiver of the Kansas City Suburban Belt Railroad Company had filed the Ancillary Bill of Complaint herein, the Kansas City Southern Railway Company filed its Intervening Petition, the general purpose and scope of which was to take away from the Guardian Trust Company the collateral securities held by it to secure the alleged indebtedness against the Belt Company, upon the theory that the
850 properties so held as security were subject to the lien of the mortgage executed by said Belt Company, by virtue of the "after acquired property" clause, and the "grant, bargain and sell" clause in said mortgage; and, by reason of which, the Kansas City Southern Railway Company, as the purchaser of the Belt properties at the foreclosure sale, became the owner of the equitable right or title in and to all properties covered by the mortgage, to the same extent as if they had been in existence and specifically named in it when executed; hence the intervenor asserts its claim to be the

equitable owner of all said collateral securities as against all parties to this suit.

The intervening petition was filed, pursuant to a stipulation, permitting the Kansas City Southern Railway Company to become a party to this action, either as joint complainant or by bill of intervention, as it might elect, and further providing that the "testimony heretofore or hereafter taken in this cause, so far as applicable, may be considered as evidence in support of the claim or bill of the Kansas City Southern Railway Company, and in support of the claim of the adversary parties." Rec. Vol. 57-35055.

Thereafter, another stipulation, appearing in Rec. Vol. 57-35058, was filed May 1, 1905, in which it was agreed that an Amended Intervening Petition of the Kansas City Southern Railway Company might be filed, setting up, in addition to the matters contained in the intervening petition then on file, the intervenor's claim against the Guardian Trust Company for certain alleged breaches of trust by it, under the mortgage made to it and the Provident Life & Trust Company, as trustees, by the Union Terminal Railroad Company.

For the purpose of more convenient references, the various companies involved or concerned in the amended intervening petition, hereinafter referred to as the intervening petition, are as follows:

1. Kansas City Southern Railway Company, herein referred to as the Southern Company.

2. The Kansas City Suburban Belt Railroad Company, herein referred to as the Suburban Company.

3. Consolidated Terminal Railroad Company, herein referred to as the Consolidated Company.

4. The Union Terminal Railroad Company, herein referred to as the Union Company.

5. Kansas City & Independence Air Line, herein referred to as the Air Line.

851 6. Kansas City Suburban Belt Railroad Company, herein referred to as the Belt Company.

7. Kansas City & Northern Connecting Railroad Company, herein referred to as the Connecting Company.

8. Kansas City, Pittsburg & Gulf Railroad Company, herein referred to as the Gulf Company.

9. Missouri, Kansas & Texas Trust Company, later by change of name called the Guardian Trust Company, herein referred to as the Trust Company.

10. Central Improvement Company, herein referred to as the Central Company.

11. Fairmount Amusement Company, herein referred to as the Amusement Company.

12. Northern Townsite Company, herein referred to as the Townsite Company.

13. Cambria Steel Company, herein referred to as the Cambria Company.

14. Missouri Elevator & Terminal Company, herein referred to as the Elevator Company.

15. The Provident Life & Trust Company, herein referred to as the Provident Company.

In the building of the railroads belonging to the Suburban Belt, and its allied railroad companies, a mortgage was first placed upon the properties of each road, respectively, and providing, generally speaking, that the mortgage lien should cover the railroad constructed, and to be constructed and properties described in such mortgage, then owned or controlled by such road, and also such properties as should thereafter be acquired by it. The object being to secure the money required to build the roads from the sale of the bonds secured by the mortgage, it was important, as a protection to future bondholders, that the proceeds of the bond sales should be used for and go into the building of the respective railroads, or in the purchase and acquirement of properties connected with the building or operation thereof, or otherwise for the betterment of the railroad company, so as to thereby enhance in value the security for its bonds. In other words, that the properties then owned or possessed, as well as those thereafter to be acquired, should alike come under the lien of the mortgage by virtue of the "after acquired property" clause thereof, as the purchasers of the bonds were bound to know the contents of the mortgage securing the same,
852 and had the right to rely thereupon, and to claim all the benefits to be legitimately obtained by reason of its provisions.

In so far as they may be involved in this case, it may be generally stated that the mortgages executed by the Gulf Company, Consolidated Company, Union Company, Air Line, and Connecting Company, and in fact all the allied railroad companies, contain substantially the same clauses as to "after acquired property", as those found in the Belt mortgage, and whereever the meaning or effect of any particular clause is a controverted issue in the case, a more specific reference will be made to that clause.

The statements contained in paragraphs 1, 2, 3, and 4, of the intervening petition, as to the organization, general purposes and bonded indebtedness of the Belt, Consolidated, Air Line, Union and Gulf Companies, are in the main admitted in the answer filed by the Trust Company, and, hence, I shall not make needless references to the records as to such uncontroverted matters.

The Suburban Company, a corporation organized and existing under the laws of Missouri, on or about May 1, 1890, executed and delivered its deed of trust or mortgage to the Missouri, Kansas & Texas Trust Company, (now by change of name called the Guardian Trust Company, one of the defendants herein) as trustee, and in which it is recited that it shall be a "first mortgage and paramount lien upon said railroad and upon all the property and rights of property of the railroad company of every name, nature and description then held or that might thereafter be acquired including all the privileges and franchises thereto appertaining; that in and by said mortgage or deed of trust there was conveyed to said trustee, to secure an issue of the first mortgage bonds of said railroad company in the principal sum of One Million (1,000,000) Dollars, all

and singular the dougle track standard *guage* railroad of the company, (meaning thereby the Kansas City Suburban Belt Railroad Company), constructed and to be constructed from a point at the intersection of Second and Broadway Streets in Kansas City, in Jackson County, Missouri; thence in an easterly direction on and along said Second Street to its point of intersection with Harrison Street in said city; thence in a northeasterly direction to a point near Randolph Avenue in said city; thence east for a distance of about one and one-half miles; thence in a southeasterly and southerly direction to the southern limits of said city; thence in a general southwesterly direction to a point at or near the mouth of Brush Creek in said County of Jackson, being about twelve (12) miles of double track rail-
853 road, about ten (10) miles of which are within the corporate limits of Kansas City; also all the lands, tenements, easements and hereditaments acquired or appropriated or which shall be thereafter acquired or appropriated for the purpose of a right-of-way for said railroad, or for its tracks or switches; also all railroad tracks, railways, and rights-of-way, depot grounds, station grounds and other grounds, bridges, viaducts, culverts and other structures, depots, station houses, engine houses, car houses, fuel houses, warehouses, machine shop and other shops, water tanks, turn tables, superstructures, erections, fixtures, rolling stock, furniture, fuels, tools, implements, machinery and appliances and other facilities for maintaining and operating said railroad, as well such as are then owned or held by the company as also such as the company might thereafter construct or acquire for use in connection with its said railroad; also all the terminals, terminal rights, privileges, contracts, leases, connections and appliances which the company then owned and held and which it might thereafter own and hold for use in connection with its said railroad; also all of certain described lots, tracts and parcels of land situated in Kansas City, in the County of Jackson, State of Missouri, more specifically described in said mortgage or deed of trust; also all and singular the rents, tolls, income, issues and profits of the said railroad premises and property; and also all the estate, right, title and interest, legal and equitable and present and future of the company in and to the same and every part thereof; and also all the corporate and other rights, privileges, liberties and franchises of the company connected with or pertaining to the said railroad or the construction, acquisition, maintenance or use thereof as well those thereafter to be acquired as those then held."

The Consolidated Company, a Missouri corporation, on or about February 1, 1892, executed and delivered its deed of trust or mortgage to the Trust Company and the Provident Company, of Philadelphia, as trustees, to secure an issue of first mortgage bonds in the principal sum of $750,000.00, to be secured by a first mortgage upon its standard *guage* railroad and properties described therein, constructed and to be constructed from a point on the line of the Kansas City Suburban Belt Railroad, at or near the intersection of Grand Avenue and Second Street, in Kansas City, Missouri, in a westerly direction to a point on the State Line between the states of Missouri and Kansas, near the south bank of the Missouri River;

the provisions of which mortgage are substantially set forth in paragraph 2 of the intervening petition.

The Consolidated Company and the Suburban Company on or about July 25, 1892, entered into articles of consolidation
854 as authorized by, and in accordance with, the provisions of the Statutes of the State of Missouri, in such case made and provided, and the two companies thereby became consolidated, forming a new and separate corporation under the name of Kansas City Suburban Belt Railroad Company, herein referred to as the Belt Company, and thereby forming a continuous line of railroad, running in the same general direction.

The Air Line a Missouri corporation, on or about March 1, 1892, executed its deed of trust or mortgage to the Trust Company as trustee, to secure an issue of first mortgage bonds of the principal sum of $300,000.00, and to be secured by a first mortgage upon its standard gauge railroad, running from a point on the line of the Belt railroad to the City of Independence, and also upon certain properties therewith connected; the provisions of which mortgage are set fourth in paragraph 2 of the amended intervening petition.

Default was made in the payments, required in and by said Belt, Consolidated and Air Line mortgages, and, on September 6, 1900, the proper proceedings in foreclosure were instituted and had in the United States Circuit Court for the Western Division of the Western District of Missouri, the Trust Company being made a party to such proceedings, and all the above named foreclosure suits being consolidated, and, on November 6, 1901, a final decree of foreclosure and sale was entered in the consolidated suit. The properties there involved were thereupon sold, pursuant to said decree, to the Southern Company, which thereby became the purchaser of all the properties of said companies, included in or covered by their respective mortgages.

The Union Company, a railroad corporation organized and existing under the laws of the State of Kansas, and being about to construct and equip a line of railroad in Wyandotte County, Kansas, from the City of Argentine, so as to encircle the City of Kansas City, in said County of Wyandotte, and connect with the Kansas City Suburban Belt Railroad Company's railway at the State Line between Kansas and Missouri, on or near the south bank of the Missouri River, did, on or about February 1, 1893, execute and deliver its deed of trust for $2,000,000.00 to the Trust Company and the Provident Company, as trustees, the provisions of said mortgage being substantially set forth in paragraph 3 of the intervening petition. Default was made in the payments required by the terms of said mortgage, and, on September 6, 1900, such proper proceedings were instituted for the foreclosure thereof in the United States Circuit Court for the District of Kansas, that, upon November 6, 1901, a decree of foreclosure and sale was entered therein, and the
855 properties embraced in said mortgage were decreed to be sold. A sale was made pursuant to the decree, and the Southern Company became the purchaser thereunder. The Gulf Company, a Missouri corporation, on or about April 1, 1893, exe-

cuted and delivered its deed of trust or mortgage to the Trust Company and the State Trust Company of New York, as trustee, to secure the issuance of its first mortgage bonds in the principal sum of $23,000,000.00, the provisions of said mortgage being substantially stated in paragraph 4 of the intervening petition. Default was made in the payments, required by said mortgage, and, on April 28, 1899, proce-dings were instituted in the United States Circuit Court for the Western Division of the Western District of Missouri, for the foreclosure of said mortgage, which resulted in the rendition, on Febbruary 5, 1900, of a decree of foreclosure and sale, and, pursuant to which, the railroad properties and franchises of the Gulf Company were thereafter, on March 19, 1900, sold to the intervenor..

The Guardian Trust Company denies that, in the foregoing mortgage, it is recited that the same shall be paramount liens upon all the properties and rights of said railroad companies, respectively, of every name, nature and description, then held or that might thereafter be acquired; and said Trust Company states that suits for the foreclosure of all said mortgages were begun and prosecuted, and decrees entered therein, and foreclosure sales made thereunder, pursuant to and in accordance with the plan and scheme, and under the circumstances, described in the answer (meaning thereby the Reorganization plan and agreement under which it is claimed that the so-called Stilwell system of railroads was foreclosed and purchased by the Southern Company).

In paragraph 5 of the intervening petition, the intervenor charges that the Trust Company, in the year 1887, conceived and entered upon the plan and purpose to cause to be constructed a number of railroads in and about Kansas City, Missouri, and Kansas City, Kansas, and that it was a part of said plan and purpose to cause said railroads to be built, constructed and operated by various corporations to be organized by the Trust Company, and to elect certain of the officers, agents and representatives of the Trust Company as officers and directors of the several railroad companies, so as at all times to absolutely dominate and control the corporate action of said railroad companies through their common directors and officers; that it was also a part of the Trust Company's plan and purpose to utilize and employ one or more of said railroad companies to act for the Trust Company in building and operating railroads, so as
856 to benefit the Trust Company in the issuance of the railroad stock and bonds, and gather to it all the profits and other advantages accruing therefrom, and leaving all the losses, burdens or other liablities to be borne by the railroad company. It is charged by the intervenor that, in carrying out said plans and purposes, the Trust Company assumed the duty and position of trustee and agent in constructing and operating said railroads, and in managing and disposing of their stocks, bonds and other assets, and that the Trust Company was and is held to the liability of trustee for the use and benefit of all parties who might and did become interested or concerned in any of such transactions, wherefore, the intervenor, charged that the relation of the Trust Company to said railroads so used for its purposes, was that of a principal bound and charged

with the duty to indemnify and protect such railroad company, so employed and utilized in any particular transaction, against any and all losses, burdens and liability arising in the premises." The intervenor also charged that the Trust Company was, as between itself and the Provident Company, its co-trustee, the active trustee in charge and management of the trust created by the several mortgages or deeds of trust, and that as such trustee it owed an active duty at all times to care for and protect the interest of the bondholders secured by the mortgages, as well as to care for and protect the interest of the mortgagors themselves. The intervenor charges in substance that, in pursuance of the aforesaid plans and purposes, the Trust Company acquired the control of the Suburban Company in 1899, and caused it to issue its stock and bonds, and to construct and operate its railroad, and that the Trust Company also caused the incorporation of the Consolidated Company, the Union Company, Air Line, and Gulf Company, and the consolidation of the Suburban and Consolidated Companies into the Belt Company, and the issuance of their stocks and bonds, and the construction and operation of their railroads, respectively, and, also caused the Union Company to execute a lease of all property, rights and franchises to the Belt Company, and thereunder the Belt Company, to operate the Union line in connection with the Belt road until the foreclosures, and, also caused the Gulf Company to enter into contracts with the Belt Company for the use of the latter's terminals at Kansas City.

The intervenor further charges that the Trust Company, by virtue of its ownership and control of the capital stock of the Belt Air Line and Union Companies, did at all times cause its officers and directors to be elected as the officers and directors of said lines, and, also, that it caused its officers and directors to be elected as officers and directors of the Gulf Company, and did thereby dominate and control [*and*] affairs and business of all said railroad companies, and caused them, and each of them, "to do and perform all such corporate acts and things as the Trust Company, from time to time, deemed to be beneficial to its own interests."

857

The Trust Company, in paragraph 5 of its answer, denies all the averments in paragraph 5 of the intervening petition and alleges that all said railroad companies were "managed and controlled by directors and officers, freely and voluntarily elected by the stockholders thereof in the usual and ordinary manner."

It is not deemed necessary to here [*made*] detailed reference to the remaining paragraphs of the intervening petition, in as much as the controverted items in each paragraph are hereinafter, under appropriate headings, separately examined and reported upon. In a general way, however, it may be stated that paragraphs 6, 7, 8, 9, 10, 11 and 12, relate to certain securities and properties, claimed to be held by the Trust Company as collateral to and for its alleged Belt indebtedness, that is,

Paragraph 6 is in respect to Central Company stock, or the lands claimed to be represented by such stock;

Paragraph 7 is as to certain steel rails and fastenings, or their value;

Paragraph 8 pertains to Union Company and Air Line stocks, or their values;

Paragraph 9 relates to Connecting Company stocks and bonds or their value;

Paragraph 10 has reference to a terminal contract claim of $133,000.00 against the Gulf Company, and assigned by Belt Company to the Trust Company;

Paragraph 11 concerns Townsite Company stock, or the conveyance of Townsite Company properties;

Paragraph 12 is in regard to the alleged misconduct of the Trust Company in obtaining the securities therein described on account of Belt indebtedness;

Paragraph 13 is as to alleged breach of trust of the Trust Company as trustee, in connection with Union Company affairs, and, wherein is claimed the sum of $773,246.00 and interest.

Paragraph 14 is concerning the question of the Cambria claims being subordinated to those of the intervenar.

858 The Trust Company denies any liability whatever to the intervenor on account of any of the claims set out in the intervening petition, for the following, among other, reasons, briefly stated:

1. That the properties claimed b ythe intervenors are not now and were never subject to the mortgage liens, as contended by intervenor's counsel.

2. That if the intervenor's claims were ever good, they were barred by the statute of limitations, when presented in this cause, and are now so barred.

3. That the intervenor has been guilty of such laches in the presentation and prosecution of its alleged claims as to prelude or estop it from asserting and prosecuting the same in this cause.

4. That the intervenor, either by consolidation with the Belt, statutory or de facto, or by assumption, express or implied, under the provisions of the Reorganization Plan, (by which the Gulf, Belt and other allied railroads were acquired by the Southern Company—) or otherwise, has become liable to the Trust Company for the Belt indebtedness to it, and for that reason is not entitled to the properties pledged to the Trust Company in trust, until it pays to the Trust Company the debt secured by these collaterals.

II.

Authorities on After Acquired Property.

In order to economize the time and lessen the labor of the court in the consideration of the questions for determination in the intervening petition, the Master has made somewhat extended references to the adjudications, applicable to the legal propositions, submitted by counsel.

It will be readily understood from the pleadings, that the principal issue is in respect to what properties, if any, of those in dispute are within the "after-acquired property" clause of the Belt mortgage, and, in consideration thereof, the cases herein enumerated

will be, perhaps of some service to the Court. Following these authorities, an investigation of each disputed item of property has been made, and a conclusion reached as to whether, under the law and facts of each transaction, the intervenor has any legal or equitable claim to the property, and, if so, the nature of such claim.

In Central Trust Co. v. Kneeland, 138 U. S., 414, Mr. Justice Brewer said:

859 "The first mortgage had the "after-acquired property" clause in it. It is settled that such a clause is valid, and that thereby the mortgage covers not only property then owned by the railroad company, but becomes a lien upon all property subsequently acquired by it which comes within the description in the mortgage. Pennock v. Coe, 64 U. S., 23 How., 117 (16:436); Dunham v. Cincinnatio, P. & C. R. Co., 68 U. S., 1 Wall., 254 (17:584); Galveston H. & H. R. Co. v. Cowdry 78 U. S., 11 Wall., 459 (20:199); Thompson v. Whitewater Valley R. Co.; 132 U. S., 68 (33:256). And this is true, not only as to property to which it acquires the legal title, but also as to that to which it acquired only a full equitable title. Toledo, D. & B. R. Co. v. Hamilton, 134 U. S., 296 (33:905)."

Again:

"So far as the property standing in the name of Ballou is concerned, he was the financial agent of the mortgagor, the Toledo, Delphos & Burlington Railroad Company, and while he took title to some properties in his own name, the purchase was made with moneys of the mortgagor. Hence while he held the legal title, the full equitable title was in the railroad company, and that property became, therefore, in equity, subject to the lien of the first mortgage * * * All that part whose title was taken in the name of Ballou was paid for by the funds of the Toledo, Delphos & Burlington Railroad Company, and therefore it had the full equitable title, and he had only the naked legal title in trust for its benefit * * * So, whatever may have been the secret thought and scheme of the parties controlling the management of these railroad companies, we are of the opinion that the various properties included in the right of way and terminal facilities became, in fact, subjected to the lien of the two mortgages of January and June, 1880, executed by the Toledo, Delphos and Burlington Railroad Company."

In Wade v. Chicago, etc., R. Co. 149 U. S., 327, the court say at page 341:

"The after-acquired clause" in the mortgage of the Chicago Springfield and St. Louis Railroad Company, under the decisions of this court, covers all acquisitions made to the property either by the Con-struction Company or others acquiring rights, under it. * * * In this latter case (Central Trust Co. v. Kneeland, supra) it was held that the "after-acquired property" clause of a mortgage will cover not only the legal acquisitions, but all equitable rights and interests subsequently acquired by or for the mortgagor."

860 In Toledo etc. R. Co. v. Hamilton, 134 U. S., 296, the Court say at page 305:

"In the case at bar, as appears from the testimony and the decree, only the naked legal title remained in Ballou; the full equitable title was in the railroad company—and in that company before the contracts were entered into. The railroad company had the same title when it made the contracts that it had when the work was done and the decree rendered. Hamilton's contracts were with the railroad company, and of course gave a lien upon the lands only to the extent of the title that the railroad company had. The mortgage being one with words of general description, conveyed land held by a full equitable, as well as that held by a legal title."

In Augusta etc., R. Co. v. Kittel, 52 Fed. Rep., 63, it appears that the State of Florida granted to the Railroad Company certain lands, which amounted to quite an extensive tract: To secure a certain indebtedness of the Railroad Company, a mortgage was executed in favor of Kittel. In considering the effect of the mortgage, the Circuit Court of Appeals for the Fifth Circuit say:

"In our opinion, if the company had not a legal title to the lands mortgaged it had a full equitable title. The language of the mortgages, in the granting part, is full and complete, conveying any and all interest of the railroad company in the land, and passed whatever title the railroad company had. It was sufficient to mortgage land held by a full equitable title, as well as that held by a legal title."

In Pere Marquette Railroad Co. v. Graham, 99 N. W. Rep. 408 (Mich.) the court hold:

"A mortgage by a railroad company, covering its present and after acquired property, described the property as the company's railroad, located and to be constructed, and all lands and depot grounds, purchased or to be purchased, and all property acquired under the authority of its franchises now in possession or thereafter to be acquired, and including all the appurtenances and appendages of the railroad and the property of the company. Held, that, as against a stranger, the mortgage included an after acquired city lot adjacent to the company's main line, and adapted to use in its business, and hence the deed on foreclosure of the mortgage, describing the property in substantially the language of the mortgage, conveyed the lot."

Again:

861 "That the purpose of this broad language was to include all the after-acquired property which the railroad company should see fit to acquire, having any relation to the business of the corporation, is, we think, perfectly manifest. That this property, being adjacent to the main line of the company, was adapted to use in its business, is, we think, also manifest."

In Columbia Finance & Trust Co. v. Kentucky etc. Railway Co., 60 Fed. Rep. 794, it is held:

"A railroad mortgage covering, among other things, "all the corporate rights, privileges, franchises, and immunities, and all things in action, contracts, claims, and demands of the said party of the first part, whether now owned or hereafter acquired in connection or relating to said railroad", is sufficient to include a subsequently ac-

quired lease of a belt railway whereby the company acquired access to a city at one of its terminals."

In Brady v. Johnson, 26 Atl. Rep., 49, the court say:

"For it is now well settled that a mortgage with the after acquired property clause in it embraces and creates a charge upon all property subsequently acquired by the mortgagor, which comes within the description of the mortgage; and this is not only as to property to which the mortgagor acquires the legal title, but also as to that to which it acquired only an equitable title." Trust Co. v. Kneeland, 138 U. S., 414, 419; Railroad Co. v. Hamilton, 134 U. S., 296.

In Knevels v. Florida etc. Railroad Co., 66 Fed. Rep. 224, 23 U. S. App., 549, the disposition of courts in construing the afteracquired "property clause in a railroad mortgage, is illustrated, where it is held:

"The general term "railroad", as ordinarily used, includes many kinds of property, both real and personal, and cannot with any degree of propriety be confined to the track or the land simply necessary to lay the track upon. It is not necessary to consider whether the land can pass as appurtenant to the land, for it is unquestionable that land may pass as appurtenant to a railroad. It is claimed that nothing can be appurtenant to the railroad unless it is necessary for its operation. Here the term "necessary" may be used with several significations and limitations, and we do not consider that its most restricted and confined use should be accepted in this connection. It can at no time be claimed that a strip of land
862 one hundred feet wide, or two hundred feet wide, as is frequently granted by charter, is absolutely necessary for the laying of a track and the operation of a railroad, and yet it is considered that it is reasonably necessary and appurtenant to the railroad, and it all passes with it.

A careful examination of the numerous authorities cited satisfies us that any piece of land that may be considered reasonably necessary for the present operations of the road, or for the contemplated and prospective extensions or improvements, and that is held for that purpose, may within the scope of the decisions be held to appertain to a railroad."

Again:

"These lots were partly paid for with funds thus procured. Even in the absence of a positive lien a court of equity might well hold them subject to an equitable lien in favor of the holder of the bonds whose money could be traced to them."

In McGourkey v. The Toledo & Ohio Central Railway Co., 146 U. S. 536, the syllabus is as follows:

"The future acquired property clause of a railway mortgage attaches only to such property as the company owns, or may thereafter acquire, subject to any liens under which it comes into the possession of the company.

If, however, the property though nominally leased by the railway company, was acquired under an arrangement which amounted in law to a purchase by it, the mortgagee of the company, or a purchaser at the foreclosure sale, may insist that the railway thereby ac-

quired the title to the property, and that it had become subject to the lien of the mortgage.

Any arrangement by which directors of a corporation become interested adversely to such corporation in contracts with it, or organize or take stock in companies or associations for the purpose of entering into contracts with the corporation, or become parties to any undertaking to secure to themselves a share in the profits of any transactions to which the corporation is also a party, is voidable at the election of the corporation or by the party whose rights were sacrificed."

In Galveston Railway Co. v. Cowdry, 11 Wall. (U. S.), 459, it is held:

"A railroad mortgage as against the company and its privies although given before the road was built, attaches itself thereto, as fast as it is built, and to all property covered by its terms, as
863 fast as it comes into existence as property of the company."

In Omaha etc. Railway Co. v. Wabash etc. Railway Co., 108 Mo., 298, the court say:

"From the foregoing statement, it will be seen the important question here is whether the mortgage from the St. Louis, Kansas City and Northern Railway Company to the United States Trust Co. dated the fifteenth of February, 1879, covered this after-acquired real estate. That mortgage contains an after-acquired property clause; and it must be taken as well settled law that such a clause is valid as to subsequently acquired property, real or personal. Fenwick v. Coe, 23 How., 117; Dunham, v. Railroad, 1 Wall., 254; Thompson v. Kneeland, 138 U. S., 414. The case last cited shows that this is true as to property to which the company acquires the equitable title as well as to that to which it acquires the legal title.

The real question, therefore, is whether this property is fairly embraced within the terms of the mortgage. The mortgage covers the entire line of road between the designated points "as said railroad now is or may be hereafter, constructed, maintained, operated, or acquired, together with all the privileges, rights, franchises, real estate, right of way, depots, depot-grounds, side-tracks, water tanks, engines, cars, and other appurtenances thereto belonging." The question to be determined does not depend upon the technical meaning of the word "appurtenances" as seems to be argued by counsel for defendants. The mortgage in clear terms includes "after-acquired real estate", and these words cannot be confined to such real estate as may be used for right of way, depot grounds, side-tracks, and tanks. They do not, of course, mean, or include, real property not used in connection with the road, but they do mean any real estate acquired for use in the operation of the railroad proper. Now, it is to be remembered that Stanberry was the end of the division, and there was no hotel or boarding house at that place. Under these circumstances the property was purchased and the hotel erected for these purposes; namely, first, for an eating house; second, to accommodate the employes of the company, and, third, to accommodate passengers and other persons. Had this hotel been erected on the right of way or depot grounds though such grounds

were acquired after the date of the mortgage, it seems to us there can be no doubt but it would become subject to the mortgage. The circumstances that it is separated from the passenger depot
864 and right of way by a street, is immaterial, the property being convenient and suitable for the designated purposes. As has been said the property was purchased and the building erected, not as an independent speculation, but as an incident and aid in operating the railroad. Surely the company could, as a legitimate part of its operations, provide an eating house, and could provide accommodations for its employes, there being no hotel or boarding house at the place. Grounds obtained and a structure erected for such purposes would be part of the property of the company owned and used in the operation of the road. The addition of the ordinary hotel feature, does not make it an independent outside enterprise. In our opinion this property is part and parcel of the railroad property, and is covered by the mortgage. This is the conclusion reached by the Circuit Court of the United States for the Southern District of Iowa, for that court ordered the moneys arising from the insurance on the building paid over to the receiver, who represented the first mortgage creditors. 32 Fed. Rep. 480.

The chief question in this and like cases is, whether the parties to the mortgage intended that the after acquired property, the subject of the litigation, should be subject to the lien of the mortgage. 1 Jones on Mortgages (4 Ed.) Sec. 153. That the parties intended all such property as this should come under and subject to the mortgage is, we think, clear and beyond doubt; for the mortgage professes to convey every part and parcel of the line of railroad and all real estate then or thereafter acquired and thereto belonging.

The defendants press upon our attention Humphreys v. McKissock, Receiver, 140 U. S., 304. That controversy arose out of the mortgage now in question. There the mortgagor, by its new name of the Wabash, St. Louis, and Pacific Railway Company, and other railroad companies, subscribed for stock in the Union Elevator Company at Council Bluffs; and the question was whether the mortgage now in question covered that stock or any interest in the elevator property. It seems the trial court held that it did, but the Supreme Court of the United States reversed the judgment. In doing so it was held: First that the elevator company and railroad company were separate corporations, that the railroad company was simply a stockholder in the elevator company and had no interest in the property of that corporation which it could transfer or mortgage; second, that the stock held by the railroad company in the elevator company was not an "appurtenance" to the railroad property, and, hence, was not covered by the mortgage to the United States Trust Company. That case is wholly unlike the one now on
865 hand, as must be apparent from this statement. The present controversy does not turn upon any proposition of law involved in that case, and that case is therefore inapplicable to the one in hand.

As we hold the mortgage attached to the property now in question,

the other questions discussed in the briefs become immaterial and out of the case. The judgment is therefore affirmed."

In United States Trust Co. of New York v. Wabash etc. Ry. Co., 32 Fed., 480, the syllabus is as follows:

"The St. Louis, Kansas City & Northern Railway Company executed a mortgage to the United States Trust Company, covering the line from Pattonsburg, Missouri, to Council Bluffs, Iowa, "as said road is or may be hereafter constructed, maintained, operated, or acquired, together with all privileges, rights, franchises, real estate, right of way, depots, depot-grounds, side-tracks, water-tanks, engines, cars, and other appurtenances thereto belonging." Subsequently the line to Council Bluffs became part of the Wabash System being known as the "Omaha Division". After the consolidation the Wabash Company purchased a lot in Stanberry, Missouri, and built a hotel thereon to afford accommodation for their employes and passengers. The title to the lot was taken in the name of a trustee, in order that the company might sell the hotel if proper arrangements could be made, and to prevent the mortgage from becoming a lien on the property. The trustee in the mortgage had no knowledge of this arrangement. The receivers of the Wabash System, who had been previously appointed, insured all the property in their hands including the hotel, for the benefit of all parties interested therein. The hotel was leased and kept for the benefit not only of the employes and passengers of the Wabash System, but of all persons desiring to stop thereat, until it was entirely destroyed by fire. After the fire, a receiver of the Omaha division was appointed and the receivers of the Wabash system turned over to him said division, and the property appurtenant thereo. Held, that the hotel was to be deemed appurtenant to the railway, and that the insurance thereon was payable to the receiver of the Omaha division for the benefit of the mortgagees holding under the mortgage, and not to the receivers of the Wabash system, representing the general creditors of the Wabash, St. Louis and Pacific Railroad Company."

In Harris v. Youngstown Bridge Co., 90 Fed. Rep., 322, the court say:

"It is well settled, since the decision of the Supreme Court of the United States in Pennock v. Coe, 23 How., 117, that one may
866 execute a mortgage, valid at least in equity, upon property not in existence or not owned by him, the lien of which will immediately attach to the property when it shall come into existence, or become the property of the mortgagor, and this whether the title of the mortgagor is legal or equitable. The rule has been applied both to real and to personal property. Dunham v. Railway Co., 1 Wall., 254, 266; Railroad Co. v. Coudrey, 11 Wall., 459, 481; U. S. v. New Orleans R. R., 12 Wall, 362; Dillon v. Barnard, 21 Wall., 430, 440; Fosdick v. Schall, 99 U. S., 235, 251; Myer v. Car Co., 102 U. S., 1; Porter v. Steel Co., 122 U. S., 267, 283; 7 Sup. Ct., 1206; Thompson v. Railroad Co., 132 U. S., 68, 74, 10 Sup. Ct., 29; Railroad Co. v. Hamilton, 134 U. S., 414, 423, 11 Sup. Ct., 357; McGourkey v. Railway Co., 146 U. S., 536, 567, 13 Sup. Ct., 170;

Wade v. Railroad Co., 149 U. S. 327, 341, 13 Sup. Ct., 892; Irrigation Co. v. Garland, 164 U. S., 1, 17 Sup. Ct., 7."

In Contracting & Building Co. of Kentucky, v. Continental Trust Co. of N. Y., 108 Fed. Rep., 1, the court say:

"It is too obvious for discussion that the arrangement under which the railroad company acquired the ten locomotives in question was no ordinary letting of property for a fixed rental, and that no such thing was really contemplated, and that the retention of title was intended as a mere mode of securing the payment of the purchase price. The real character of such transactions has been often the subject of judicial construction, and their rank in relation to the claim of creditors, considered with reference to the registry laws of the states within which the property is situated. Hervey v. Locomotive Works, 93 U. S., 664, 23 L. Ed., 1003; Heryford v. Davis, 102 U. S., 235, 26 L. Ed., 160; McGourkey v. Railroad Co., 146 U. S., 536, 13 Sup. Ct., 170, 36 L. Ed., 1079. The real transaction was a bargain and sale, the title being retained as security for the purchase money. Being property susceptible of separate ownership, and separate liens, it passed under the after acquired property clause of the existing mortgage, subject to the lien of the vendor; the existing mortgages not being purchasers for value in respect of such after-acquired property. Harris v. Bridge Co., 33 C. C. A., 69, 90 Fed., 322; U. S. v. New Orleans R. R., 12 Wall., 362, 20 L. Ed. 434; Myer v. Car Co., 102 U. S., 1, 26 L. Ed., 59; Fosdick v. Car Co., 99 U. S., 256, 25 L. Ed., 339; Kneeland v. Trust Co., 136 U. S., 89, 95, 10 Sup. Ct., 950, 34 L. Ed., 379. The lien thus acquired by the mortgagees could not be displaced by any subsequent agreement to which they were not parties. Evans v. Kister, 35 C. C. A., 28, 92 Fed., 828. It follows that the assignment of the so-called "lease contract" was unavailing, as against the antecedent mortgage lien."

867 In New England Water Works Co. v. Farmers' Loan & Trust Co., 136 Fed., 521, the second syllabus is as follows:

"A water company owning a plant and a franchise for supplying water to the inhabitants of a city executed a mortgage to secure an issue of bonds largely in excess of its then indebtedness, a part of which were to be retained by the trustees, and issued only when required for the extension of the plant. The mortgage covered the company's property and franchises, and all extensions and additions thereto, and all after-acquired property. The reserved bonds were issued on the sworn certificate of the officers that extensions were to be made, and a new pumping station, necessary to obtain a supply of pure water and to fulfill the company's contract obligations to the city, was built, and mains extended therefrom and connected with those of the company. Such station and mains were nominally constructed and owned by a second company controlled by the same stockholder, but the station was equipped with the engine from the old station, and they had no purpose or function except to supply water to the pipes of the original company. Held, that they constituted the extensions and additions contemplated and provided for by the mortgage, and came within its lien, as after-acquired property, without regard to

whether or not they were actually built with the proceeds of the bonds sold for the purpose."

Again the court says:

"Here, then, in a sentence, is the whole case: A mortgage on a necessarily expanding water works system—looking forward, as well as to the present, and contemplating that the new property, as fast as created, shall be drawn under the mortgage; a requirement that new property by created, constituting, in connection with the old property removed, the mouth and throat of the whole enterprise, and, finally, the actual creation of such new property, having no function other than to act as mouth and throat for the old. Can any one doubt that under such circumstances the new property, whatever may be the legal form given to it, is equitable but after-acquired property, within the meaning of the mortgage? Does not such a case, on its physical aspects alone, constitute a case of after-acquired property?

Thus viewed, we need not concern ourselves with the question whether the new station was actually built out of the bonds issued under the prior mortgages or not. It is enough that the mortgage bond issue contemplated just such extension."

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III.

Properties Pledged to the Trust Company as Security for the Belt Indebtedness; and as to the Title, Legal or Equitable, of the Southern Company in or to Such Securities.

From the intervening petition it is disclosed that the Southern Company's claim is founded upon the following two propositions:

First. That the appointment of the Trust Company as trustee in the Belt mortgage, and its acceptance of such trusteeship, created such a fiduciary relation between it, the Belt Company and the Belt bondholders as to place the Trust Company under a disability to accept or receive in pledge any of the Belt property as security for the Belt indebtedness to the Trust Company, and, further, that the Southern Company, as the purchaser at the Belt foreclosure sale, has succeeded to all the rights and liens of the Belt Company and its bondholders as to all properties included in or covered by the Belt mortgage, and for that reason, it is entitled to recover said properties in kind from the Trust Company, or their value, if they have been sold by the Trust Company.

Second. That, without regard to the existence of any such fiduciary relation between the Belt Company, its bondholders and the Trust Company, as would preclude the Trust Company's receiving the Belt properties in pledge, it appears from the provisions of the Belt mortgage that said properties were covered by the so-called after-acquired property clause thereof, and subject to the lien thereof; and hence it follows that in so receiving said property in pledge, the Trust Company diverted and took from the bondholders a part of their mortgage security, and, further, that this mortgage lien upon the pledged property was acquired by the Southern at the Belt fore-

closure sale, and, by reason thereof, the intervenor is entitled to enforce such lien against the Trust Company.

The Trust Company replies, in substance, to these propositions as follows:

First, that the Belt Company pledged the properties in controversy to the Trust Company long before any default had been made in the payment of the interest on the Belt Bonds, and that, until the Belt defaulted in its obligations under the mortgage, the Trust Company was merely a "dry or naked trustee" with no active duties to
869 perform, and, further, that its trusteeship imposed no such fiduciary relations as would prevent its extending credit to the Belt Company, and receiving security therefor, provided, of course, the property pledged was not included within the Belt mortgage.

Second, that the pledged properties were not of such nature as to come within the lien of the Belt mortgage.

Third, that more than five years before the filing of the intervening petition, the properties in dispute had been pledged to the Trust Company, and, for that reason, the intervenor's claim is barred by the statute of limitations.

Fourth, that there has been such laches in the prosecution of its claim that the intervenor is estopped to assert it in this cause.

Fifth, that the money loaned from time to time, by the Trust Company to the Belt Company, was used by it in the improvement construction and equipment of its road, in the payment of interest, and for its betterment generally, and such money having fed the security of the bondholders and thereby advantageous to them, that they and the Southern Company are both estopped to assert title to the properties pledged as security to and for such loans.

History of Transactions in Which Belt Securities Were Pledged.

1. In connection with the consideration of the duties and responsibilities of the trusteeship of the Trust Company, and its alleged disability in respect to receiving the disputed collateral securities from the Belt Company, it is essential that there should be a concise statement of the facts as to the history of the transactions, in which the securities in question were pledged by the Belt Company to the Trust Company, and the circumstances of such transactions, so as to better understand the claims of the parties interested in the controversy over the pledged properties.

An exhibit prepared by witness Willey, appearing in Vol. 1, at page 205 of the Record, sets forth in some detail the history of the Belt notes given to or held by the Trust Company, showing the dates and amounts of the original notes, and the collateral security pledged therefor, and which are as follows:

	Date original note.	Amount.	Collateral security pledged.
No. 1.	Sep. 23rd, 1898.	$25,000.00	50 first mortgage 5 per cent bonds K. C. & N. C. R. R. Co. Nos. 1129-78 with coupons of Jan. 1, 1900, and all subsequent coupons attached.
			50 Second Mortgage 5 per cent bonds K. C. & N. C. R. R. Co. Nos. 1176-90, with coupons of Jan. 1, 1900, and all subsequent coupons attached.
No. 2.	March 31, 1899.	50,000.00	2500 shares Union Terminal stock.
No. 3.	July 2nd, 1899.	50,000.00	2500 shares Union Terminal stock.
No. 4.	March 31, 1899.	50,000.00	2500 shares Union Terminal stock.
No. 5.	March 31, 1899.	50,000.00	2500 shares Union Terminal stock.
No. 6.	March 31, 1899.	50,000.00	2500 shares Union Terminal stock.
No. 7.	March 31, 1899.	50,000.00	2500 shares Union Terminal stock.
No. 8.	July 26, 1899.	203,900.00	4997 shares Union Terminal stock.
			4994 shares Air Line stock. 67 97/100 second mortgage 5 per cent bonds K. C. & N. C. R. R. Co., $1000 each. 25 shs. stock Fairmount Amusement Co. $100.00 each. 439 shs. stock Northern Townsite Co. $100.00 each. 1120 shs. stock Central Improvement Co. $100.00 each. 425 shs. stock Missouri Elevator & Terminal Co. $100.00 each.
No. 9.	Jan. 10, 1899.	50,000.00	125 first mortgage 5 per cent Northern Connecting bonds.
No. 10.	May 18, 1899.	15,000.00	42 first mortgage 5 per cent Northern Connecting bonds.
No 11.	June 9, 1899.	20,000.00	60 first mortgage 5 per cent Northern Connecting bonds.
No. 12.	Nov. 27, 1899.	24,500.00	63 first mortgage 5 per cent Northern Connecting bonds.

No. 13. June	29, 1899.	25,000.00	Secured by same collateral as Note No. 8 given above and 13,920 shares Northern R. R. Stock.
No. 14. July	19, 1899?	10,520.13	23 first mortgage 5 per cent Northern Connecting bonds.
No. 15. Sep.	21, 1899.	23,056.48	Secured by same collateral as Note No. 8, given above.
No. 16. Jan.	20, 1899.	13,600.00	34 first mortgage 5 per cent Northern Connecting bonds.

The foregoing tabulation shows the dates and amounts of the original notes, out of which arose, by renewals and readjustments, the notes now held by the Trust Company, and copies of which will be found in Vol. 11, p. 5807 et seq. of the Record. These notes are in the usual form of collateral notes, and contain the following provision: (Record 5812).

"And it is further agreed that the securities hereby pledged together with any that may be pledged thereafter, shall be applicable in like manner to secure the payment of any past or of any future obligations of the undersigned held by the holders of this obligation, and all such securities in their hands shall stand as one gen-
871 eral outstanding collateral security for the whole of said obligations, so that the deficiency in any one shall be made good from the collaterals for the rest."

The officers of the Belt Company were authorized to pledge said properties to and with the Trust Company, as appears, particularly, in the minutes of the meetings of March 31, 1899 (Vol. 52, Rec. 31420), July 20, 1899 (Vol. 52, p. 31425), and Feb. 1, 1900 (Vol. 52, p. 31429 to 31432). From the foregoing records, it appears that all the properties in dispute were pledged by the Belt to the Trust Company on or prior to July 20, 1899, with the exception of an item of 600 tons, more or less, of steel rails and fastenings, and, also, of an open account of approximately $133,000.00, due the Belt Company from the Gulf Company, and assigned to the Trust Company, and which last two items were pledged on February 1, 1900 (Vol. 52, p. 31429-31432). Hence it follows that all the properties in dispute were pledged to the Trust Company long prior to the default, on June 1, 1900, by the Belt Company in the payment of interest upon its mortgage bonds, and, on account of which, the bills for foreclosure of the mortgages were, on September 6, 1900, filed against the Belt Company and its constituent companies, by the Provident Company as sole trustee, the Trust Company having theretofore been removed as trustee by the Southern Company, which then held and controlled all the Belt bonds, and such right of removal being expressly given in the Belt mortgage.

Trust Company's Knowledge of Gulf Company's Insolvency.

2. Counsel for the Southern Company contend, however, that the circumstances under which the Trust Company obtained its collat-

eral securities for the Belt indebtedness were such, in connection with its trusteeship, as to debar its holding the same as against the Southern Company. The facts specially relied upon in support of such contention, are in respect to the knowledge of the officers of the Trust Company of the insolvency of the Gulf Company, the probable foreclosure and sale of its properties, and the disastrous effect thereof upon the Belt Company, on account of the intimate relationship then existing between the managements, operations and interests of the two companies.

It is not disputed that the Gulf Company was insolvent on April 1, 1899, having on that day defaulted in the payment of its semi-annual interest then due, and by reason of which its railroad and properties were placed in the hands of receivers appointed by the Circuit Court of Jackson County, Missouri, and that subsequently on April 28, 1899, upon bill filed by the Trust Company, receivers were appointed in the United States Circuit Court for the Western
872 Division of the Western District of Missouri, and the suit theretofore pending in the State court was then dismissed.

It may be taken as proven, by the proofs in the record, that the Trust Company, through its managing officers knew, prior to April 1, 1899, that the Gulf Company would default in its interest, that receivers would be appointed for it that the then proposed reorganization plan would most probably be adopted, and that the appointment of the Gulf receivers would likely mean that the Trust Company would not thereafter be as potential in the affairs of the Belt Company as it had formerly been. "Wilcox's testimony, Rec. Vol. 34, 18108, 18111; Nolthenius, Vol. 49, 30248; E. L. Martin, Vol. 55, p. 33800, Vol. 21, 13312, Vol. 11, 5704). Wilcox, Nolthenius and Martin were directors of the Trust Company. Martin was also 2nd Vice-president of the Trust Company and was one of the receivers appointed by the Jackson County Circuit Court, Robert Gillham and J. McD. Trimble being the other two joint receivers. (Vol. 21-13312.)

Wilcox states that, *on* or about the time of the Gulf receivership, it was the plan of the Trust Company to get possession of all the personal property of the Belt Company, and to eliminate from its books long and questionable or slow accounts, and that, in accordance with instructions from Stilwell, he got from the Belt Company all its available securities, and, he further states that the assignment and transfer of personal property by the Belt Company to the Trust Company, as shown by the Belt minutes of July 20, and September 30, 1899, and February 1, 1900, was a part of the Trust Company's plan to get whatever the Belt Company had in the way of securities in order to secure the Trust Company's claim against the Belt, and that this action was taken in view of the probable loss of the controlling influence of the Trust Company in Belt Company matters, by reason of the reorganization plan going through, and the Belt Company and its allied companies passing beyond the alleged control of the Trust Company. (Vol. 34-18108-18111).

E. L. Martin stated that, at the Belt directors' meeting of February 1, 1900, everything was taken from the Belt Company that it

could spare, and transferred to the Trust Company, that is, everything that would not interfere with the Belt Company's operations, except some accounts amounting to $50,000.00, which, if taken, would have left the Belt Company without current funds for the operation of its road, and would have crippled it. He also stated that Chadbourne, Vice-President of the Trust Company, demanded that the Belt Company secure its large indebtedness to the Trust
873 Company, that the officers of the Belt considered the debts just and thought it was best to give the securities to protect the Trust Company from loss. Mr. Martin further stated that the indebtedness to the Trust Company at that time was something like $500,000.00 the greater part of which having been incurred on account of the contract, entered into by the Belt for the construction of the Connecting railroad, and that the total debts of the Belt Company were approximately $900,000.00, but that he did not recollect of any securities having been turned over to the other Belt creditors, at that time. (Vol. 53, p. 32816; Vol. 55, p. 33676-33682).

Counsel for the Southern Company have called special attention to the proceedings of the Belt directors' meetings of March 31, 1899, July 20, 1899, September 30, 1899, and February 1st, 1900, for the purpose of showing that the officers of the Trust Company knew of the condition of Belt affairs, and, also, that Stilwell influenced the actions of the Belt Directors.

On March 31, 1899, the day preceding the appointment of the Gulf receivers, Martin and Stilwell being present at a meeting of the Belt directors, (Rec. 52-31420 to 31422) the Belt Company gave to the Trust Company $360,000.00 in promissory notes, secured by 10,500 shares of the capital stock of the Union Terminal Company; and on July 20, 1899, as shown by minutes of Belt directors' meeting (Rec. 52-31425 to 31427) the Trust Company secured from the Belt Company as collateral to the alleged Belt indebtedness to it, the following securities:

4998 shares Union Terminal stock;
4993 shares Air Line stock;
1120 shares Central Improvement Company stock;
439 shares Northern Townsite Company stock;
425 shares Missouri Elevator & Terminal Company stock;
25 shares Fairmount Amusement Company stock;
13,290 shares Connecting Company stock;
67.9 second mortgage bonds Connecting Company;
Also the right of the Belt Company to receive,
1815 additional shares of the Connecting Company stock,
207.5 additional second mortgage bonds of the Connecting Company.

On September 30, 1899, as shown by the minutes of the Belt directors' meeting, appearing in Rec. 52-31427, to 31429 the Belt Company sold to the Trust Company all of the stock of the Connecting Company then owned by the Belt, at $13.7 per share, to apply upon the alleged Belt indebtedness to the Trust Company.

874 On February 1, 1900, as shown by the Belt directors' minutes, Rec. 52-31429 to 31432, the Belt Company again turned

over to the Trust Company all of the above mentioned securities, to secure the Belt indebtedness to it, and, as additional security, transferred to the Trust Company, as hereinbefore stated, by bill of sale, 600 tons, more or less, of sixty pound steel rails, then owned by the Belt Company, and stored in its yards in East Kansas City, and, also, transferred and assigned to the Trust Company the Belt account for $133,058.00 against the Gulf Company.

In respect to the question of the effect of the acts of the Board of Directors and officers of the Belt Company, in transferring the Belt securities and personal property to the Trust Company, as shown by the foregoing minutes of Belt directors' meetings, it is not disputed that all the officers and directors of the Belt Company during the year 1899 and up until March, 1900, were officers, directors or employees of the Trust Company, excepting A. F. Nathan, who was a Belt director, and A. L. Howe, director and assistant treasurer of the Belt Company, and Neal S. Doran, who, was a Belt Director.

In his report, in respect to the charges made against the Trust Company in the second Amended and Supplemental Ancillary Bill of Complaint, the Master has made an elaborate examination of the facts and law relied upon by the receiver of the Belt Company, and, also, incidentally by the Southern Company, (which is in effect the successor of the Belt), to show that the Trust Company, for its own selfish purposes, dominated and controlled the corporate acts of the Belt Company, to such extent that such acts became and were so unjust and inequitable that they should be absolutely avoided, or, if not set aside, then that they should be inquired into for the purpose of determining what would be right and just in each transaction in controversy. The conclusions there reached and stated on the question of the alleged domination and control of the Belt Company by the Trust Company, and the legal effect thereof in this cause will be and are applicable to the like issues raised and submitted by the Southern Company in its intervening petition. For the reasons hereofore stated, and for the purposes of this intervention, the finding of the Master will be and is against the "domination and control" theory of the intervenor, and in favor of the legality of the acts of the Belt directory in the different matters complained about in the petition, so far as they may be affected by the domination question, and that too, regardless of the dual officers of the Belt and Trust Companies, the commingling of corporate interests, and the
875 manifest powerful influence of Stilwell, which unquestionably permeated and in some measure, at least, directed, even if it did not control, the Belt Company and all the allied or auxiliary companies, which had been financed by the Trust Company; in other words, that, as to the transactions about which the intervenor complains, the findings of the Master are based on the voluntary action of the Belt directory along legitimate lines, in respect to such transactions, leaving open for determination the question of the legal right of the directory otherwise to pledge the Belt securities for the Belt indebtedness to the Trust Company, under the circumstances shown in the record.

As to its Trusteeship Disabling the Trust Company from Accepting Belt Securities in Pledge.

3. The intervenor contends, in substance, that, independently of every other question in this cause, theTrust Company as trustee in the Belt mortgage given to secure the bonds, to be used in the construction and equipment of the Belt railroad, undertook to perform the trust reposed in it and thereby became trustee for all the bondholders, and, that by reason of such trustee relation to the properties in controversy, it is estopped to hold any of the properties pledged as security for its own indebtedness; that, in its trustee capacity, the Trust Company assumed an obligation to care for and protect the interests and rights of every bond holder, and that its duties arose from the express terms of the mortgage and such implications therefrom, as the law itself creates; that, while acting as such trustee, and sustaining such trust relation to said properties and to the bondholders, the law will not permit the Trust Company to take or receive any of the Belt assets or properties and appropriate them as security for its own indebtedness; that the courts are so jealous, in guarding the interests of the beneficiaries, that they will not permit a trustee to accept an equivocal position, for otherwise the interest of the trustee and the beneficiary might conflict, and it would be offering a temptation to human weakness to put it in the power of the trustee to decide which of the two duties it will perform; and, further, that such disability of the trustee would exist whether the properties turned over were included in the mortgage or otherwise. Counsel, in support of intervenor's contention, have cited the case of King v. Remington, 29 N. W. Rep. 352, decided by the Supreme Court of Minnesota. In that case, King, owner of a large quantity of real estate, was largely indebted, beyond his ability to pay, without sacrificing his property. His wife also owned considerable real estate, and, on June 15, 1875, the two conveyed the greater part of their real estate to Remington by deeds absolute in terms. 876 At the same time, King and Remington executed an agreement, in writing, acknowledging the conveyance to have been made as security for advances to King, made and to be made by Remington, and containing provisions in respect to the future advances of money and credit, which Remington covenanted to make, and, from which the purpose of the transaction appears to have been to enable King, by means of the advances so to be made, to pay off his debt, and to save so much of his property as might remain after disposing of enough to reimburse Remington for all advances made and to be made, including interest and expenses. The contract gave to Remington peculiar powers with respect to the holding and disposition of the lands conveyed.

It was held that "this created such a relation of trust and confidence between the parties as disabled Remington to purchase under judgments or mortgages or bankruptcy proceedings, and held against King, and for his own benefit, property of King, whether included in the deeds executed as security or not."

That is to say, that Remington, having accepted his deed to cer-

tain specific property to be held by him as security for advances made and to be made to King, thereby assumed such trust relations to King and his property as to disable him from becoming a purchaser at any sale, execution sale or bankruptcy sale, of any property belonging to King, even though it was not the property included in the trust arrangement. As a reason for such ruling the court say:

"Of the main questions in the case, the first that occurs is, what was the character of the relations between the Kings and Remington created by the conveyances and contract of June 15, 1875? The appellants insist that those instruments created merely a mortgage with power to enforce the security by private sales of the lands, and that the relations between the parties was only that of mortgagors and mortgagee, with no other rights, duties, and disabilities than pertain to that relation. The respondents argue that they created a trust, and between the parties the relation of trustee and cestui que trust, they did vest a valid power in trust. As Remington's only right to the lands then conveyed was as security for his advances made and to be made, it would be immaterial whether the transaction was a mere mortgage, or a mortgage with a trust, or with a power in trust added, were it not for the acquiring by Remington of outstanding titles through execution and mortgage and bankruptcy sales, and the claim by appellants of the right to hold
877 them adversely to plaintiff; for, whether the transaction be as claimed by plaintiffs or defendant, there is, unless it had been cut off by the titles thus acquired, a right to call Remington to account for sales made. And this is, in substance, an action for accounting, and not one to enforce the performance of any supposed trust, or to test the validity of any act done under a supposed power in trust. But it is important to consider the character of the transaction far enough to ascertain whether it created such a relation between the parties as, according to the rules of equity jurisprudence, disable Remington to acquire and hold, against the Kings, title to the property.

The rule which disables one occupying a confidential or fiduciary relation, in respect to property the subject of a sale, from purchasing for his own benefit, and regarding him as a trustee if he do purchase, is absolute, and looks to no other facts than the relation and the purchaser. No fraud in fact need be shown by the cestui que trust, and no excuse will be heard from the trustees. The fact established, and the result inevitably follows. The rule is entirely independent of the fact whether any fraud has intervened. It is to avoid the necessity of any such inquiry that the rule takes so general a form. The general interests of society require it to be so, as no court is equal to the examination and ascertainment of the truth in much the greater number of cases. The rule stands on the moral obligation to refrain from placing one's self in relations which will ordinarily excite a conflict between self-interest and integrity. It seeks to remove the temptation that might arise out of such a relation to serve one's self interest at the expense of one's integrity and duty to another, by making it impossible to profit by yielding to the

temptation. Nor is the application of the rule confined to a particular class of persons; as guardians, solicitors, attorneys, etc. It applies universally, to all who come within its principles; which principle is that no party can be permitted to purchase an interest in property, and hold it for his own benefit, where he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account and for his individual use. The duty in relation to the property need not be a legal one, such as the law will enforce a performance of. If it be a moral duty, growing out of confidence and trust reposed by one and accepted by another, in business relations and transactions, it is enough."

As further illustrations of the application of this principle, counsel referred to the following cases:

878 In Ex parte James, 8 Ves. 337, and in Ex Parte Bennett, 10 Ves. 381, it was applied to a solicitor for a commission in bankruptcy in respect to a sale by the commission; In Poillon v. Martin, 1 Sandf. Ch. 589, to the clerk of an attorney conducting a sale of the property, in Duncomb v. New York, H. & N. R. Co., 84 N. Y. 190, to a director of a corporation purchasing its bonds; in Case v. Carroll, 35 N. Y. 385, to an attorney, who had been consulted by an owner of land, on which there was a mortgage then being foreclosed by suit, in respect how to obtain and use the mortgage to perfect her title. The attorney, having brought suit to foreclose the mortgage, conducted it to a foreclosure, and bid in the property, and the rule was held to apply; in Gardner v. Ogden, 22 N. Y. 327, to the clerk of a broker to sell real estate who had access to the correspondence between his principal and the vendor; in Ex parte Hughes, 6 Ves. 617, to a creditor of a bankrupt, he having been consulted as to the mode of sale by the assignee; in Fulton v. Whitney, 86 N. Y. 548, to the trustee of a fund created by will, purchasing at the foreclosure of a mortgage on real estate of the deceased (not part of the trust fund), as the deficiency on the foreclosure would be chargeable as a debt against the estate, and so might diminish the trust fund; in Oliver v. Court, 8 Price, 127, trustees to sell lands for payment of debts employed a land surveyor and auctioneer. He was assisted by his son, a land surveyor and auctioneer. The son acted as auctioneer at an attempt to sell the lands at auction, which failed for want of bidders, and he afterwards bought at private sale. It was held that the rule applied to him.

It is insisted by intervenor's counsel that in none of these cases was there any legal trust, or legal enforceable duty in respect to the property, the subject of the sale, the person in each case occupying a position, because of which more or less confidence and trust were reposed in him in respect to the property, or by means of which he may have acquired information, or possessed some advantage in relation to it, not common to others; and, further, that it is against good conscience that one, occupying such a position, should make a profit to himself by use of the information or advantage which the confidence reposed in him gives him, to the prejudice, perhaps of the person reposing such trust and confidence in him.

It is strongly urged that that doctrine is especially applicable to the Trust Company, not only by virtue of its trusteeship, but, also, because of its intimate knowledge of Belt affairs, and the close and friendly relations existing between the Belt and Trust Companies, and their respective managements.

879 The Master is unable to approve the Intervenor's contention in respect to the duties, responsibilities and obligations of the Trust Company, as applicable to the proofs in this cause, however correct the principles enunciated may be as to other trust relationships. It is true that the inter-relations of the Belt and Trust Companies were exceedingly intimate and of such character as not only to warrant, but, perhaps, to exact the most scrutinizing investigation of any questionable transactions between them, at the instance of any interested party; but, it is also true that the Trust Company, as the financial support of the Belt Company, advanced to it thousands of dollars, which were used for the betterment of Belt affairs, and it would seem that every consideration of good faith and common fairness would entitle the Trust Company to be secured for all its advancements, and to be reimbursed from the securities, provided, of course, that no paramount principle of law was violated in so doing. For the reasons, hereinafter stated, the Master is of the opinion that the Trust Company was under no such duty to the Belt bondholders as would prohibit it from taking collateral security to secure an indebtedness to it from the Belt Company, nor was there any express covenant in the mortgage creating such duty, nor was there any such duty by implication of law.

In Article III, of the Belt mortgage (Rec. Vol. 48-28932), it is provided that until default be made by the Belt Company, it should be suffered and permitted to possess, operate and enjoy the mortgaged property, and, further, that, in case of default in the payment of any of the obligations secured by it, the trustee should have the right to enter into possession and operate the mortgaged property and sell the same, and, upon such sale, to apply the proceeds in payment of the debt secured. The mortgage also contained the following further provision:

"And the trustee may be removed by a majority in interest of the holders of all said bonds hereby secured, in writing, under their hands and seals, or by a vote of a meeting duly held as herein provided."

It seems to be reasonably clear, from a careful reading of the mortgage provisions, that no active duties were by the mortgage required of or cast upon the trustees until a default had occurred, nor is there any covenant in the mortgage from which, by implication, any such active duties would devolve upon the trustee before such default. The Trust Company was not even authorized to collect interest on the bonds, the same being payable at the office of the Union Trust Company, in Philadelphia, Pa.

880 The authorities justify the contention of counsel for the Trust Company to the effect that until default the duties of a trustee in a railroad mortgage are merely nominal, and that there is no such fiduciary relationship between the trustee and the bond-

holders as will prevent the trustee from receiving in pledge, to secure its own indebtedness from the mortgagor, any property not included within the lien of the mortgage.

Commonwealth v. R. R. 122 Pa. State, 306.
Sturges v. Knapp, 31 Vt. 1.
Perry on Trusts, Sec. 749.
National Water Works Co. v. Kansas City, 78 Fed. at p. 433, per Brewer, Judge.
Gasquet v. Fidelity Trust Co., 75 Fed. 343.

In Commonwealth v. R. R. 122 Pa. State, 306, the court said:

"Until default is made in the payment of the bonds or the interest falling due upon them, the trustee has no active duties to perform, but is simply the repository of the title to the property mortgaged, in trust for the whole creditor class secured thereby. The actual possession of the franchises and the property remains in the railroad company, to enable it to discharge its duties to the public and earn an income from which to pay its liabilities. But when a default occurs, the duties of the trustee become active and important. He represents all the bondholders, and is under obligations to protect them so far as the property in his hands in trust for them will enable him to do so. If he neglects or refuses to move, any bondholder may proceed by bill, filed on behalf of himself and the other members of the class of creditors to which he belongs, to compel a sale of the mortgaged premises, a removal of the trustee, or such other relief as may be appropriate."

In National Water Works Company v. Kansas City, supra, Judge Brewer said:

"There are in existence certain trust companies, who are in the business of acting as trustees in mortgages, especially railroad mortgages. They are often trustees in successive mortgages from the same grantor, or from different corporations, having a common interest and control. Any question as to the extent of the notice which these trustees take of the transactions of their mortgagors, and the effect of such notice upon parties purchasing bonds from them, is of vast importance. * * * It must be borne in mind that the trustee was selected and the terms of the trust prescribed by
881 the mortgagor alone, and that, until after the bonds were negotiated, it was acting only as the latter's agent. It is true that, after the purchase of the bonds, the bondholders look to the trustee for the discharge of certain duties, but only such duties as it was promised to perform; and, to the extent that those duties inure to their benefit, they may properly hold it liable for any default therein. If, by the terms of a mortgage, neither the principal nor the interest is payable at the office of the trustee, or through its agency, the bondholders, after purchase, deal directly with the mortgagor, and generally only in case of default do they invoke action on the part of the trustee."

In the case of Gould v. R. R. 52 Fed. 680, Judge Caldwell said:

"The corporation is under the same obligation to pay a bona fide

debt due to one of its directors and stockholders that it is to pay a debt to a stranger, and security given for a debt due to a director and stockholder, is as valid as a security given to any other creditor."

In that case, it appears that four directors of the railroad company and in control of its affairs, caused the company to execute a deed of trust in their favor to secure certain individual advances made by them to the company. Thereupon, certain of the stockholders sought to have the deed of trust set aside on the ground that these directors stood in a fiduciary relation to the railroad company, and hence could not lawfully receive from it its property in pledge as security for their individual advances. The substance of Judge Caldwell's opinion is that if the indebtedness owing the directors was contracted in good faith, they had the right to take security therefor, though the corporation was insolvent at the time, and even though the effect of the transaction might be to give them priority over other creditors in the payment of their claims.

In respect to the retention by the corporation of the money which the directors had loaned to it, the court said:

"The attack upon the validity of the trust deed must fail upon another ground. Treating the directors as trustees, is not open to the company or any of its creditors to avoid the security given in pursuance of the direction of the stockholders, as well as the directors, so long as the company retains the money which was loaned in good faith, and actually appropriated to legitimate corporate uses.

The payment of the debt [*this*] contracted is an essential pre-
882 requisite to the avoidance of the deed of trust given to secure its payment. And, in the language of the Court of Appeals of New York, "this is true whether the pledge be taken for a present or precedent debt. In either case the equity to be regarded equally exists."

As to the Properties Pledged by the Belt with the Trust Company Being within the Lien of the Belt Mortgage.

4. The Belt mortgage, in its entirety, will be found in Rec. Vol. 48-28932, and the parts thereof descriptive of the properties intended to be covered by its provisions have already been stated herein. Article III of said mortgage is as follows:

"Until default shall be made by the company in the payment of the principal or interest of the said bonds hereby secured, or some one or more of them, or in the performance or observance of any of the covenants, stipulations or agreements herein required to be by it kept, performed or fulfilled, the company, its successor or successors, lessee or lessees, or assigns, shall be suffered and permitted to possess, operate and enjoy the said railroad, premises, property, appurtenances, rights, privileges, immunities and franchises heretofore mentioned, and to take and apply to its or their own use the tolls, incomes, revenue, rents, issues and profits thereof, and to dispose of the same in any manner not inconsistent with these presents or which shall not impair its ability, fully and promptly, to comply

with, perform and fulfill all the stipulations, covenants and agreements herein contained by it to be complied with, performed or fulfilled."

The properties pledged by the Belt to the Trust Company as security for the Belt indebtedness, are as follows:

19,927 shares of stock of Union Terminal R. R.
4,994 shares of stock of Air Line.
99 first mortage Northern Connecting bonds.
315 First mortgage Northern Connecting bonds.
15 second mortgage Northern Connecting bonds.
67.9 second mortgage Northern Connecting bonds.
13,920 shares of stock of Northern Connecting.
1,120 shares of stock of Central Improvement Company.
25 shares of stock of Fairmount Amusement Company.
439 shares of stock of Northern Townsite Company.
425 shares of stock of Mo. Elevator & T. Company.

An open account against Gulf Company for accrued switching charges in amount about $133,000.00, assigned by Belt Company to Trust Company.

In addition to these securities, the Belt Company, by its bill of sale of February 1, 1900, delivered to the Trust Company
883 600 tons, more or less, of steel rails and fastenings, which were subsequently sold by the Trust Company, and applied in part payment on the Belt indebtedness.

The foregoing list of pledged properties is compiled from promissory notes, given by the Belt to the Trust Company, containing a description of the collaterals, and which notes will be found in Rec. Vol. 2-5807 to 5827.

In support of the proposition that the "after acquired property" clause of the Belt mortgage covers the stocks and bonds of the Air Line, Union and Connecting Companies, the intervenor relies upon Section 1061, R. S. Mo. 1899, which in general terms provides for acquiring stocks and bonds of other companies as follows:

"Any railroad company, heretofore organized, or which may be hereafter organized, under the laws of this state, may extend its line of railroad beyond this state into or through any other state or territory, and may acquire any line of railroad, within or without this state, which shall form a continuous line with the road operated by such company by direct connection, or over any other line or lines constructed or to be constructed, and which such company shall have the right by contract or otherwise, when completed, to use or operate, and may acquire and may hold the obligations and stocks of other companies owning or operating any such lines of road."

The claim of counsel for intervenor, in respect to the applicability of this section to the question of the stocks and bonds of said railroad companies being covered by the terms of the Belt mortgage, may be summarized as in the following manner.

It is charged that this section gives to a railroad company the power to acquire the stocks and bonds of another railroad company when the two railroads form a connecting and continuous

line, and hence that, the power existed at the outset, on the part of the Suburban Company, if it had so desired, to have itself constructed the Air Line and the Consolidated railroads; that the Suburban Company had the corporate power to do so, and, if it had in fact constructed the lines of the Air Line, Consolidated and Union Companies, that then the physical properties of these roads would have come under the after acquired property clause of the Belt mortgage, the lien of which would have extended to and bound all the properties of these railroads, respectively; that, instead of actually constructing these railroads, the Suburban
884 Company took over all stock of the Union Terminal and Air Line, and thereafter operated both roads by virtue of its large stockholdings therein; that, in as much as the Belt Company was authorized by law to build these lines, or to acquire them by purchase, neither of which it did, but, it is claimed, on the contrary, arrived at the same object by purchasing the stocks of these companies and holding them, which, under the Missouri statutes, the Belt had the right to do, as the roads formed a connecting, continuous line, it follows that those stocks now stand in the place of the properties belonging to such railroad companies, and that a court of equity will look through and beyond the shares of stock, and fasten the lien of the mortgages upon the physical properties of those companies, whose stocks were so held by the Belt Company; and, finally, that the language of the Suburban Belt mortgage is broad enough to include the railroads and properties of the Belt, and that, whether the railroads are owned by having the title thereto actually conveyed to the Suburban Belt, or by virtue of the holding of its stock ownership in the other companies, would make no difference; in other words, that a court of equity will look beyond mere forms and get at the substance and that, for example, if the Belt Company owned all the capital stock of the Air Line, then in contemplation of law it would be the owner of the Air Line, so far as a court of equity is concerned.

The case of the New England Water Works Co. v. Farmers Loan & Trust Co., 136 Fed. Rep. 521, has been cited as showing that, where a second company is formed for the express purpose of doing certain things, which were part of the functions of the first or original company, then a court of equity will look beyond the corporate form of the second company, and fasten upon the property acquired by it the lien of the after acquired property clause of the mortgage of the original company. In the same way, it is contended that the lien of the Suburban Belt mortgage properly attaches to and fastens itself upon the stock of the other companies held by the Belt, and, further, that it was the intention of the parties, at the time the mortgage was made, to include other railroads, whether owned by the Suburban Belt by the conveyance to it of their physical properties, or by the ownership of their stock, or bonds, or both; and the fact that the Belt Company, because of its ownership of the stocks of the Air Line and Union Terminal, took upon itself the operation of these roads,

without any leases, or other authority, except its stock control, is referred to as sustaining intervenor's contention that these roads were considered as parts of the Belt System, and that by the construction thereby placed upon the transactions by the parties themselves, the Air Line and Union Companies were not re-
885 garded as distinct or separate companies, except for the purpose of issuing their securities, and that, after that was done, all distinction was apparently lost, and the Air Line and Terminal roads became practically parts of the Belt System; and, by way of suggestion, as tending in the same direction, reference was made to the original charter of the Suburban Company to show that it contemplated a railroad that should encircle the City of Kansas City, Missouri, and Kansas City, Kansas, and hence it is claimed that the incorporation of all these other companies was intended to carry out the original purpose for which the Belt was organized, and, also, that the construction of the Union Terminal road in Kansas was a part of the same general plan.

It is insisted that the same line of argument applies to the stock and bonds of the Connecting Company, whose railroad was really constructed through the instrumentality of the Belt Company, which was required to take its stocks and bonds in payment for the construction of the road, and that these stocks and bonds became charged with the lien of the after acquired property clause, since the statute gave the railroad company the right to own stocks and bonds of other companies, as above stated.

It is not otherwise contended by counsel for the Southern Company that the Belt mortgage in terms creates a lien on the stocks and bonds of these other companies, at least until such time as the Belt Company defaulted in the payment of its obligations, and possession had been taken by the trustee or other legal representative of the bondholders.

As to the railroads of the Union Company, Air Line and Belt Company being connecting railroads, and forming a continuous line of railroad with the Belt Company, see Wilcox's testimony (Rec. 34-18368), wherein he states that the Air Line, Union Company and Belt Company were connecting, and formed a continuous line of railroad, and that, as early as 1896, the Belt had acquired the stock of the Air Line and Union Company through exchange, and at that time the old Suburban Company had consolidated with the Consolidated Company, and thereafter forming the Belt Company.

The foregoing reasons, given by the intervenor in favor of the proposition that the Belt's mortgage lien attached to and covered the stocks and bonds of the other railroad companies mentioned, are, in the judgment of the Master, unsound in law. It is undisputed that each of the railroad corporations, whose stocks and bonds are in controversy, was a distinct and separate legal entity, organized for the specific purpose of building its own railroad between
886 two certain points, and connecting, either directly with the Belt, as in the cases of the Air Line and Consolidated, or indirectly through another road that did so connect with the Belt, as in the case of the Union Terminal in Kansas, which connected with the

Consolidated and which latter in turn connected with the Belt, the whole forming what was known as the Belt System. In order to construct and build these railroads, it became necessary for each company to place a mortgage upon its own franchises, proposed railroad and properties, to secure the bond issue, which had to be floated, and, from the proceeds of the bonds sold, the funds were obtained with which to build the projected railroad. The money for that purpose did not come from the Suburban Company or the Belt Company, however much interested, as a business measure, they were, or might have been in the successful construction and building of the several allied railroad lines, which were to become such important feeders or adjuncts of the main Belt road; on the contrary, the needful funds for building each road came from the sale of the corporate securities of the particular company, organized to build such road. The mere fact that the Belt Company acquired some of the stocks and bonds of the allied companies for a consideration, whether of money or services, in connection with the building of one or more of these roads, and, possibly, in pursuance of a plan of its own, in respect to building up the Belt system, as an entirety, by means of these separate railroad corporations, does not, in the least, militate against the proposition that they were, in a corporate sense, entirely free and independent of the Belt, and owned their respective properties, without any equitable claim thereon or therein, by the Belt. It is true that the Belt Company had the statutory right to buy and own the stocks and bonds of other connecting lines just as it might do as to other personal property, but that right of itself in no way affects favorably the broad proposition of the intervenor that, through the ownership of said stocks and bonds, the physical properties of these roads became subject to the Belt mortgage lien, that is, presumably, the equity in such properties, as the prior mortgage executed by each road, as above stated, was admittedly the first lien thereon.

In conclusion, this is not a case, then, where the Belt had used its own money in building another road, whereby, under some circumstances, it might possibly acquire an equitable lien on or right to the railroad property it had helped to bring into existence but, on the contrary, these allied roads were built from their own resources, and the fact that the Belt Company might have built them, in the exercise of its statutory right, does not change
887 the real situation here involved and presented for determination.

The Trust Company denies that any part of the stocks and bonds in controversy were covered by the terms of the Belt mortgage, or that they were in any way appurtenant or necessary to the operation of the Belt railroad, and then alleges that they were all acquired after the consolidation between the Suburban and Consolidated Companies, forming the Belt Company, which acquired the railroads of the Consolidated and Suburban, subject to the mortgages placed by those companies on their properties prior to the consoli-

dation, and, on account of which it is claimed that the intervenor acquired no right, title or interest to said stocks, or any part thereof, by means of the foreclosure proceedings.

This same statement as to the effect of said consolidation applies to all the stocks, bonds, securities or properties pledged to the Trust Company all of which are claimed to have been acquired by the Belt Company after the consolidation; and it is to be inferred that the Trust Company means to assert that the after-acquired property clause of the Suburban Company mortgage (herein otherwise referred to as the Belt mortgage) applies only to the properties acquired by the old Suburban Company, which went out of existence by the consolidation in 1892, and not to properties acquired by the new company, called the Belt Company, after the year 1892.

Now, is that proposition tenable, in view of the Articles of Consolidation, and of Section 1059 (R. S. Mo. 1899), which latter imposes upon the Consolidated Company all of the contracts and liabilities of the constituent companies. This section is as follows:

"Any two or more railroad companies in this state, existing under either general or special laws, and owning railroads constructed wholly or in part, which, when completed and connected, will form in the whole or in the main one continuous line of railroad, are hereby authorized to consolidate in the whole or in the main, and form one company owning and controlling such continuous line of road, with all the powers, rights, privileges and immunities and subject to all the obligations and liabilities to the state, or otherwise, which belonged to or rested upon either of the companies making such consolidation."

In the Articles of Consolidation between the Consolidated Terminal Railway Company and the Kansas City Suburban Belt Railroad Company, articles 1, 2, 8, and 9, are as follows:

888 Article I. "The said Consolidated Terminal Railway Company of Kansas City and The Kansas City Suburban Belt Railroad Company do hereby severally and mutually agree with each other to consolidate and to form a permanent union of their interests, rights and management, and do hereby unite and consolidate their respective companies, properties and franchises into one consolidated company which shall succeed to, possess and enjoy all the property, franchises, powers, rights, privileges and immunities which belong or belonged to the said constituent companies hereby consolidated, or to either of them, and which shall have the power to sue and be sued in all courts of competent jurisdiction, and shall have and enjoy all the benefits, immunities, grants, rights, powers and franchises conferred upon incorporated railroad companies by the laws of the State of Missouri."

Article II. "The name of the new company formed by this consolidation shall be "Kansas City Suburban Belt Railroad Company."

Article VIII. "The two constituent companies the parties hereto, do by these presents assign, transfer, set over and convey unto the Kansas City Suburban Belt Railroad Company, the new con-

solidated Company, hereby formed, subject to all liens now on the same, all the rights, privileges, powers and franchises of each of the constituent companies and all the property real, personal and mixed, and all choses in action, accounts, claims, and demands, of whatever nature owing or belonging to either of said constituent companies, and all rights of way, leases, leasehold interests, depots, station houses, turntables, tanks, terminal yards and terminal facilities, tracks, roadbeds, rails, iron, rolling stock, tools and implements, including all the property of every name, nature and description belonging to either of the constituent companies with all the rights, privileges and appurtenances thereunto appertaining; to have [*to*] to hold unto and to be owned and controlled by the said Kansas City Suburban Belt Railroad Company, the consolidated company hereby formed, and its successors and assigns, as fully and completely to all intents and purposes as either or both of the constituent companies can now own, hold, use, enjoy and control the same;

And the said constituent companies hereby covenant and agree with the said new company, and with its successors and assigns, that they and each of them will upon the demand or request of the new company, its successors or assigns, duly execute and deliver any and all such further assurances, assignments, transfers and deeds of conveyance to the said described property, or any part
889 thereof, as may be deemed necessary to vest in said new company, its successors and assigns, a good and sufficient title thereto, subject to all liens which may exist against any of said property at the time this consolidation shall be consummated, including a mortgage or deed of trust, dated February 1st, 1892, given by the said Consolidated Terminal Railway Company to the Missouri, Kansas and Texas Trust Company and The Provident Life and Trust Company of Philadelphia, as Trustee, to secure its issue of seven hundred and fifty thousand (750,000) Dollars of bonds, all of which liens the new company hereby formed shall assume and pay."

Article IX. "The consolidated company hereby formed shall assume, pay, satisfy and discharge all and every the debts, duties and obligations of each of the constituent companies and said consolidated Company shall assume, perform, fulfill and satisfy all of the obligations and contracts of each of the constituent companies of whatever kind or nature."

It appears that, independently of said statutory provision there is an express assumption by the Belt Company of all of the debts, duties and obligations and contracts of each of the constituent companies; and, furthermore, there was an adjudication of this liability question in certain foreclosure suits in this court to which The Trust Company was a party. The foreclosure bills were against the new consolidated company, and the decree rendered therein recited that the Suburban Company consolidated with the Consolidated Company in 1892 and by the terms of which consolidation the new company assumed and agreed to pay all the obligations and

liabilities of the constituent companies, which became merged in the Belt Company.

In the opinion of the Master, however, the legal effect of said consolidation is immaterial in this cause, in so far as it might affect the merits of the claim of the intervenor, in respect to the alleged Belt mortgage lien on the securities and properties pledged by the Belt to the Trust Company, in view of the conclusion reached by the Master that, in law, no such lien existed, and, hence, the intervenor, as the purchaser at the foreclosure sale, could not be subrogated to any such lien.

IV.

As to Shares of Stock of the Union Company and Air Line Pledged as Security to the Trust Company.

There were 19997 shares of Union Company stock and 4994 shares of Air Line stock pledged as collateral security for the Belt indebtedness to the Trust Company, and these constituted, outside of a few shares held to qualify the directors of the Union
890 Company and the Air Line Company, respectively, all of the outstanding capital stock of these companies, and which had been acquired by the Belt Company by exchanging its own stock for the Union Company and Air Line stocks. (Rec. Vol. 34-18368).

As will be more fully hereinafter shown, the Philadelphia Committee, a Committee of bondholders interested in the Belt and Gulf Companies and allied railroad companies, associated themselves together for the purpose of reorganizing the railroads belonging to said companies, and working out some plan, by which the Committee should bring within its control the capital stock of the Air Line and the Union Company, which had been theretofore pledged by the Belt Company to secure its indebtedness to the Trust Company. Thereupon, this Committee selected one of its members, Max Pam, to enter into negotiations with the Trust Company for a surrender by it of the Air Line and Union Company stocks, and, as a result of these negotiations, the Committee of bondholders purchased these stocks for the sum of $35,000.00, which was paid to the Trust Company, and applied by it upon the Belt indebtedness. These facts will be disclosed by the minutes of the proceedings of the Reorganization Committee, found in Vol. 41, pp. 22208, 22226, 22233, 22255, 22256, and 22304.

At a meeting of the Committee of June 6, 1900, the following resolution was adopted:

"It was resolved that the Mercantile Trust Company be authorized to pay the sum of $35,000.00 upon delivery to it, for account of this committee, of 20,000 shares of the Union Terminal Railway Company's, and 5,000 shares of the Kansas City and Independence Air Line Company's stock, less the outstanding shares, for qualifying directors of the company." (Rec. Vol. 41, p. 22304.)

The Trust Company contends that, in as much as the bondholders

Committee, which was succeeded by the Southern Company, recognized the Trust Comapny's title to the stocks in question, the Southern Company, which had been incorporated in June, 1900, when this transaction took place, is not now in a position to attack such title. The Southern Company had then acquired, through the Committee, substantially all of the bonds of the Belt Company, and, in all respects the Southern Company received the benefits of the reorganized plans of the Philadelphia Committee, and stands relatively in the same position to the transaction, conducted by that Committee, as it would have stood, provided it, the Southern Company, had personally conducted such transactions. These Air Line and Union Company stocks were acquired by the Committee
891 for the Southern in order that the latter might be able to include such stock in its general mortgage as further security to the new security holders or bondholders thereunder. It would seem to be clear, then, that the Southern Company, having received the benefits of the Committee's purchase of this stock, has ratified the Committee's acts, and cannot be now heard to repudiate the transaction and claim any advantages adverse to it, for it cannot be contended that even if, as an original matter, the Trust Company was guilty of fraud in taking the Air Line and Union Company stock in pledge, yet the bondholders' Committee had the right to waive any alleged breach of duty, and which they unquestionably did when they purchased the stock from the Trust Company, thereby recognizing that it had a title to sell to them.

For the foregoing reason, it is wholly immaterial whether said stocks came within the lien of the Belt mortgage or not, for, in the opinion of the Master, the intervenor, under the circumstances above stated, has neither a legal nor equitable right to the $35,000.00 received by the Trust Company for said Union and Air Line stocks; and the finding as to that issue is in favor of the Trust Company and against the Southern Company.

V.

Bonds and Stocks of Connecting Company, Alleged to Have Been Converted by the Trust Company.

These bonds and stocks of the Connecting Company, which were pledged by the Belt to the Trust Company, are as follows:

99 first mortgage bonds.
315 first mortgage bonds.
15 second mortgage bonds.
67.9 second mortgage bonds.
13920 shares of stock.

In the 9th paragraph of the intervening petition, it is charged that, in the year 1896, the Trust Company caused the incorporation of the Connecting Company, for the purpose of constructing a railroad from Kansas City to Pattonsburg, Missouri, in order to connect with railroads at that point, running eastwardly to Quincy,

Illinois, and northwardly to Council Bluffs, Iowa; that the Trust Company caused the Connecting Company to issue its capital stock, and to execute its bonds, secured by mortgage upon all its properties, and, also, caused the Connecting Company and the Belt Company to enter into a contract, under which the Belt Company undertook to acquire the right-of-way and to construct the
892 railroad for said Connecting Company, and, under which the Connecting Company agreed to give the Belt Company its bonds and stocks.

The Trust Company admits that such a contract was made between the Belt and Connecting Companies, but it states that the contract was made freely, and of their own accord, and without any interference on the part of the Trust Company; that the railroad of the Connecting Company formed a direct connection with the Belt Company, the two making a continuous line of railroad, and, that, in pursuance of said contract, it is admitted by the Trust Company that the Belt Company began the construction of a railroad for the Connecting Company, and the acquisition of its right-of-way, and receiving, as consideration for so doing, a large amount of the first mortgage bonds and all the capital stock of the Connecting Company, and that the Belt Company held such stocks and bonds, on and prior to July 20, 1899.

The intervenor also charged that, at various dates, the Trust Company took and converted to its own use the following Connecting Company stocks and bonds, then owned by the Belt Company;

1130 first mortgage bonds of the value of.....	$845,415.00
16 second mortgage bonds of the value of.....	7,200.00
and 6250 shares of stock, of the value of.....	35,500.00

The intervenor further charges that on or about July 20, 1899, the Trust Company took from the Belt Company 414 first mortgage bonds, and 3920 shares of stock of the Connecting Company, being the property of the Belt Company, and claimed to hold the same as collateral security for an alleged indebtedness from the Belt Company to it; that all of said bonds and stocks came under the after acquired property clause of the Belt mortgage, and were charged with an equitable lien to secure the Belt bonds, and, that the Trust Company at all times knew such to be the fact; that, by the foreclosure proceedings and sale to the intervenor, above referred to, the equitable title to said stocks and bonds, or the proceeds thereof, when they had been sold by the Trust Company, vested in the intervenor, which is now the equitable owner thereof; that, on or about September 30, 1899, the Trust Company claims to have sold said 3920 shares of Connecting Company stock for $19,885.71.

The Trust Company denies that said bonds or stocks, or any of them, came under the after acquired property clause of the Belt mortgage, or that they, or any of them, were charged with an

equitable lien to secure the bonds of the Belt Company, or
893 that, by reason of the foreclosure proceedings and sale thereunder, the equitable title to said stocks and bonds, or the proceeds thereof, vested in equity in the intervenor; but, on the contrary, the Trust Company states that said mortgage did not by its terms cover said bonds and stocks, or any part thereof, that they were not necessary or appurtenant to the operation of the railroad, and were all acquired after the consolidation between the Suburban Company and Consolidated Company into the Belt Company, and, that said intervenor acquired no right, title or interest of any kind whatsoever in said stocks and bonds by means of said foreclosure proceedings.

The Trust Company admits that, on or about September 30, 1899, it sold 13920 (not 3920) shares of Connecting Company stock, which it had theretofore held as collateral security for the sum of $19,885.71, being the full and fair value thereof, but alleges that, prior to said sale, it had accepted said stock as part payment of its indebtedness at the same price, for which it afterwards sold the same.

The intervenor further charges that the Trust Company sold all of said first mortgage bonds, and received, as the proceeds thereof, the sum of $995,415.00, and to which the intervenor claims it is entitled, in equity and good conscience, for the reason that the proceeds of all said stocks and bonds so disposed of, stand in equity for the securities themselves.

The claim of the intervenor, when analyzed, is to the effect that 414 first mortgage bonds and 82.9 second mortgage bonds and 3920 shares of stocks of the Connecting Company, were pledged by the Belt Company to the Trust Company as collateral security for the Belt indebtedness to it; and, also, that the Trust Company otherwise took and converted to its own use 1130 of said first mortgage bonds, including those pledged as above stated, and all being of the alleged value of $845,415.00, and 6250 shares of Connecting Company stock of the alleged value of $37,500.00.

First, as to the pledged stock and bonds of the Connecting Company, 315 first mortgage bonds were taken as collateral to a Belt note for $109,500.00, dated February 8, 1900. (Rec. 11-5816) and were sold by the Trust Company, on October 23, 1900, at 35 cents on the dollar, to the National Bank of Commerce of Kansas City, Missouri, and the proceeds, amounting to $110,250.00, were applied on the Belt debt. (Rec. Vol. 11-5805, and Vol. 15-8231);

894 23 first mortgage bonds were given to the Trust Company as collateral security to a Belt note for $23,056.41, dated September 21, 1899, (Rec. Vol. 14, p. 7806-7815);

50 First mortgage bonds, as collateral to Belt [*note*] for $25,000, dated January 25, 1900, (Rec. Vol. 11, p. 5807 and Vol. 14, pp. 7806 to 7815);

26 first mortgage bonls, as collateral to Belt note for $10,400.00, dated February 9, 1900, (Rec. Vol. 11-5827).

The 99 first mortgage bonds, together with 381 coupons, were sold, on November 1, 1901, under an order made by Judge Thayer in the Bierce case, dated October 30, 1901, and pending in this court for

$40,001.25, and which sum, under said order, was, by the receiver of the Guardian Trust Company, appointed in that case, placed in a separate fund to await the outcome of this litigation, (Rec. Vol. 2-5795, and Vol. 15-8231), as both the Cambria and Southern Companies as well as the Trust Company, claim this money.

The 13920 (not 3920, as stated in intervening petition) shares of Connecting Company stock were by the Trust Company sold to John Lambert, one of the associates of John W. Gates, at $1.42-6/7 per share, or $19,885.71, and the proceeds credited upon the Belt debt. This sale to Lambert was made on September 30, 1899, and long before any default was made by the Belt Company in the payment of interest on its bonds. (Rec. Vol. 2-5809; Vol. 15-7840-7844), and at a time when, under the terms of the mortgage, the Belt Company was authorized to own, possess, use and enjoy its property and the income thereof.

The second mortgage bonds are now on hand, but are utterly worthless by reason of the foreclosure of the first mortgage on the railroad of the Connecting Company.

It is not controverted that such foreclosure under the first mortgage, was made, and that, after applying the proceeds of the foreclosure sale on account of the bonded indebtedness, there was left unpaid a large deficiency on the first mortgage bonds in addition to all the second mortgage bonds.

The history of the incorporation of the Connecting Company and the construction of its road by the Belt Company, unmistakably shows that it could not have been intended that the bonds, issued by the Connecting Company, and acquired by the Belt Company, were to be within the lien of the after-acquired property clause of the Belt mortgage.

It appears from the record that the Connecting Compapny made a construction contract with the Belt Company, dated June
895 30, 1896 (Rec. Vol. 15, pp. 8174 to 8191), whereby the latter loaned its money and credit to the former in exchange for the securities, bonds and stocks of the Connecting Company, which were to be in the way of compensation to the Belt for the building, construction and equipping of the Connecting road, and, in view of the transaction as conducted between these companies and the Trust Company in the disposition of these securities, it necessarily follows that it could not have been contemplated between the Belt and Connecting Companies that these securities of the latter Company should be held and retained in the Belt treasury as part of the mortgage security of the Belt bondholders. On the contrary, it was clearly the intention of all parties concerned that the Belt should raise money on these securities, in order to provide the necessary funds for the construction of the Connecting road, for, otherwise, as shown by the record, and about which there is no controversy, the Belt Company had no other means of raising the funds required to build the railroad of the Connecting Company, which was approximately 90 miles in length.

In fact, one of the main complaints, made by the intervenor against the Trust Company, is based upon the alleged domination

and control of the Belt by the Trust Company, by reason of which the intervenor claims that the Trust Company financially involved the Belt Company in the building of the Connecting Company's railroad alleged to be an unprofitable venture on the part of the Belt Company.

It is shown in the record that, as the work of building this road progressed, these securities were turned over to the Belt Company from time to time, and, in lieu thereof the Belt Company, operating largely through the Trust Company, furnished the funds with which to carry on the construction work. The Connecting Company was a distinct and independent organization from the Belt Company, and, during the construction period especially, was managed and operated by its own officers, though afterwards, by reason of Belt ownership of all its capital stock, it became largely a Belt institution. There can be no doubt that, perhaps the principal motive actuating the Belt Company, in entering into the construction contract with the Connecting Company, was that the latter Company would become a tenant line of the Belt, under the terminal contract for its switching, thereby increasing the earnings and revenues of the Belt Company, and, in addition, it is reasonable to suppose that the Belt Company intended, and in fact expected, to make some profits out of the construction of the Connecting railroad. It was intended then, as a business transaction, mutually beneficial to each
896 of the contracting companies.

Second, as to the unpledged stocks and bonds of the Connecting Company, disposed of by the Trust Company:

The Connecting Company stocks and bonds, obtained by the Belt Company, were turned over to the Trust Company and sold and disposed of by it. (Wilcox's testimony, Rec. Vol. 34, pp. 18068-69, 18367-69, and '70).

In Johnson's statement, (Rec. Vol. 15, pp. 8225-8226) there is shown the disposition of 1306 first mortgage bonds of the Connecting Company, all of which were either disposed of to the Trust Company, or by it to others, except 176 bonds, which were disposed of by others than the Trust Company, and thereby leaving 1130 first mortgage bonds, including those pledged to it, which were either acquired by the Trust Company or disposed of by it, for an aggregate sum of $845,415.00.

Sixteen second mortgage bonds of Connecting Company, belonging to the Belt, were acquired by the Trust Company, pledgee, for $7200.00. (Johnson's statement, Rec. Vol. 15-8227), and 6250 shares of Connecting Company stock were acquired by the Trust Company at the price of $37,500.00 (Rec. Vol. 31, pp. 16679-16680, and Johnson's statement, Rec. Vol. 15-8224).

No useful purpose would be subserved by here showing the particulars of the various transactions had by the Belt and Trust Companies in respect to the disposition of said Connecting Company securities, as it appears, from the statements in the record as to the disposition thereof, that the Trust Company has fully accounted for the proceeds of all sales of said bonds and stocks, made to it directly or through it to others.

Briefly stated, the reasons heretofore given and conclusions reached, to the effect that the Union and Air Line securities are not within the lien of the Belt mortgage, are equally applicable to the stocks and bonds of the Connecting Company.

The Master is of the opinion that the intervenor's contention, in respect to the Connecting Company securities, is not sustained by the proofs, and the law of the case, and, his finding is adverse to intervenor's claim.

VI.

Account of Belt Company against Gulf Company for About $133,000.00, *and Assigned by Belt to Trust Company as Collateral Security for Belt Indebtedness.*

897 This account is now the subject of an intervening petition, filed by the Trust Company in the Gulf foreclosure case in this court, and the intervention is still pending there, awaiting the determination of the issue in this case, and nothing whatever has yet been realized on the open account.

In paragraph 10, of the intervening petition, it is charged that the Trust Company caused the Belt Company to enter into a terminal contract with the Gulf Company, by the terms of which the Belt gave to the Gulf an entrance into Kansas City, and certain valuable terminal rights and facilities, and that the Gulf undertook and agreed to pay the Belt certain sums of money as rental for such rights and privileges, both parties entering upon the performance of the contract, and continuing to so perform, until April 1, 1899, when receivers were appointed for the Gulf Company, at which time, it is alleged that the Gulf was indebted to the Belt, on account of said contract, to an amount in excess of $133,000.00. It is charged by the intervenor that, by virtue of the after acquired property clause in the Belt mortgage, said terminal contract became charged in equity with the mortgage lien to secure the Belt bonds, and, that the rents, issues and profits at that time due the Belt Company under said contract also became charged in equity with such mortgage lien, and, further, that, by reason of said foreclosure proceedings and the sale thereunder to the intervenor, the latter acquired "all equitable right and title to said contract and to the rentals due thereon, as the Trust Company, at all times well knew."

It is, also, charged that the Belt Company, on or about February 1, 1900, undertook to transfer and assign said account to the Trust Company, as collateral security to secure an alleged indebtedness to the Trust Company from the Belt, and that the Trust Company now claims to be the assignee of said account.

The Trust Company admits that the parties operated under said contract until April 1, 1899, when receivers for the Gulf Company were appointed, and that there was then due from the Gulf to the Belt, under said contract, the sum of about $133,000.00, and that, on or about February 1, 1900, the Belt Company transferred and assigned to the Trust Company, its said account against the Gulf

Company as collateral security for and to the Belt indebtedness to the Trust Company.

The Trust Company, however, denies that it caused the Belt Company to enter into said terminal contract with the Gulf Company, or that, under the after acquired property clause in the Belt mortgage, the said contract became charged in equity with a mort-
898 gage lien to secure the Belt bonds, or, that the rents, issues and profits, accruing under said contract, became charged in equity with such mortgage lien, or that, by virtue of the foreclosure proceedings and sale thereunder to the intervenor, the latter acquired any equitable title or right to said contracts, and the rentals, issues, and profits due thereon. The Trust Company, on the contrary, contends that said contract, its rentals and profits, are not covered by the terms of said Belt mortgage, and are in no way appurtenant to the operation of the Belt railroad; and, further, that, in as much as said contract was made and the rentals and earnings accrued thereunder, after the consolidation hereinbefore mentioned between the Suburban Company and Consolidated Company into the Belt Company, the said rentals and earnings are not within the after acquired clause of the Belt mortgage. The effect of this consolidation has already been considered by the Master, and, the conclusion there reached will suffice for the purpose of this intervention, wherever the same contention is made in Trust Company's answer.

There is a slight discrepancy in the record as to the amount owing by the Gulf Company on said terminal contract. From the testimony of witness Ingals, the total claim appears to be $132,805.48, which is taken as correct for the purpose of this intervention. As for the items comprising that amount, see Ingals' testimony, and exhibit, in Rec. Vol. 48, pp. 28823 to 28850.)

In Rec. Vol. 52-31429, will be found a record of a meeting of the Board of Directors of the Belt Company, held in February 1, 1900, at which there was adopted a resolution, reciting the Belt indebtedness to the Trust Company, and directing the Belt officers to execute an assignment to the Trust Company of the account, held by the Belt against the Gulf Company, aggregating the sum of $133,058.04, and which represented past due charges for switching services and terminal facilities furnished by the Belt to the Gulf as provided in a written contract between them. The furnishing of these terminal facilities and switching services constituted an important source of income and revenue to the Belt Company, and, the intervenor claims that such account is included within the lien of the Belt mortgage. This account is strictly for the revenue or earnings of the Belt Company, accruing from its daily operations and without which it could not be expected to continue its legitimate or ordinary business affairs, or, in other words, exercise its proper corporate functions. It is well settled that the income or earnings of such a railroad company are not included within its mortgage, and further, that neither the bondholders, nor the trustee in
899 the mortgage, are entitled to the income or earnings which accrued and had been disposed of, prior to the time possession is taken by the trustee or receiver. In this case, the receivers

were not appointed, nor was possession taken until September 6, 1900, which was some seven or eight months after the assignment of the claim to the Trust Company.

Jones, in his work on Corporate Bonds and Mortgages, Section 80, says:

"The earnings of a railroad, which is allowed to remain in the possession of the mortgagor, are not subject to the lien of the mortgage, although in terms the mortgage covers the tolls of the road, if at the same time the mortgage implies that the mortgagor is to hold possession and receive the earnings of the road until the mortgagee takes possession."

Counsel for the Trust Company also cite the following authorities:

Gilman v. Railroad, 91 U. S., 603, 617;
R. R. v. Cowdry, 11 Wallace, U. S. 459;
American Bridge Co. v. Heidelbach, 94 U. S., 798;
Dow v. R. R. 124, U. S., 652;
N Y. Security Co. v. Gas Company, 159 N. Y., 137;
See also 45 L. R. A., 132.

It has been held that the money, which is in the hands of the treasurer of a railroad company, at the time when possession is taken of its properties and assets under a mortgage covering such properties and earnings, belongs to the railroad corporation itself, and not to the trustee in the mortgage, that is, in case the mortgage provides that until default the company may retain possession; and if, in such case, the trustee should take possession of the money, it will be subject to garnishment, at the suit of general creditors of the company, because of the fact that it is not subject to the lien of the mortgage, and hence, legally belongs to the corporation, and not to the trustee or bondholders.

Jones on Corporate Bonds and Mortgages, Sec. 86.
Schmidt v. Railroad, 112, Ky. 717.

Counsel for the Southern Company contend that this claim for switching charges was included within the Belt mortgage, because of the fact that the mortgage conveyed "all the terminals, terminal rights, privileges, contracts, leases * * * which the company now owns and holds, and which it may hereafter own and hold for use in connection with its said railroad," the point of the contention being that the word "contracts", as used in that con-
900 nection, must be deemed to mean terminal contracts, and, that therefore, in as much as these switching charges arose out of a terminal contract between the Gulf and Belt Companies, it follows that this open account was subject to the mortgage.

From an examination of the authorities cited, the conclusion has been reached that even in cases where the mortgage expressly covered income tolls and earnings, yet, if it further provided that the mortgagee was to remain in possession until default, then the bondholders and the trustee in the mortgage are not entitled to the earnings or income of the road, earned prior to the taking of possession, and cer-

tainly not to such as had theretofore been disposed of to bona fide creditors; and it follows that all such earnings and income belong to the general creditors of the corporation, and not to the mortgagee.

In the judgment of the Master, this claim for switching charges falls strictly within the earnings and income of the Belt, and for that reason is not, under the facts of this case, within the terms of the Belt mortgage; and, for the reasons above mentioned, the finding of the Master, as to this item, is against the claim of the Southern Company.

VII.

Steel Rails and Fastenings Pledged by the Belt Company to the Trust Company.

As to the alleged appropriation by the Trust Company, on February 1, 1900, of 600 tons of steel rails, and 20 tons of fastenings, belonging to the Belt Company, the Southern Company, in paragraph 7 of its intervening petition, charges that, on February 1, 1900, and prior thereto, the Belt Company was the owner and in possession of, approximately, 600 tons, more or less, of steel rails, and 20 tons of fastenings for use in connection therewith, and that, by virtue of the after acquired property clause in the Belt mortgage, the steel rails and fastenings became charged with a lien to secure the payment of the Belt bonds, secured by the Belt mortgage, and that, upon the foreclosure of the Belt mortgage, and the sale had thereunder, the equitable title to said rails and fastenings passed to and vested in the intervenor, who became the equitable owner thereof.

The intervenor denies that the Trust Company has any right or claim to the rails and fastenings, and asks that it be required to account therefor at the rate of $35.00 per ton.

901 In paragraph 7 of its answer, the Trust Company denies that said rails and fastenings were covered by, or became charged with, the lien of the Belt mortgage, by reason of the after acquired property clause, or that the intervenor became the equitable owner of said properties, upon the foreclosure of said mortgage and the sale thereunder.

The Trust Company also alleged that there were less than 360 tons of said rails and fastenings and that they were purchased after the consolidation of the Suburban and Consolidated Companies, thereby forming the new company, called the Belt Company, and long after the execution of the Belt mortgage; that said rails and fastenings were not appurtenant to the operation of the Belt railroad, and are held by the Trust Company as collateral security to the Belt indebtedness to it; that said rails and fastenings were sold for about $11,000.00, and that the net proceeds of the sale has been credited by the Trust Company on its indebtedness against the Belt Company; and, further, that notwithstanding the Belt Company had theretofore given said rails and fastenings to the Trust Company as collateral security for its indebtedness against the Belt Company the latter afterwards refused to deliver the same to the Trust Company,

and, thereupon, it was compelled to bring a replevin suit for such rails and fastenings, in the Circuit Court of Jackson County, Missouri, and which suit was subsequently determined in favor of the Trust Company, and, by reason of which, it is claimed by the Trust Company that the judgment rendered therein is res adjudicata and cannot be here inquired into.

The Trust Company acquired these rails and fastenings by reason of the proceedings at the Belt Directors' meeting of February 1, 1900, (Rec. 52, pp. 31429 to 31432), and, in this connection, see Martin's testimony, as to what occurred at that directors' meeting of February 1, 1900, and the reasons given for the Trust Company's taking additional collateral security, and, also, Wilcox's testimony as to the rails being taken as collateral security by the Trust Company on that date, and as a part of what he understood was the general plan of the Trust Company to get all the collateral it could from the Belt, in view of the probable loss of control of the Belt Company. (Rec. 53-32816, and Rec. 34-18294).

E. L. Martin further stated that these rails had been brought from the Cambria Company, and were, on February 1, 1900, available for any purpose in connection with the Belt Company (Rec. 55-33760 to 33761), and, Neal S. Doran, stated that it was his recollection that the rails were down in the East Bottoms yards, (Rec. 51-31215).

902 The statement of account between the Trust Company and the Belt Company (Rec. 1-137) shows the sale of 16-1712/2000 tons of fastenings at $33.00 per ton, and also the sale of iron rails at $33.00 per ton, the net proceeds being $11,133.06, which were credited upon the Trust Company's open account against the Belt Company. There is a dispute as to the number of tons of rails acquired by the Trust Company, the intervenor [—] that there were 600 tons and the Trust Company claiming that there was only 343-1940/2040 tons, but the Master finds that the amount in the hands of the Trust Company, as proceeds of said rails and fastenings, is $11,133.06.

It appears, on page 167, of the testimony taken by counsel for the Cambria Steel Company, before the Special Master, upon the application for a temporary injunction in this cause, and filed with the Clerk of this Court on November 27, 1900, and which by agreement of counsel is made part of the record of this cause, that witness Johnson identified a letter from the Belt Purchasing Agent, reading as follows:

"The rails are intended for use in constructing new yards for the Kansas City and Northern Connecting; also these splice bars are intended for use in connection with the rails recently received for the new yards of the Kansas City & N. C. R. R. at Kansas City."

It is not disputed that in April, 1900, the so-called Stilwell management retired from the management of the Belt Company, and thereupon Stuart R. Knott became the manager thereof, and that, on September 6, 1900, said Knott and E. F. Swinney were appointed receivers of the Belt Company, that the Trust Company demanded possession of said rails and fastenings, and, upon being re-

fused, brought an action in replevin against the Belt Company in the State Circuit Court; that, on October 9, 1900, the Belt filed its answer in the replevin suit, and on January 25, 1904, judgment was rendered in favor of the Trust Company for the possession of said properties, and damages for the detention thereof. (Rec. 53-36690).

It appears from the record that, during the pendency of that suit, the said Knott was the president of the Belt and Southern Companies, and was also one of the receivers of the Belt Company, and, for such reasons, it is contended by the Trust Company, that it cannot reasonably be claimed that the Southern Company, as well as the Belt receiver, did not have actual notice of the pendency of the replevin suit, even though neither the Southern Company nor the Belt receiver were made parties to said suit.

903 The Trust Company, having so obtained possession of the rails and fastenings in question, sold the same on September 26, 1900, and credited the net proceeds of $11,133.06, upon the open account due the Trust Company from the Belt Company. (Rec. 1-137).

Counsel for the Southern Company insist that, inasmuch as the replevin suit was not brought against it, the judgment rendered therein does not in any wise affect its rights to the rails and fastenings in controversy.

Counsel for the Trust Company, however, contend that the judgment in the replevin suit is res adjudicata and is conclusive on the Southern; and, also, that the replevin suit did not abate the appointment of receivers for the Belt, and, further that, in view of the official connection of Receiver Knott with the Southern and Belt Companies, as above stated, the Southern after its long waiting, ought not now to be permitted to dispute the title of the Trust Company to the rails in controversy.

The Master does not deem it necessary to express an opinion as to the "res-adjudicata" proposition involved, for, independently of the legal effect of the judgment in the replevin suit, that is, whether it is binding on the intervenor, or otherwise, the main question for determination is whether the rails and fastenings in question were part of the mortgaged property, and covered by the after acquired property clause of the Belt mortgage.

After a careful examination of the provisions of the Belt mortgage, and the authorities on the subject, the Master has reached the conclusion that it does not purport to convey after acquired rails, or other materials, which are not part of the roadbed. The mortgage mentions specifically, many kinds of properties, which are intended to be included within its provisions, whether then owned or thereafter to be acquired, as, for example, water tanks, fuel, tools, implements, machinery, etc., but nowhere does it mention or specify materials. The necessities of railroads frequently require them to dispose of their old surplus materials, and acquire new or different materials for their purposes, and, for that reason, the omission of the word "materials" was doubtless intentional, and for the very purpose of not interfering with the usual and customary right of rail-

roads in disposing of their surplus materials, such as ties, rails, etc.

Jones, in his work on Corporate Bonds and Mortgages, Sec. 104, says:

"A mortgage conveying a railroad, with its superstructure, track and all other appurtenances, made or to be made, and also
904 the railroad furniture, including engines, tenders, cars of every description, tools, materials, machinery, and every other kind of personal property which shall be used for operating said railroad, does not purport to grant property thereafter to be acquired by the company, except so far as it becomes appurtenant to the road, or is used in it. Chairs intended for fastening down the rails afterwards acquired, which were never used in its construction, but were lying upon the ground in heaps, are not appurtenant to the road or used in operating it, within the terms of the mortgage, and consequently are not covered by it. There is no language in the instruments which purports to convey materials, to be after acquired for the construction or repair of the road," citing cases.

The cases of "Farmers Loan & Tr. Co., v. Bank, 11 Wis. 207, and 15 Wis. 424," and "Dinsmore v. R. R. 12 Wis. 649", are to the same effect.

In the case at bar, it appears that the materials in dispute were intended for use on the Connecting Company road, rather than the Belt road.

The conclusion of the Master is that the intervenor's claim as to said rails and fastenings, cannot be maintained, and, hence, that the Trust Company should not be held to account to the intervenor for said properties, or their proceeds.

VIII.

Central Improvement Company Properties and Stock.

One of the most valuable collateral securities, turned over to the Trust Company by the Belt Company, is 1120 shares of stock of the Central Improvement Company, herein called Central Company, and, the claim of the Southern Company, as the purchaser at the Belt foreclosure sale, by reason of the after acquired property clause of the Belt mortgage, is found in the sixth paragraph of the intervening petition, in which the intervenor states, in substance, that the Trust Company caused the Central Company to be incorporated in 1895, with its directors and officers made up from those of the Trust Company, and its purposes being to hold the title to such real estate as might be needed for rights of way, or other uses in connection with the operation of the different railroads, alleged to be dominated and controlled by the Trust Company, the title in some instances being taken by the Central Company to enable it to give back a first deed of trust on the property purchased, to secure the unpaid balance of the purchase price, and so as not to be subject to the lien of the general mortgage given by such road upon its own properties.

905 In pursuance of this plan, large amounts of money were contributed by the Gulf, Belt and Air Line Companies, respectively, for the purchase of such rights of way and terminal properties as were necessary for the use and operation of their respective railroads, the titles thereto being, for convenience merely, placed in the Central Company, and, the money to pay for such properties being furnished by the particular company, for whose benefit the purchase was made, and either paid directly to the vendor of the property, or to the Central Company, which issued its capital stock to the Company furnishing the money to the extent, approximately, of the amount so furnished.

In this way there were issued by the Central Company 1407 shares, and of which, 817 shares were to the Belt Company, 334 shares to the Union Company, 22 shares to the Air Line and 234 shares to the Gulf Company, said companies having furnished, from time to time, for the purposes above stated, the following amounts: Belt Company, $129,571.50, Air Line, $16,104.41, and Gulf Company, $23,673.89, making the total sum of $169,349.60, and being the only money furnished to the Central Company, which did not have any assets, other than the properties bought by it for said companies respectively.

Intervenor charges that, by reason of the premises, the Central Company is, and was, at all said times, a mere trustee, holding the legal title to the various properties, in trust, for the railways, for whose use and benefit said lands were bought, and that immediately upon the vesting of the legal title in the Central Company, the particular railroad interested in any such purchase, because the equitable owner, and entitled to the conveyance of the property purchased; and, also, that all the properties so purchased were necessary for the use and operation of the railroads purchasing them, and came within the after acquired property clause of the general mortgage placed upon said railroads, respectively, "so that the equitable liens of said mortgages attached to and became a charge upon the said properties, in favor of the bondholders of said companies, respectively; that the proceeds of some of said properties, sold by the receiver of the Central Company, under the orders of this Court, are now in the receiver's possession.

Intervenor further charges that, by reason of the foreclosure proceedings, and sales thereunder, it acquired the equitable title to all of said properties, so held by the Central Company, and became and is [not] entitled to the conveyance thereof, and to the proceeds of all sales thereof made by the receiver of the Central Company under the order of this Court, and now held by such receiver. The prayer of the petition is as follows:

906 "Wherefore, your petitioner prays:

a. For a judgment order and decree of this court requiring the Central Improvement Company and its receiver to convey to your intervenor all the real estate or other property standing in its name and to turn over to your intervenor all the moneys held [by] the Central Improvement Company, or its receiver, or owing to it, or them or arising from the sale of the proceeds of said property,

and for such other relief as may be equitable and just." (Int. Pet. 28).

The Trust Company, in its answer, denied all the material averments of the intervening petition, excepting the organization of the Central Company, and, then alleged, in substance, that its officers and directors were freely elected by its stockholders and had no personal interest in procuring any benefit or advantage, for respondent, at the expense of the Central Company, and did not procure any such advantage; that the Central Company was organized, by the procurement of the Belt and Gulf Companies, for the purpose of securing and acquiring the title for various tracts of land in and about Kansas City, the money for the purchase of which lands was to be furnished and paid by the Gulf, Belt and Air Line Companies, respectively, and for which payments, the capital stock of the Central Company was issued, from time to time, to each company, according to the amount of the payments; that the interest of the company, so advancing the money, is represented by the Central stock, and, in that way, the three companies, through their stock representation, became the beneficial owners of the properties of the Central Company, subject to any liens thereon; and the Trust Company further alleged that no part of the Central Company properties was covered by any of the general mortgage liens, which were foreclosed in the foreclosure proceedings of the Belt and constituent companies, nor were any of said properties appurtenant or necessary to the operation of the foreclosed railroads, nor did the intervenor acquire title to any of said properties by reason of said foreclosures.

1. The Central Company was organized March 21, 1895, with a capital stock of $50,000.00, afterwards increased to $200,000.00, and its corporate purposes, as expressed in its Articles of Association, were to buy, own, rent, hold and improve real estate [to] the states of Missouri, Kansas and other states; to sell, rent, lease, mortgage, and otherwise dispose of the same for pecuniary profit or gain (Rec. Vol. 18-9160).

It is not controverted that the evidence in the record (Vol. 53 31895 to 32375), discloses that, from time to time, the Gulf
907 Belt, Air Line, and Union Terminal railroads, deemed it expedient or necessary to arrange for the purchase or control of more real estate than was then absolutely required for their respective rights-of-way purposes. In some instances, lands were bought or leased for the purpose of erecting, either for the railroads or for some vendee, industrial plants along the lines of the railroads, with a view to increasing their traffic. In other cases, tracts of vacant property were acquired for the use of terminal yards for switching, in view both of present and future necessities; and, again, as in the case of Fairmount Park, large tracts of land were bought or leased for use as amusement parks, and for the purpose of building up the business of the Air Line and Suburban Belt roads. In still other cases, such lands were bought for the purpose, in part, of providing the necessary right-of-way for the road making such purchase, and, in as much as the entire tract through which the right-of-way was projected could be purchased for about the same price that the

right-of-way would cost, the whole tract would be brought, and the surplus held for future use.

Before the organization of the Central Company, another corporation, called the State Realty Company, mainly managed by officers of the Trust Company, had been organized and used as an instrumentality for taking the title to such land as was acquired by foreclosure by the M. K. & T. Real Estate Trust Company, which preceded the Trust Company, and the State Realty Company also took and held the titles to such lands as the various railroads mentioned desired to control, and later on, as these properties increased in number, it was seen that there was a necessity for divorcing and separating from the business of the State Realty Company the business of the various railroad companies, and, to accomplish such purpose, the Central Improvement Company was organized. It is also shown in the record, and not controverted, that one of the chief underlying purposes of so vesting in the Central Company the title of the real estate investments of the different railroads, of the nature above indciated, was that it was intended thereby to prevent said properties from being subject to the line of the railroad mortgages, which had been executed by said railroads and covering after acquired properties, and in that way, the object was to enable the Central Company, as the corporation holding such titles, to make such disposition of said lands as might be desired, from time to time.

The Belt Company was strictly a switching road, and, in order to enable it to build up its business, it was deemed necessary for it to develop and enlarge its own traffic arrangements by encour-
908 aging industries to locate along its lines, and, with that end in view, real estate was acquired adjoining the Belt right-of-way with the view of erecting elevators and other plants thereon, so as to make business for the road. The same object was attempted to be attained by the Air Line, when it acquired the Fairmount Park tract for the purpose of increasing its passenger traffic over it and the Belt road.

When the Central Company was organized, the lands held by the State Realty Company were quitclaimed to it, and the railroad companies, holding stock in the State Realty Company, surrendered the same, and took in lieu thereof the stock of the Central Company, which made a full and complete settlement with the Realty Company, (Vol. 53-32353) and from that time forth the function, theretofore performed by the Realty Company, in the respect mentioned as to such railroad purchases, was taken up and performed by the Central Company. The Realty Company billed these properties, so conveyed to the Central Company, at their actual cost, that is to say, at their original purchase price, with all taxes and other fixed charges thereon, and thereupon, the Central Company charged the amounts thus fixed against each property to the various railroads, along whose route the lands thus acquired laid, and against those charges the Central Company credited itself with its own capital stock, which it issued out of its treasury to the railroad companies, respectively.

From time to time, the Central Company made other purchases and the cost of such lands were in each instance charged to the par-

ticular railroad purchasing the same, the custom of conducting the business being to make a requisition upon such road for the necessary funds to pay for the land purchased, and the railroad company would respond by issuing to the Central Company its voucher, covering the cost of the land and the expenses incident to the purchase, such as attorneys fees, recording fees, abstract, etc.; and, all such advances made by any railroad company, on account of land purchased, were credited to it by the Central Company, and, for the exact amount of which the stock of the Central Company was issued to such railroad company (Vol. 53-31120). This business was conducted in an accurate and systematic way, and certificates were always issued, calling for even hundreds of dollars, par value, and, in case the amount advanced by any railroad company to the Central Company, was more or less than an even hundred dollars, then the Central Company would issue its capital stock for an even amount and either issue its voucher for the remainder in excess of one hundred dollars, or it would issue to the railroad company up to
909 the next one hundred dollars, and then collect from it the difference between the amount of stock so issued and the actual amount paid in by the company on the purchase in question. As to taxes, insurance and other fixed charges, paid at the time of the acquisition of the lands, they were charged direct to the railroad company interested in each particular purchase, and stock issued therefor, but as to taxes, insurance and other fixed charges accruing after the title was taken by the Central Company, the evidence is somewhat confusing, though, in many instances, these amounts were paid out of the funds in the Central Company treasury, and charged to profit and loss, as is claimed by respondent.

The financial resources of the Central Company were derived from the amounts received from the Gulf, Belt and Air Line Companies on account of land purchases by these roads, and for which the Central Company stock was issued, as herein stated, and, also, from the rents and sales of buildings on the properties purchased by it with the funds supplied by said companies. The Trust Company, however, contends that the income from rents and sales of properties went into the common treasury of the Central Company, and was disbursed by it for general purposes, and applied to the payment of expenses of all the real estate, without any discrimination, and, in proof of such contention, relies on the testimony of expert accountant Francis A. Wright, which tends strongly to such conclusion. Another source of income was about $16,000.00, which was realized by the Central Company on its note executed on December 18, 1896, to the Pennsylvania Fire Insurance Company, and secured by mortgage on real estate purchase No. 6, which said Wright states is the only purchase listed as Gulf property on the Central Company ledger (Rec. Vol. 54-33063-'067), and, which mortgage upon its maturity, was purchased by the Southern Company, and is now owned and held by it and stands unreleased on the record. (Rec. Vol. 53-32360). The Trust Company insists that the holding of this mortgage by intervenor is wholly inconsistent with its claim that the Central Company should be treated

as a mere form or nullity, while the intervenor suggests that, in as much as said notes were indorsed by the Gulf Company (Rec. Vol. 18-9537 to 9566), such fact is indicative of the existence of a greater interest in the Gulf at that time in said real estate purchase No. 6, than that of a mere stockholder, who does not ordinarily feel called upon to make himself personally responsible for such large corporate liability; in other words, that, instead of being against it, the
910 $16,000.00 mortgage transaction tends strongly to support the intervenor's theory that the Central Company was a mere trustee, holding the title for the Gulf Company, which was simply taking care of its own property in that transaction, as it should have done, in view of the alleged trust relation existing between it and the Central Company.

It appears from the testimony of expert accountant Johnson (Vol. 21-10713 to 10718) that the total amount advanced by the Belt, Gulf and Air Line Companies, direct to the vendors of the properties purchased and conveyed to the Central Company, or to the Central Company itself, on account thereof, is as follows:

Belt Company	$129,571.50
Air Line	16,104.41
Gulf Company	23,673.89
Making a total of	$169,349.60

To this should be added the sum of $18,502.90, paid by the Southern Company in order to protect real estate purchase No. 6, and thereby making a total amount paid by all of said companies, including the Southern, of $187,852.50, and all of which came from said railroad companies, or from rentals received from the properties purchased, or from sales of buildings upon said properties.

It also appears from said Johnson's statement that the Belt item of $129,571.30, included $10,327.00, paid by the Kansas City Terminal Construction Company on account of the Belt railroad; and further, that the total payments made by the Belt, Gulf and Air Line Companies direct to parties, from whom the properties were bought, or to their agents, were $46,961.68, by the Belt Company, $6,204.41 by the Air Line Company, and $19,002.90 by the Gulf Company, making a total of $72,168.99, so paid direct to the vendors of the properties purchased; and further, that the amount, advanced by these same companies, as shown by Central Company's cash book, is $115,683.51, which, added to said $72,168.99, totals $187,852.50, the full amount paid by said companies, as above stated; and it further appears by said Johnson's statement that the actual cost of all said properties was $173,863.67, and, that the difference of $13,988.83 (in excess of actual cost) was used in paying the expenses of the Central Company, and taxes, excepting about $228.00, turned over to the receiver of the Central Company, but since then, several tracts of land have been sold and the proceeds thereof used by the receiver of the Central Company in paying taxes

and other fixed charges, including his fees, as will be hereinafter shown.

911 The Air Line ceased making advancements to the Central Company, after December 23, 1897, and, thereafter, the payments, on account of Air Line properties, were made by the Belt Company (Vol. 21-10719); and the Belt Company, also, responded for the Union Company (Vol. 55-33030).

For funds, supplied by the Belt, Air Line and Gulf Companies, in connection with real estate purchases, the Central Company issued to them its stock, from time to time, until finally their holdings of Central stock aggregated as follows:

Belt Company, 817 shares; Gulf Company, 234 shares; Union Company, 334 shares; Air Line, 22 shares; making a total of 1407 shares. Ten shares were also issued to A. E. Stilwell, but it does not appear that the Central Company received any consideration therefor. The Trust Company, as trustee, holds 58 shares of Central stock, and in which it disclaims any interest. It also holds and claims 1120 shares of Central stock, pledged to it as collateral security by the Belt Company, in connection with other like securities, as has hereinbefore been fully stated, in respect to the pledging thereof for the Belt indebtedness to the Trust Company (Rec. Vol. 18-9215-9262).

Nature and Conduct of Central Company's Business.

2. For the purpose of giving the Court a clearer idea of the objects intended to be accomplished by the conveyance of properties to the Central Company, it is thought best to call special attention to the statements of the persons at that time directly concerned in the acquisition of the properties claimed by the intervenor; and then, also, refer to certain communications between the Central, Trust and Belt Companies, in respect to the manner of conducting the business of buying and paying for lands acquired by the Central Company.

The statements of Frank B. Wilcox, E. L. Martin and J. H. Pickering, concerning Central Company matters, are given because of their special familiarity with the relations existing between the Central, Belt and Trust Companies.

Frank B. Wilcox, a former officer of the Trust Company, stated in substance that, in furtherance of the general policy of the Trust Company, in respect to developing the natural resources, locating townsites and creating business enterprises in connection with the Belt and Gulf systems, various companies were organized, and controlled mainly by the same men who were officers of the Trust Company, and, among these companies, were the Central Company, the State Realty Company, and the Second Street Improvement Company, all of which followed out the general policy of

912 the Trust Company in their organization, and were regarded as subsidiary companies, the Central Company, and the Second Street Improvement Company, being engaged in pur-

chasing lots and lands for railway purposes, and for business purposes, adjacent to said railroads. (Rec. 34-17999-18001).

The books of the Central Company were kept in the office of the Trust Company, and the clerical work was done by the Trust Company clerks. (Rec. 34-18010-18011).

The reason for the organization of the Central Company was to provide the means, in the form of a corporation, by which properties could be acquired for the railway corporations, in which the Trust Company was interested, and to thereby enable them to acquire lands for rights-of-way or other purposes in connection with the railway uses, and for which the stock of the Central Company, representing the investment would be issued, it being intended that through this process the after acquirement clause of the mortgages, securing the railroad companies' bonds might be overcome, and these properties not pass directly under the mortgages already created, but leave the properties clear of those mortgages. (Rec. 34-18038-18039).

E. L. Martin testified, in part, that the Central Company was organized for the purpose of taking title to lands lying along the road of the Suburban Belt. In some instances, the Belt road had to buy more land than was then actually needed for its own railroad uses, and, in order to reserve that part, which was not so needed for railroad purposes, it became necessary to place it in the name of some other person or corporation than that owning the railroad, so that such reserved portion would not be held under or subject to the general railroad mortgage, and the Central Improvement Company was organized to hold the title to such properties. (Rec. pp. 32829-32830).

In some cases, part of the lands purchased was for the future use of the railroad; and other lands were bought because frequently the whole tract could be purchased on better terms than to force the railroad right-of-way through it, thereby leaving the remainder of such land to be sold to some industry at a profit, and, without being incumbered with the railroad mortgage, which might have prevented a sale, if such property had been conveyed direct to the railroad company, and an opportunity had arisen to sell the same.

If it had not been for the railroad mortgage the land would have been conveyed to the railroads. (Rec. 53-32831).

913 The Central Company was incorporated for the purpose of taking titles to properties, running along and adjoining the railroads, and, of buying rights-of-way for them. One of the purposes of handling these transactions through the Central Company, was to prevent the properties, purchased for right-of-way and switch purposes, from coming under the after-acquired clause of the railroad mortgage, and, so that the portion not needed for right-of-way could be disposed of, and, the sale thereof not be hindered by reason of the railroad mortgages. The lands, the titles to which were taken in the name of the Central Company, were situated in and about Kansas City, and along the Belt, Union Terminal, Consolidated Terminal, and Air Line and Gulf; and, in cases where more land was bought than was actually needed for the then present requirements of the right-of-way, it was the intention to hold it,

if desired, to use for additional terminal facilities, or for such other future uses, as might be necessitated by the growth of the railroad. The properties were acquired by and conveyed to the Central Company with moneys, furnished and provided by the Belt, Air Line and Gulf, and, upon his (Martin's) recommendation, as an officer of all said railroads, including the Union Terminal. At the time he recommended these purchases of property by the Central Improvement Company, it was his opinion that they were required by, or useful to, the particular railroad company which he represented in each purchase. It was his recollection that no properties were purchased with the Belt money, except upon his recommendation as President of the Belt. The right-of-way was secured expressly for the railroad, and the balance of the purchase was for such disposition as might be needed for the future requirements of the road. (Rec. 55, pp. 33655-33661).

The 1120 shares of Central Company stock represented and covered real estate purchased for the use of the Suburban Belt Railroad Company, part of which is clear, and part of which has mortgages upon it for part of the original purchase price. (Rec. 55, pp. 33699-33700).

The Trust Company had nothing to do with the Central Company and the Second Street Improvement Company, further than to organize them, and find subscribers to their stock. (Rec. 55-33761).

James H. Pickering, in part, testified that he became General Superintendent of the Belt in 1892, continuing as such until March, 1899, (Rec. 35, pp. 18581-2), and that, after he became connected with the Belt Company, he was instrumental in urging the acquirement of certain lands for yards, side tracks and rights-of-way,
914 in connection with the Union Terminal, the Belt and the Consolidated Terminal railroads, the terminal facilities, including ample switching yards and side tracks, being absolutely necessary to railroads like the Belt and its allied lines. Railroad companies, after having projected their lines, frequently find that the values of properties along it which are desired for terminal facilities and switching yards, have become greatly increased. (Rec. 35, pp. 18689-18690).

The usual width of a right of way is one hundred feet, though the least economical right of way for roads, such as the Belt and its allied lines, fifty feet. (Rec. 35, pp. 18705-6).

The Union Terminal, Consolidated Terminal, Belt and Air Line are all single track roads, except the Belt, which is a double track, and spurs and sidings and switch yards are especially important for single track railroads. In order to have switches for passing tracks, there must be additional grounds than the mere right of way; and switches play an important part on roads like the Union Terminal and Consolidated Terminal, and add greatly to the economy in handling cars and are essentially necessary.

It is absolutely necessary that proper side tracks and terminal yards should be furnished in order to handle the business of any railroad, and particularly the Belt lines. Railroads acquiring properly for yards and such as that always buy for future requirements.

They always purchase more ground than they absolutely need at the time the purchase is made. That is the invariable custom of all new roads. That it the policy pursued, and it is a good business policy. (Rec. 35, pp. 18829 to 18832.)

The following letters and other memoranda tend to throw light upon and explain the nature of the Central Company transactions with the Belt and other companies.

As to the purpose of the Central Improvement Company, see letter of C. A. Braley, (at that time a director of the Central Company, and attorney for the Trust Company), dated April 19, 1895, and addressed to State Realty Company, wherein is the following recital:

"The Central Improvement Company has now been incorporated for the purpose of taking title to all of such tracts of land and reimbursing you through the Suburban Belt for all moneys expended in reference to such purchases for the benefit of said Railroad Company." (Vol. 21-10745).

Neal S. Doran, auditor of the Belt Company, in his letter (Rec. 55-33199), says "The total capital stock of the Central Im-
915 provement Company is 2000 shares. This company is authorized to secure property for the Suburban Belt, the Union Terminal, the Air Line and the Kansas City, Pittsburg & Gulf Railroads."

In the letter of Auditor Doran to Willey, auditor of the Trust Company, December 6, 1899, appearing in Rec. 55-34046, he says that, in compliance with Willey's request, he inclosed certain statements, a portion of the latter being "statement of real estate, title to which is in the name of the Central Improvement Company, and purchased by them for the use of the Union Terminal R. R. and the Kansas City Suburban Belt Railroad Company, and the Kansas City & Independence Air Line. The interest of the Kansas City Sub. Belt. R. R. in these properties is represented by 1153 shares of Central Improvement Co. stock purchased."

The letter of Trimble & Braley, attorneys for the Trust Company, (Rec. 32-17068), in respect to one of the Central Improvement Company's purchases, is attached to Belt voucher in Rec. 32-17069, and by reference thereto, it will be seen that this purchase of property was by the Belt Company charged to right of way of the Union Terminal Railroad Company. The Belt Journal voucher (in Rec. 32-17144), shows that the moneys advanced the Central Company are charged by Belt Company to right-of-way the body of the voucher being as follows:

"Kansas City Suburban Belt R. R. Journal Voucher.

Right of way real estate represented.

By capital stock of Central Imp. Co. March 31, 1898: For 795 shares of the capital stock of the Central Improvement Company, owned by this Company on March 31st.	To stocks and bonds owned. $79,500.00	$79,500.00

The ownership of this stock represents right of ways lands, and lands adjacent to our right of way, occupied by this Company. As this is practically a part of the cost of road, the above account is opened to show it as such."

In the connection, see letter of Nolthenius, vice president of the Trust Company, to Doran, auditor of Belt, Belt Company voucher, based upon said letter, appearing in Rec. 32, pp. 17146-47, wherein it is shown that the Belt Company made payment of $800 to the Clerk of the Circuit Court in condemnation proceedings on lands of the Union Elevator Company, (this being on real estate purchase No. 27). By reference to the Belt voucher, it will be seen that
916 this expenditure was charged by the Belt Company to its right of way.

In the letter to said Doran by Nolthenius, treasurer of Central Improvement Company, and Belt voucher (Rec. 32-17170-'71), it appears that, in connection with real estate purchase No. 30, the costs of that property, as shown by the Belt Company on account of the same, was $813.86, and, by reference to the voucher thereto attached, $493.53 of this amount was charged to right-of-way, and the balance was charged to taxes, *sus*pense, etc.

As shown by the testimony in Rec. 25-13377, R. J. McCarty, auditor of the Belt Company, on April 3, 1900, gave a receipt to the Trust Company for the Central Improvement Company's books.

Wright's statement concerning Central Improvement Company:

In the testimony of Accountant Wright, the following statements are made, in respect to the Central Improvement Company: That the Central Company paid no salary of any kind to its officers or clerks (Rec. 54-32965); that money was paid by the railroad companies for taxes and interest on Central Company property, but no Central Company stock was issued therefor; that the Belt Company paid more money to the Central Company than it had stock issued for the same, that is, the Belt Company paid money to the Central Company for taxes and other expenses, for which the Belt Company was credited by the Central Company, but the same was charged to the account of interest and taxes (Rec. 54-32930-'31, 32938 and 33289).

In Central Company voucher (Rec. 54-32373), is shown the payment by Belt Company to Central Company of $2,665.21, for which only $1,600 of Central stock was issued, the balance being taken up by the taxes and interest paid by the railroad company. In Rec. 54-33374-'75, there is a letter from Hastings, assistant treasurer of

the Central Company, calling for $74.14 for payment of taxes upon real estate purchase No. 10, and a Belt voucher, showing this amount charged by Belt Company to accrued taxes; and in Rec. 54-33376 to 33382 inclusive, there are shown letters of Barnhart, tax commissioner, and of Hastings, assistant treasurer of the Central Company, wherein is listed the Central Company "property, held in trust for the K. C. Sub. Belt R. R." and showing a call by Hastings upon the Belt for $318.67 and $504.13 for taxes upon certain Central Company real estate therein mentioned; and it will be seen that the Belt voucher, at page 33382, charged to
917 "Accrued Taxes" the total amount of this payment of $822.80 made to the Central Company. Johnson's statement (Rec. 18-9217 to 9244) shows that the Central Company from its inception to March 23, 1900, received but $974.26 in rents, none of it coming from the railroads, for the use of a certain Central Improvement Company property; and, as shown by Wright's testimony (Rec. 54-33084) there is no evidence of the railroad companies involved ever paying the Central Improvement Company any rent for the use of the properties standing in the name of the Central Company.

Real Estate Purchases Nos. 1 to 30, inclusive, and "A" and "B".

3. The intervenor's claim, as the purchaser at the foreclosure sales, is based, principally, upon the proposition that all these properties were necessary for the use and operation of the railroads, for which they were respectively bought, and that, under the circumstances shown in evidence, each property came under the after acquired property clause of the general mortgage executed by the railroad interested in that property. It becomes important, then, to state the facts as to each purchase for the purpose of ascertaining whether it is or is not covered by any of the general railroad mortgages in controversy, and under which the intervenor claims title.

These facts must come almost entirely from two witnesses, the said James H. Pickering, and George C. Ward. Their testimony on this subject covers several volumes of the record, and to which are attached blue prints, showing locations of the different tracts of land: the title to those shown in yellow being still standing in name of Central Company, while those tracts shown in red have passed out of the Central Company.

Witness Ward was tax collector for the Southern Company, and prepared a deed record for the Gulf road from Kansas City to Port Arthur, and, also, as to all the terminal properties; and having examined the records with reference to all the various tracts in [troversy,], stated he was familiar with the titles to all said properties (Rec. Vol. 25-13276-'7). For convenience, these properties are herein referred to as "Real Estate Purchase No. 1", etc., to avoid lengthy descriptions, which can readily be had, if desired, by reference to the records, cited in respect to each tract.

In the following statements, in reference to the testimony of Pickering and Ward, the intention is merely to give the effect, or substance, and not the full statements of the witnesses.

Real Estate Purchase Number 1.

For map showing Purchase No. 1, see blue print, Rec. 25-
918 13299-*a*. Pickering testified that purchase No. 1 is on a switch from the main line, extending on First Street towards Central Avenue some distance from Schwarzschild & Sulzberger Packing House; that he built the railroad track which runs up over purchase No. 1, and that Purchase No. 1 is on the Union Terminal and is convenient for team track advantages, and team tracks are very important in connection with the Union Terminal road (Rec. 35-18690-1-2); that the whole spur on Tract No. 1 is used for an unloading track, there being a demand therefor, and it became necessary to accommodate certain business that had been offered to the road; that Tract No. 1 is excellently located for additional team tracks to be built upon it (Rec. 35-18839-'40).

Ward testified that purchase No. 1 stands in the name of the Central Company, (Rec. 25-13279).

Real Estate Purchase No. 2.

For map showing Purchase No. 2, see blue print, page 13299-*a*, Record 25.

Pickering testified that he urged the purchasing of the tract, called Real Estate Purchase No. 2, for switching yards, which were needed for switching facilities in Kansas; that two tracks were built upon this land and were used for switching and storing cars, the tract being necessary for the economical handling of cars, and absolutely necessary to the railroad as it existed at that time, and also at the time he testified (Rec. 35-18692-'3); that at the time this tract of land was purchased, he didn't expect to at once fill the entire tract with railroad tracks, but intended to use as much as was necessary, with the idea that, in the future, additional tracks would have to be put there, and that, from an economical standpoint of railroading, he considered this tract to be absolutely necessary and indispensible to the operation of the Union Terminal railroad, its present and future necessities, and for that reason advised the purchase of it (Rec. 35-18697); that tract No. 2 is of such a character that it could only be used for railroad tracks, spurs or switches (Rec. 35-18695), and, with industries along the ground, such as factories and the like, which would have to be reached, he thought this purchase No. 2 was advisable for the handling of cars and switching tracks to such industries, etc.; that the tract was not purchased for the purpose of locating factories on it, but for the purpose of placing tracks on it for switching purposes (Rec. 35-18807-8-9).

919 Ward testified that Real Estate Purchase No. 2 stands in the name of the Central Company (Rec. 25-13279), and lies along the right of way of the Union Terminal and adjoins it (Rec. 25-13299).

Real Estate Purchase Number 3.

For map showing Purchase No. 3, see blue print, page 13308 Record 25.

Pickering testified that Purchase No. 3 is the approach into the

Schwarzschild & Sulzberger plant, and the purchase was absolutely necessary to enable the Union Terminal road to obtain a connection with Schwarzschild & Sulzberger; that he built the tracks upon this tract, which tracks required only a part of the whole tract but it was found to be more economical to purchase the entire tract of land, as the balance of it, not so used for the track to said plant, is of such a character that it could only be used for railroad purposes, spurs or switches (Rec. 35-18694-'5); that tract No. 3 is absolutely necessary and indispensable to the Belt railroad, is cut off on both sides by railroad tracks and could not, for that reason, be used for business industries or factories (Rec. 35-18809-'10, and 18697).

Ward testified that Purchase No. 3 stands in the name of the Central Improvement Company (Rec. 25-13279), and adjoins the right of way on the main track of the Belt road, and has a spur into the Schwarzschild and Sulzberger packing house (Rec. 25-13300).

Real Estate Purchase No. 4.

For map showing Purchase No. 4, see blue print page 13301-*a*, Record 25.

Pickering testified that he urged the acquisition of Real Estate Purchase No. 4, as being necessary for the Union Terminal railroad because needed for tracks and for economical handling of its business, and it was so situated as to be an ideal location for railroad yards, and for which purpose it was purchased; that he built tracks upon this tract, and, the Santa Fe yards being just south of it, the transfer of cars from the Santa Fe yards could be switched to this before being taken east for distribution; that, in his judgment, this tract is a desirable and necessary property for the Belt road and its allied lines, and it was economical railroading to acquire it (Rec. 35-18695-'6-'7); that at the time of its purchase, it was not intended to build railroad tracks over the entire tract at that time, but
920 it was thought that the growth of the railroad company's business which might reasonably be expected, would be such as to require additional tracks to handle such business in the future a large part coming from the Santa Fe, and that he regarded this tract as necessary for the construction of the tracks, which — would require for switching purposes, and, for that reason, he advised its purchase (Rec. 35-18695, 18810, to 14).

Ward testified that Purchase No. 4 stands in the name of the Central Improvement Company (Rec. 25-13279); that it is at the end of the Union Terminal in Argentine, has a connection with the Santa Fe track, and lies between the main line of the Union Terminal and the spur that connects with the Santa Fe (Rec. 25-13301).

Real Estate Purchase Number 5.

For map showing Purchase No. 5, see blue print, page 13302-*a*, Record 25. This tract of land has been disposed of.

Pickering testified that there was a switch track known as "Commercial" switch, run down through tract No. 5, in the East Bottoms,

to accommodate a paper mill, which was afterwards burned down, or was moved away. (Rec. 35-18813-'14.)

Ward testified that this tract No. 5, has been sold by the Central Improvement Company to the Heim Brewery Company (Rec. 25-13279).

Real Estate Purchase Number 6.

For map showing Purchase No. 6, see blue print, page 13305-*a*, Record 25.

Pickering testified that he urged that this tract be acquired for the purpose of getting connections with the Union Pacific and Wabash roads, and that he built the connections running down to those roads; that a freight house was put on this land for the use of the Frisco Road under a contract made by the Belt to build such freight house for the Frisco which used the tracks for loading and unloading its merchandise, and the balance of the ground was used for the approaches to the freight house, and for teams to load, and unload upon this tract No. 6; that there was a great volume of business done there, and this tract of land was, at the time it was purchased, and is now, absolutely necessary for the operation of the road (Rec. 35-18697-'99).

Ward testified that the title to tract No. 6, stands in the Central Improvement Company (Rec. 25-13280); and that the main line of the Belt passes through this tract of land, and there is, also,
921 a connecting track from the Belt running on Santa Fe Street to the connection with the Wabash, Santa Fe and Union Pacific roads, and has a freight depot or shed on it (Rec. 25-13304).

Real Estate Purchase Number 7.

Johnson's testimony in Record 19, pages 9616-9625, shows that the title to this tract was taken in the Central Company by error, and that the land was afterwards transferred to the Trust Company.

Ward testified that the title was taken in the name of the Trust Company originally, but that it was afterwards put on the books of the Central Improvement Company by error (Rec. 25-13280).

Real Estate Purchase Numbers 8, 14, 15, 16, and 17.

For map showing purchases Nos. 8, 14, 15, 16, and 17, see blue print, page 13308-*a*, Record 25. Title to all these properties, comprising 57 acres, has passed from Central Improvement Company to J. P. Kerr (Rec. 25-13280-'87), by order of this court, and since this action was instituted.

Pickering testified that the object of having Fairmount Park was to create traffic, for the Belt and the Air Line, and that the park did create a very heavy passenger traffic during the summer months (Rec. 35-18770-1-2-3-4).

These purchases constitute a part of Fairmount Park (Rec. 25-13280-'87, and blue print, page 13308-*a*).

Real Estate Purchase Number 9.

For a map showing purchase No. 9, see blue print, page 13306-*a*, Record 25.

Pickering testified that, after Real Estate Purchase No. 9, was acquired, some tracks were constructed on it, the spur, marked "YY", running to an elevator, and to another industry on Owen Avenue; that the spur on this tract was built by him, and, at the time he left the railroad, and at the present time, this tract of land was absolutely necessary and indispensable to the railroad for the operation of the road (Rec. 35-18700-'1).

Ward testified that the title to tract No. 9 is in the name of Central Improvement Company (Rec. 25-13280), and that a spur track runs through it (Rec. 25-13306).

Real Estate Purchase Number 10.

For map showing Purchase No. 10, see blue print, page 13306-*a*, Record 25.

922 Pickering testified that, as to Purchase No. 10, track "YY", running through it is the Missouri Pacific connection with the Belt, also connection with one or two industries located on the track and the main line of the Belt runs through this tract of land; that he built two spurs on the river bottom there on this tract No. 10, because they were necessary, and that portion of Tract No. 10, marked "River" is of such a nature that, if it was filled and brought to a level of the track, it could be used for switches, and this land when filled, would become valuable for switching purposes; that this whole track No. 10 is valuable for additional tracks, and is so located that its ownership is necessary for the economical operation of the Belt and its allied lines, and, it was and is absolutely indispensable in the light of economical railroading, that this tract should have been acquired and held by the Belt for such tracks and spurs as might be needed (Rec. 35-18701-2-3), and that, if that portion of it, lying towards the river, had been filled, he would have built additional tracks on it that this tract No. 10, is of such a nature and size that it can be used to great advantage for storage tracks, side tracks, switches or spurs (Rec. 35-18703-'4).

Ward testified that the title to Purchase No. 10 is in the name of the Central Improvement Company, subject to the reservations of one hundred foot right of way of the Kansas City Suburban Belt (Rec. 25-13280 and 13306), which now runs through it.

Real Estate Purchase Number 11.

For map showing Purchase No. 11, see blue print, page 13307-*a*, Record 25.

Pickering Testified that he was and is acquainted with the location of the lots, representing Purchase No. 11, and that it was economical railroading to acquire the entire lots, instead of the bare right-of-way, in as much as the Union Terminal railroad runs diagonally across them; that one hundred feet is the usual width of right-of-way, though fifty feet would be the least economical width right-of-way, and, that the property included in this Purchase No.

11, is absolutely necessary for the operation of the Union Terminal Railroad (Rec. 35-18705-'6).

NOTE.—By reference to the scale of measurement on the blue prints, showing Purchase No. 11 (Rec. 25-13307-*a*, *b* and *c*,) it will be seen that, in order to have the usual width of right-of-way of one hundred feet the entire lots covered by Purchase No. 11, would be taken in. The scale is one inch to one hundred and fifty feet, and there is no point on this Purchase No. 11, where a full width
923 right-of-way of one hundred feet would not take in all of the lots, represented by Purchase No. 11, with the possible exception of a very small portion of the lots set out on page 13307-*a*.

Ward testified that the portion of Purchase No. 11, lying south and west, of the Union Terminal right-of-way, of lots 14, 15, 16, 17, and 18, in Loomis' Riverside Addition to Kansas City, Kansas, was sold to August Uihlein, on April 4, 1904, by T. T. Crittenden, receiver of Central Company, for $2,500.00, and the balance of it stands in the name of Central Improvement Company (Rec. 25-13280-'1, 13307).

The description of the portion sold of Tract No. 11 is found in the copy of receiver's deed, made under the order of this Court, and appearing in record 25, pp. 13282-'6, inclusive.

Real Estate Purchase Numbers 12 and 13.

For map showing Purchase Nos. 12 and 13, see blue print page 13305-*a*, Record 25.

Pickering testified that the right of way of the old Consolidated Terminal passes over the south ends of Purchases 12 and 13, which lots run down in the direction of the river and are below the grade of the Consolidated Terminal road, which is 50 feet above the river, though if a double track should be desired or needed, these lots could be used on which to build it (Rec. 35-18707-18709).

NOTE.—The usual width of right-of-way, as heretofore testified to by witness Pickering, will take in practically the full depth of these lots, and the intervenors feel that the situation of tract 12 and 13 is such that they should be entitled to the entire tract of land.

Ward testified that the title to tracks Nos. 12 and 13 stands in the Central Improvement Company (Rec. 25-13287), and that the main line of the Belt runs through them (Rec. 25-13304).

Real Estate Purchase Number 18.

It appears from Johnson's testimony (Rec. 20, pp. 10145 and 10198) that the title to this tract is in the State Realty Company by tax deed.

Ward testified that the principal part of Purchase 18 is in the name of Belt Railroad Company by sheriff's deed by order of court, and that it was never in the name of Central Improvement Company (Rec. 25-13287-'8). The title, not being in the Central Company, the property is not involved in this cause.

Real Estate Purchase Number 19.

924 From Johnson's testimony (Rec. 20, pp. 10198 to 10223, and 10219), it appears that the title to this property was conveyed by the Central Company to the Belt Company, which apparently owns it, and hence, this property is not involved in this cause.

Real Estate Purchase Number 20.

For map showing Purchase No. 20, see blue print, page 13309-*a*, Record 25.

Pickering testified that if a depot should be located on tract No. 20, the whole of it was necessary, the point in question being a very desirable one for a depot, and, that in acquiring ground for depot purposes, there ought to be sufficient ground secured, as it would not be good policy to acquire a small amount when a sufficient amount could be acquired at a low price; that, at the point in question, a large piece of land should be acquired, such as Tract No. 20, which is no more than would be necessary in view of the location of the depot (Rec. 35-18837-'38-'39).

Ward testified that this Purchase No. 20 is in the name of Central Improvement Company (Rec. 25-13288), lies just west of the Belt right-of-way (Rec. 25-13309), and that there is a little depot there, about half way (Rec. 25-13317-'18).

Real Estate Purchase Number 21.

For a map showing Purchase No. 21, see blue print, page 13305-*a*, Record 25.

Pickering testified that a part of the freight house at Second and Wyandotte, and of the terminal tracks, is located upon this tract No. 21, this land being also used for team tracks and for loading and unloading freight; that he was and is acquainted with the terminal facilities at Second and Wyandotte, and that this tract was absolutely necessary and indispensable to the railroad (Rec. 35-18709-'10).

Ward testified that the Central Company has title to an undivided one-half of that tract, and the Belt Company has a deed to the other undivided half of the lot (Rec. 25-13288); and that the freight house, and one of the tracks running into it, are located on this tract, which lies north of the Grand Central Depot, the space around it being used for tracks and terminals at the depot (Rec. 25-13305).

Real Estate Purchase Numbers 22 and 23.

For a map showing Purchases Nos. 22 and 23, see blue print page 13305-*a*, Record 25.

925 Pickering testified that the Main line of the Union Terminal, or the old Consolidated Terminal, runs through Purchases 22 and 23, and there are one or two spur tracks located upon them, which tracks he built because they were necessary team tracks; that a team track is used for loading and unloading freight, and that portion of tracts 22 and 23, not covered by railroad tracks, is used for an approach by the teams to the cars for the purpose of

loading and unloading them, and both said tracts 22 and 23 are absolutely necessary for the railroad purposes of the Belt and allied lines (Rec. 35-18710-'11); and, that said tracts are used by the main line and team tracks located thereon, and also as an approach for the team tracks (Rec. 35-18822).

Ward testified that a part of this tract has been sold, the description of the sold portion being set out in deed (Rec. 25-13290-'2); and that the deed was made on October 26, 1896, by the Central Company, and conveys all that portion of this purchase that lies north of the Belt right-of-way, and the remainder of the two tracts, Nos. 22 and 23, is in the Central Improvement Company (Rec. 25-13293).

Real Estate Purchase Number 24.

For a map showing Purchase No. 24, see blue print, page 13305-*a*, Record 25.

Pickering testified that tract 24 was purchased, in order to get a switch into the yards, a switch being constructed at that point, and that the ground was absolutely necessary to get an approach to the yards, the leads, and that he built the lead tracks, indicated by the white lines shown on this tract 24; and further, that the portion of the tract, not already covered by these leads, could be used for additional leads, and, that the acquisition of tract 24 was absolutely necessary to utilize the yards there (Rec. 35-18711-'12).

By reference to the map, showing Purchase 24, at page 13305-*a*, it will be seen that the same leads and tracks cover it now as testified to by the witness Pickering, being right in the heart of the present Kansas City Southern.

Ward testified that purchase No. 24 stands in the name of the Central Improvement Company (Rec. 25-13293), and, lying adjacent to the right of way of the Belt, has some of the lead tracks into the Santa Fe yards—the freight yards (Rec. 25-13303-'4).

Real Estate Purchase Number 25.

926 For a map showing Purchase No. 25, see blue print, page 13305-*a*, Record 25. This property has been disposed of.

Ward testified that this tract, having been foreclosed by the Trust Company, the title does not stand in the name of the Central Improvement Company (Rec. 25-13293).

Real Estate Purchase Number 26.

From Johnson's testimony (Rec. 20-10499 to 10523), it appears that the title to this property is in the Belt Company; and hence that this tract is not in controversy in this cause.

Real Estate Purchase Number 27.

For a map showing Purchase No. 27, see blue print, page 13305-*a*, Record 25.

Pickering testified that a part of the freight house, located on said purchase or tract No. 6, is built upon tract No. 27, which became necessary in order to build a freight house of sufficient size,

and, that the portion of tract No. 27, not occupied by the freight house, is used for an approach to the freight house and a platform for the approach of teams; and this tract of land was and is absolutely necessary to the operation of the railroad (Rec. 35-18699-18700).

Ward testified that the title to this tract is in Central Improvement Company (Rec. 25-13293).

Real Estate Purchase No. 28.

It appears from the testimony of Johnson (Rec. 20-10600 to 10-610) and of Ward, (Rec. 25-13293), that the title to this property was taken in the name of the Belt Company.

Real Estate Purchase Number 29.

For a map showing Purchase No. 29, see blue print, page 13306-*a*, Record 25.

Pickering testified that Purchase No. 29 is of such a nature that, if filled and brought to a level of the main line of the Belt, it could be used advantageously in connection with No. 10, for building sidings and spurs, and that it would be economical railroading to have the ownership of tracts numbered 29 and 10; that a spur track was built out on purchase No. 29 under his supervision, two tracks were there, and he would have built more if the balance of tract 29 had not been in the river, there being just enough room for the two tracks, and, if that portion of tracks 29 and 10 in the river had been filled, it would have been needed for additional tracks; and he would have built such additional tracks (Rec. 35-18702-'3).

927 Ward testified that the title to this tract stands in the name of Central Improvement Company (Rec. 25-13293); and that the right-of-way of the Belt runs through this tract 29 (Rec. 25-13306).

Real Estate Purchase No. 30.

For a map showing purchase No. 30, see blue print, page 13310-*a*, Record 25.

Title to this tract has passed from Central Improvement Company, by deed executed by T. T. Crittenden, Receiver, on May 16, 1903, for a consideration of $1.00 and payment of taxes and assessments against the property (Rec. 25-13294).

Real Estate Purchases "A" and "B".

As to Purchases "A" and"B", appearing on Ward's Exhibit 5, in Record 25, page 13305-*a*, witness Pickering says that they were absolutely necessary in the operation of the Consolidated Terminal or Belt road, for switch yard purposes down there, and that the plat shows that the ground was covered solidly with tracks, in fact all the tracks that could be placed upon it; and that switch yards are located upon said tracks, which were needed to accommodate such yards in the proper operation of the railroad (Rec. 35, pp. 18819 to 18821, and 18834-'35).

The master, for his findings, adopts the statements of witness

Pickering, in respect to the utility and necessity of said tracts of land for the railroads adjoining or contiguous to which they are situated; in other words, he finds that the titles to the following tracts should be vested by a decree in the Southern Company, to-wit:

Real Estate purchases No. 1, No. 2, No. 3, No. 4, No. 6, No. 9, No. 10, the unsold part of No. 11, Nos. 12 and 13, No. 20, an undivided half of No. 21, Nos. 22 and 23, No. 24, No. 27, No. 29, and real estate purchases "A" and "B".

It has been conclusively shown by the proofs in this cause that each real estate purchase was made at the direction of the railroad company interested in such purchase, and not by the directors of the common interests of all the stockholders alike, as should have been done in case all such stockholders were intended to be interested alike in each and all of the purchases so made.

It has been suggested by counsel for the defendant that there are discrepancies in book-keeping, which do not at all times indicate that the exact amount of money required for each purchase
928 was furnished by the particular road alleged to be interested in such purchase. It would seem that, though such be the case in some rare instances, yet that fact should not militate against the principle involved in this controversy, and that is, that each road interested in these respective tracts of lands indicated what it desired the Central Company to buy, how much was to be paid for the tract bought, and generally arranged the details of such purchase. It is shown by the foregoing facts that the object in placing the titles to these properties in the Central Company was to avoid the effect of the general mortgages executed by these different railroads upon their properties then owned, and thereafter to be acquired. These properties in controversy were acquired subsequently to the execution of these mortgages, and it was unquestionably the effort of these different railroad companies to place the titles to these properties in the Central Company, so as to avoid the operation of the general mortgage upon their properties, and one object in doing so was unquestionably to have these properties so that any surplus, not then actually needed for railroad purposes, could be sold to an advantage, and the money realized therefrom go to the railroad companies, respectively, rather than be held for the satisfaction of the general mortgage indebtedness.

Francis A. Wright, the principal accountant for the defendant, in his cross-examination, admits that whenever money was received by the Central Company, the railroad supplying or paying it was credited accordingly on the Central books, and that such credit was likewise made when moneys were paid for taxes or interest, though sometimes carried to the interest on tax account, and in that way, no stock would be issued for such items of payments (Rec. 54-33028); and further, that when calls were made, from time to time, to pay interest or taxes, they were always made upon the company which, according to the "heading" in the company's ledger, was interested in such property (Rec. 54-33029).

Counsel for defendants have suggested that after the various rail-

road companies acquired the Central Company stock, they bought and sold such stock to each other, and call attention to an instance where the Gulf Company purchased from the Belt Company at par, 40 shares of Central Company stock, and paid the Belt Company $4000.00 in cash therefor (Rec. 53-32280). Mr. Wright, however, explains that transaction in a very satisfactory manner, as appears in his testimony (Rec. 54-33033 to 33035), in which he states in substance, that the Gulf Company had $19,000.00 of stock issued to it, but, by the stock ledger of the Central Company, it is
929 shown that the Gulf had 235 shares of Central stock, or $23,-500.00, par value. The Gulf Company received five shares from the Belt, and also 40 shares from the Belt, and the balance of 190 shares was issued direct to the Gulf Company; Five Hundred (500) dollars was originally advanced by the Belt upon Purchase No. 6, and later on, the Gulf refunded the amount to the Belt, thereby simply equalizing between them, and issuing stock to the right party as to this No. 6, purchase (Rec. 54-33034); and as to the 40 shares obtained from the Belt, the $4000.00 was paid by the Gulf to the Belt, (not entered on Central Company book), and thereby simply adjusting this matter as between the Gulf and the Belt Companies (Rec. 54-33033).

In this connection the defendant has cited the case of Humphreys v. McKissick, 140 U. S., 304, in which several railroad companies combined to construct an elevator to be connected with their respective roads, each to contribute an equal amount towards its cost, and each to receive corresponding certificates of stock in a corporation organized to take title to the elevator and to construct it. This arrangement was carried out. The Wabash, one of the railroads, had executed a mortgage on its railroad between certain termini, in which the following language was used: "as said railroad now is, or may be hereafter constructed, maintained, operated, or acquired, together with all the privileges, rights, franchises real estate, right of way, depots, depot grounds, side tracks, water tanks, engines, cars and other appurtenances thereunto belonging." It was contended in that case that the Wabash Company had a separable interest in the elevator property, and that it was within the lien of the Wabash mortgage, but it was finally held by the United States Supreme Court, on an appeal from the Circuit Court, that the interest of each railroad company in the elevator was as a stockholder in the company which constructed the elevator, that neither company had any separable interest in the elevator property, and that neither the stock of the elevator company, nor any interest in the elevator itself, was within the mortgage lien.

In the case of Pardee v. Aldridge, 189 U. S., 429 (also cited by defendant), it was held that where a railroad company mortgages its road, including all appurtenances and appendages of said railroad, then owned, or afterwards to be acquired, or used for and pertaining to the operation of said railroad, a sale under said mortgage does not include land acquired by the Company after the mortgage, for the purpose of re-sale, notwithstanding there was evidence

that the company intended to use the land for main track,
930 sheds, and such switches and side tracks as should be necessary for the operation of the road.

Counsel for defendant have also made further citations of authorities, to the effect that a Congressional or State land grant to aid in the construction of a railroad, does not pass as an appurtenance thereto; R. R. v. Parker, 143 U. S., 43; Wilson v. Beckwith, 117 Mo., 61; nor would land purchased by the railroad for the purpose of cutting wood and timber therefrom, and to be used on the railroads; Dinsmore v. R. R., 12 Wis., 649; nor will town lots or other lands situated outside of the layout of the roadway, and purchased by the Company for re-sale, be included within the mortgage; Calhoun v. R. R., 2 Fipp. U. S., 242; R. R. v. Livermore, 47 Pa. St., 469; Seymour v. R. R., 25 Barb., N. Y., 284; nor will the mortgage include land purchased by a railway company for a general manufactory for cars, and intended for the use and accommodation of the road; Eldredge v. Smith, 34 Vt., 484.

In the judgment of the Master, these authorities do not reach the point involved in the case at bar for the reason that the proofs here show that the specific properties desired by each of the three railroad companies involved, were paid for by and with the moneys of that company, and for its purposes. There were no undivided interests, as in the elevator case, where three roads built the same elevator.

The theory upon which the conclusion of the Master is reached, is based upon the principle that the Central Company was simply used for the purpose of holding the titles to the particular properties belonging to each one of these railroads, and to all intents and purposes, it acted as a trustee, and was not a beneficial owner, the intention being, as already stated, to place these properties beyond the lien of the general railroad mortgage, which covered after acquired properties.

The proofs show that the intervenor acquired, at the foreclosure sales, all the interests of the Gulf, Air Line and Belt Companies, as to all properties legally covered and included in the mortgages foreclosed; hence it must be shown that the real estate purchases in controversy were appurtenant to the railroads, along which they are contiguous, for if they are not appurtenant, and do not come within the class of cases which would otherwise bring these properties within the lien of the general railroad mortgage, then, of course, the titles to such properties did not pass by the foreclosure sales to the intervenor, and they would still be in the Central Company, giving value to its stock.

Under the facts, the Master finds that a certain portion of said
931 properties were and are appurtenant and needful for railroad purposes, and are of such character as would come within the after acquired property clause of the mortgages.

The Belt Company pledged its Central Company stock to the Trust Company, for the purpose of securing its large indebtedness to that company, and, subject to the rights of the intervenor herein the Trust Company has the undoubted right to subject such col-

lateral to the payment of the Belt obligations to it, in so far as it affects the properties which have not been purchased by the intervenor at such foreclosure sales.

It is the opinion of the Master, and he so finds, that the intervenor is entitled to the judgment order and decree of this court, requiring the Central Company and its receiver, to convey to said intervenor those portions of said real estate hereinbefore found to be appurtenant to said railroads, and included within the after acquired property clause of their mortgages.

IX.

Townsite Company Stocks and Lands.

In paragraph 11 of the intervening petition, the intervenor states that in connection with the contract between the Belt Company and the Connecting Company, and as a part of the obligation of the Belt thereunder to procure a right of way for the railroad of the Connecting Company, the Belt Company purchased and acquired certain lands along the line of said railroad in addition to those required for the right of way, and took the title to such other lands in a Missouri corporation called the "Northern Townsite Company", hereinafter referred to as the "Townsite Company"; that in so purchasing land for the right of way, it frequently became necessary, in the economical handling thereof, to purchase larger tracts than required for the purposes of the right of way, out of which the right of way would be carved, and also to purchase lands for townsites, and the title to the latter class was also taken in the name of the Townsite Company; that all of the money used in the purchasing said lands, aggregating $46,463.75, was furnished and provided by the Belt Company, excepting $6720.07, which was furnished by the Trust Company; that the capital stock of the Townsite Company to the extent of 439 shares was issued to the Belt Company to represent the moneys contributed by it in the purchase of said lands, the purchase of which was incidental to the construction of the railroad, and the titles to said lands (excepting such as may be held to have been purchased with moneys furnished by the Trust Company) in equity belonged to the Belt Company and were covered by the after-acquired property clause in the mortgage of the Connecting Company, which has been foreclosed and by virtue of which foreclosure the intervenor
932 became vested with the title to said lands, so owned in equity by the Belt Company, and became entitled to the capital stock so issued by the Townsite Company to the Belt Company; that the Trust Company denies the right of the intervenor to said lands or the capital stock or any part thereof, and claims to hold said capital stock as collateral security to an alleged indebtedness from the Belt Company to the defendant Trust Company; wherefore, the intervenor asks for a decree, requiring the Trust Company to turn over to it all of the capital stock representing moneys advanced by the Belt Company, the cancellation of any and all capital stock of

the Townsite Company issued without consideration, or the conveyance to the Belt Company of all of the properties and assets of the Townsite Company upon repayment to the Trust Company by the intervenor of the said sum of $6720.07, so advanced by it to the Townsite Company.

The Trust Company, in paragraph 11 of its answer to the intervening petition, alleges that the Townsite Company was organized by its own stockholders for the purpose of acquiring and dealing in lands along the line of the railroad of the Connecting Company, but denies that the Belt Company and the Trust Company furnished $46,463.75; but, on the contrary, states that a much smaller amount was furnished, and that the total amount furnished by the Belt Company for the purchase of said lands in which the Townsite Company had, or claimed to have, an interest, was $6286.57, and that the Belt Company received from said townsite Company 439 shares of its capital stock, of the par value of $100.00 each, on account thereof; and that the total amount furnished by the Trust Company for the purchase of said lands in which the Townsite Company had, or claimed to have an interest, was $6720.07, and that it received therefor 489 shares of the capital stock of said Townsite Company; defendant denies that in equity the lands represented by the money furnished by the Belt Company belong to it, or were covered by the after acquired property clause in the Connecting Company mortgage, or that the foreclosure proceeding vested the title to said lands, or any part of them, or of the capital stock, in the intervenor. Defendant alleges that it holds said 439 shares of the capital stock as collateral security to a bona fide indebtedness from the Belt Company to the defendant; wherefore, defendant claims that the intervenor is not entitled in law or equity to any interest or title in said land or stock, and that the same were not covered by the terms of the mortgage.

It is not controverted that it was the duty of the Belt Company, under its contract with the Connecting Company to furnish the right of way for the latter's railroad (Rec. 15, pp. 8174 to
933 8191); that the Townsite Company was organized for the purpose of acquiring this right of way, together with other real estate along the line of the railroad, or that lands, other than the right of way, were so acquired and the title taken in the name of the Townsite Company. There is a dispute, however, as to the amounts of money actually furnished and paid out by the Belt Company or the Trust Company in the purchase of these lands. The Trust Company contended that the Belt Constructing the Connecting Company road advanced $30,062.75 in payment of lands, the title to which was taken in the name of the Townsite Company, and in addition thereto paid the Townsite Company $6288.57, in part payment of Townsite Company stock, that the Trust Company also paid the Townsite Company $6720.07 in part payment of Townsite stock, and, further that the Townsite Company received $10,053.24 from various parties in payment of certain lands that had theretofore been purchased by the Belt Company and the title taken in the name of the Townsite Company, and that these amounts are

the only moneys that the Townsite Company ever received from any source.

Under the issues made by the pleadings, the material inquiry here is simply as to whether or not the Belt Company, in equity, has acquired title to any part of these lands, or to the Townsite Company stock by reason of the foreclosure proceeding under the Connecting Company mortgage, or whether said Townsite Company stock, now held by the Trust Company, shall be retained by it as collateral security for its indebtedness against the Belt Company.

It is not thought necessary to encumber the record with the legal descriptions of all of the properties standing in the name of the Townsite Company at the time of the filing of its answer but a list of such properties will appear in the answer of the Townsite Company and its receivers. In Johnson's testimony (Rec. 16, p. 8443) he gives a list of the properties purchased and describes them.

A copy of the deeds of trust executed by the Belt and Consolidated Companies will be found in Rec. 21, pages 10953 to 10977 and 10978 to 11001; a Decree of Sale in Rec. 48, pages 28775 to 28809; a Commissioner's Report of Sale, Rec. 57, pages 34811 to 34832; an Order and Decree Affirming Sale, Rec. Vol. 57, pages 34833 to 34838; a Commissioners' Deed to the Southern Company, Rec. 48, pages 28877 to 28893.

The circumstances under which the Trust Company acquired said Townsite Company stock have already been stated in connection with the other collateral securities turned over to it and need not be again repeated.

934 In their argument before the Master, counsel for the complainants have endeavored to show that the Southern Company has very much the same rights to those lands held by the Townsite Company, or to its stock, as to those lands held by the Central Company but, in the judgment of the master, the difference is a very material one. There is no proof in this record that any particular parts of the funds furnished by either the Belt Company or the Trust Company went into the purchase of any specific lands; in other words, the funds furnished by the Belt Company were provided by it by reason of its contract with the Connecting Company to build the railroad belonging to that company, and it became its duty to acquire the necessary right of way for that purpose. As an incident to the purchase of such right of way, it was deemed wise to also purchase additional lands out of which to carve the right of way or to [pay] out townsites, etc.

In the discussion of the other collateral turned over to the Trust Company, and occupying relatively the same position as this Townsite Company stock, the conclusion has heretofore been reached by the master that such stocks were not included within the after-acquired property clause of the mortgages, and that same conclusion applies to this stock. Inasmuch then as the stock in controversy, was turned over by the Belt to the Trust Company as collateral security and is unaffected by the lien of the Connecting Company mortgage, it necessarily follows that the Trust Company is entitled to retain such stock for the purposes of the pledge.

The Townsite Company and its receivers, by virtue of the sale of a portion of the lands purchased, as shown in Rec. 16 at page 8443, had on hand on June 10, 1905, the sum of $10,560.48.

For the reasons above stated, the master is of the opinion and so finds, that the complainants are not entitled to a decree requiring the Trust Company to turn over said shares of the capital stock of the Townsite Company to them, or to a decree requiring the Townsite Company to make a conveyance to the Belt Company of all its properties and assets upon the payment to the Trust Company of $6720.07, so advanced by it to the Townsite Company.

X.

Amusement Company Stock; Elevator Company Stock.

The Trust Company holds as collateral 25 shares of the Amusement Company stock, and 425 shares of the Elevator Company stock, but in as much as the proofs do not show that the intervenor has any superior rights or equities to these stocks, by
935 reason of its purchases at the foreclosure sales, the Master will not take the time of the Court in making a special report upon these stock items, as in his opinion, they come within the principle that they are not included in the after acquired property clause of the foreclosed mortgages.

XI.

As to Whether the Claim of the Southern to the Properties Pledged by the Belt is Barred by the Statute of Limitations and by Laches.

1. Statute of Limitations.—It is not disputed that all of the properties pledged to the Trust Company to secure the Belt indebtedness to it, were pledged on or prior to July 20, 1899, with the exception of the steel rails, and the open account of $133,000.00 held by the Belt Company against the Gulf Company, for switching charges, and both of which items were also pledged on February 1, 1900.

It is not controverted that the first assertion of a claim by the Southern Company to any of the pledged properties, was when it filed its original intervening petition in this cause, on February 27, 1905, which was more than five years after the pledge of each and all of the different items of the collateral securities.

Sections 4271 and 4273, Revised Statutes of Missouri, 1899, which have been expressly pleaded by the Trust Company in its answer in bar of the claims of the intervenor in respect to said collateral securities, are as follows:

"SEC. 4271. Period of limitation prescribed.—Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued."

"SEC. 4273. Within five years * * * fourth, an action for taking, detaining or injuring any goods or chattels, including actions, for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated; fifth, an action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud."

The foregoing statutes of limitations are controlling in this cause.

Miles v. Vivian, 79 Fed. 848-852.
Harpending v. Dutch Church, 16 Peters, 455.

936 The cause of action, if any, of the intervenor, is either (1) "for the recovery of specific personal property", or the taking or detaining thereof, or (2) for an "injury to the rights of another", and, in so far as such cause of action may be affected by said statutes, it is immaterial whether the action, attempted to be asserted by the intervenor, be regarded as the one or the other.

On the theory that the intervenor seeks relief for "injury to the rights" of the Southern Company, then the gist of its cause of action must be on account of the alleged breach by the Trust Company of its duty to the bondholders, caused by its receiving, while trustee in the Belt mortgage, the properties pledged as above stated.

On the assumption that the taking of such securities constituted a breach of duty on the part of the Trust Company, it was, as hereinafter stated, in the 13th subdivision of this report, the breach of an implied duty, rather than of an express duty, and hence is covered by said five year statute of limitations, and the principles, announced in Frismuth v. Farmers Loan & Trust Co., 95 Fed., 7, and 107 Fed. 169, would be entirely applicable to the facts of the case at bar.

It would also follow, in case the Trust Company was guilty of any such breach of duty in so receiving from the Belt Company the properties pledged, such breach of duty was an accomplished fact the very moment that each property was pledged, and it is not disputed that all the pledges of said properties were made more than five years before any claim was asserted by the Southern.

It is true that the Southern Company was not incorporated until March 19, 1900, and, as a corporate entity, could not have maintained an action before that date, but such fact does not materially affect the operation of the statute of limitations for the reason that as claimed by the Trust Company, all the rights acquired by the Southern in the premises were of a derivative nature, that is, were derived from and acquired by the Southern Company as purchaser at the foreclosure sale; in other words, the Southern was subrogated to the same right and lien which had belonged to the bondholders, and not a new right, and hence, it is apparent, that if the statute of limitations has run against the bondholders, it has likewise run

against the Southern Company, which had no superior right to the bondholders.

In this connection, it may be suggested that the Southern is chargeable with all the acts and omissions of the reorganiza-
937 tion Committee, to which it succeeded, and it is not disputed that this Committee had, in December, 1899, acquired substantially all of the bonds of the Belt Company for reorganization purposes, and was from that date, and until March 19, 1900, when said bonds were turned over to the Southern Company, practically the sole bondholder of the Belt Company.

The claim of the intervenor as to the pledged properties is not covered by the provision in respect to "an action for relief on the ground of fraud", so as to permit an action to be brought at any time within ten years after the discovery of the facts, constituting the fraud, because, first, the gist of the action is the breach of duty on the part of the Trust Company in receiving the properties in pledge, and whether done fraudulently or otherwise, would be immaterial (Frismuth v. Trust Co., 107 Fed. 169); and, second, because there are no sufficient averments as to such fraud, and of what it consisted, nor is there a sufficient showing that any diligence was used to discover the alleged fraud at any earlier date, nor that any means were used by the Trust Company to prevent the discovery of such fraud.

Wood v. Carpenter, 101 U. S., 135;
Bank v. Carpenter, 101 U. S., 567;
Bent v. Priest, 86 Mo., 475.

The mere fact that the Trust Company was trustee in the Belt mortgage does not justify the intervenor in invoking the rule to the effect that the trustee cannot claim the benefit of the statute of limitations to shield himself from the consequences of his wrongful acts, for the reason that such rule only applies to cases of express trust, and not to cases where the breach, if any, has been of implied duties by the trustee.

Frismuth v. Trust Co., 107 Fed., 169;
Landis v. Saxton, 105 Mo., 486.

The effect of said statutes of limitations, as affecting the duties and liabilities of the Trust Company, as trustee, in the mortgages in controversy, is more fully considered in the 13th subdivision of this report on the Southern's intervention, and to which reference is here made.

For the foregoing reason, the Master is of the opinion that respondent's plea of the statute of limitations is well taken and should prevail, as against the claim of intervenor, in respect to the properties pledged as collateral securities for the Belt obligations to the Trust Company, except as next hereinafter stated.

938 The conclusions reached in this report by the Master, as to the application of the statute of limitations, and the principle of laches, to said pledged properties, are not, however, to be understood as, in any wise, affecting or changing any specific find-

ings or conclusions by the Master, in respect to any superior rights or equities found by him to exist in favor of either the intenvenor or respondent.

2. Laches.—The Trust Company contends that the Southern Company and the Belt bondholders have been guilty of such laches as to estop them from asserting title to the pledged properties, because of certain equitable considerations, which are opposed to the granting of the relief sought by the intervenor; in other words, it has been insisted that the intervenor's conduct has been such as to have induced the respondent to adopt a course of action, which it would not otherwise have done, and that it would be inequitable to now permit the intervenor to obtain an advantage thereby over the respondent.

The point is made that the reorganization Committee and its successor, the Southern Company, were in position prior to the foreclosure sale of the Belt railroad property, to have asserted the claim, now asserted by the intervenor, to the collateral securities in controversy, and that, in justice to the rights of the respondent, it should have been done, so that the latter could have pursued such other remedies, as were then open to it, in respect to the collection or protection of the Belt indebtedness owing to it.

The intervenor maintained silence as to its claims upon the pledged securities until many years after the appointment of the Belt receivers, and the sale of its properties by foreclosure proceedings, and, also, after it had received the active and influential cooperation of the Trust Company in putting through the reorganization plan, in its entirety, and, by so doing, the intervenor received all the advantages and benefits of its own conduct and silence in the premises, without giving the least intimation that it claimed any interest in the properties pledged for the large Belt indebtedness to the Trust Company.

Counsel for intervenor answer the foregoing suggestions by stating that, if the properties pledged were covered by the mortgage lien, the respondent had constructive notice thereof, and, was otherwise familiar with all the transactions of the Belt and allied companies. Through the efforts of the reorganization Committee, assisted by the Trust Company and others, sufficient Belt bonds and stocks had been deposited with the Committee in December
939 1899, to make the plan operative, and, in the following March the Southern Company was organized.

On April 2, 1900, the mortgage executed by the Southern Company shows that, in exchange for its own securities, it had become the owner, for reorganization purposes, of 897 Belt bonds, out of a total of 1000 bonds, and, also of 46322 shares of Belt capital stock, out of a total of 47500 of such shares (Rec. Vol. 57-35196), so that, for all practical purposes, the Southern was the owner of substantially all of the Belt bonds and stocks, and, through such ownership, had placed its agents and nominees in charge of the properties and books of the Belt Company, and, from which books and corporate records, it could easily and readily be ascertained that the properties in question had been pledged to the Trust Company.

On September 6, 1900, nearly six months after the incorporation of the Southern Company, the receivers were appointed for the Belt Company, at the instance of the Southern, and through the Provident Company, as trustee, which filed the foreclosure bill; the foreclosure decree being made on November 6, 1901, and the sale on December 31, 1901, to the Southern Company. During this period, no claim was asserted by the Southern Company, nor until February 27, 1905, when the intervening petition was filed in this cause.

In the meantime, all the properties of the Belt Company, which had pledged the securities in dispute to the respondent, had been foreclosed, or otherwise disposed of, long before the assertion of intervenor's claim, so that nothing was left, out of which the respondent could have possibly protected its Belt indebtedness, if it lost the collateral securities pledged therefor.

Under all the facts and circumstances, in respect to the dealings of the reorganization Committee and Southern Company, with the Trust Company, in regard to the reorganization scheme, and the various interests therein involved, it would seem that the laches of the intervenor has operated to the prejudice and injustice of the respondent, which, under different circumstances, might have taken steps to protect its interests, either before or at the time of the Belt foreclosure sale.

In this connection, it may be suggested that, by the 10th article of the Belt mortgage, the majority of the bondholders had the right to remove the trustee by writing, signed by them, and which they did in fact, by removing the Trust Company, as trustee, before the filing of the foreclosure bill; and, hence, the fact that the Trust
940 Company was a trustee in the Belt mortgage, was no hindrance to the assertion and prosecution of the intervenor's claim, in as much as the intervenor was really the sole bondholder, and could remove the trustee, if it so desired. It can hardly be contended that the Committee and the Southern were ignorant of the pledges of the disputed properties to the Trust Company, for the reason that, in the minutes of the Committee, on January 17, 1900, it appears that the Committee was negotiating with the Trust Company for the release by it of the Union Company stock held as collateral (Rec. Vol. 41-22208), and which negotiation was closed on June 6, 1900 (Vol. 41-22304).

In the opinion of the Master, however, the laches question is not especially important, as respecting the claim of the intervenor to the properties in controversy, if he is correct in the conclusions heretofore stated, to the effect, first, that said properties are not covered by the terms of the Belt mortgage, and, second, that, even if they were included therein, the claim of the intervenor therefor was barred by the statute of limitations of this State, when the intervening petition, containing such claim, was filed in this cause.

XII.

As to the Liability of the Southern Company for the Floating Debt of the Belt Company.

The Trust Company contends that, in carrying out the provisions of the reorganization plan, under which the Southern Company was organized, the latter became liable thereunder for the Belt indebtedness to the Trust Company, and, for that reason, the Southern Company is not entitled to the possession of the properties pledged as collateral security until it pays the Trust Company the full amount of the indebtedness secured thereby.

The claim of the Trust Company, in respect to the Southern Company's liability for the general and unsecured indebtedness of the Belt Company is fully stated in paragraphs 15 to 20, both inclusive, of the Trust Company's answer to the intervening petition, and it is based substantially upon the following allegations:

(*a*) That, on or about June 14, 1899, William F. Harrity, B. M. Baker, August Heckscher, Edward Wagner, Samuel R. Shipley, Silas W. Pettit, and Winthrop Smith, calling themselves a Reorganization Committee, entered into an agreement for the reorganization of the Gulf, Belt, and Port Arthur Channel & Dock Companies, and their so-called subsidiary or auxiliary companies, including the Belt, Union, Consolidated and Air Line Companies, and, also,
941 formed and promulgated a plan or reorganization, dated November 7, 1899, by which they invited all the holders of the bonds and stocks of said companies to deposit the same with said Committee, which then proposed to organize a new corporation, to be known as the Southern Company, and which should acquire all the properties of the above named companies, and issue, in payment therefor, the bonds and stocks of the new corporation on the terms and in the manner provided in the reorganization plan.

(*b*) That, after the promulgation of the plan of November 7, 1899, the requisite number and amount of bonds and stocks were deposited with the Committee, which, on December 20, 1899, declared the plan operative, and thereafter caused the incorporation of the Southern Company to acquire the properties of the aforesaid companies pursuant to said plan, and, thereupon, practically all the stocks and bonds of the old companies, including the Belt, were exchanged for those of the new company, as set out in the reorganization plan, and, subsequently, the Southern Company caused the election of officers and directors of the Belt Company who managed and operated it "in the interests of, and as a component part of, the railroad system," of the Southern Company.

(*c*) That the organization of the Southern Company, the exchange of its stocks and bonds for the stocks and bonds of the Belt Company, and the other steps taken in pursuance of the said reorganization plan, effected a consolidation of the Southern Company and the Belt Company under the Statutes of the State of Missouri or a consolidation de facto, and that, by reason thereof, the Southern Company

thereby became and is liable for all debts incurred by said Belt Company, including its debts to respondent Trust Company, and, further, that the Southern Company is estopped to deny such consolidation or to claim that the same was not legally complete.

(*d*) That the reorganization Committee, when working out the plan of reorganization, expressly represented to, and promised, the Trust Company that, in consideration of the debt due and owing from the Belt Company to the respondent, the Committee would provide for the payment of, or would pay, or cause to be paid, all the debts and obligations due to the respondent from all the corporations, including the Belt Company, proposed to be consolidated and included in said reorganization plan, and, also, that the new and reorganized company would pay such debts; that certain members
942 of said Committee, constituting a purchasing committee, purchased, at the Gulf foreclosure sale, all of the assets and properties of the Gulf Company, and, thereafter, assigned their bid therefor to the Southern Company, which entered into a contract with said Committee, wherein and whereby it assumed and agreed to complete and carry out all the obligations undertaken and assumed by said Committee, and, by reason of which, the Southern Company became and is liable to respondent for all the Belt obligations to it.

(*e*) That, at the time of the foreclosure and sale of the Belt Company's assets, the Southern Company, under the reorganization plan, became and was the owner and holder of nearly all of the Belt bonds and stocks, which enabled it to procure such foreclosure, and, as a result of the reorganization plan of exchange of stocks, the Belt stockholders became the owners of a large amount of Southern Company stock, which was then, and is now, of much greater market value than the total claims of the Trust Company against the Belt Company, and, hence, it is alleged by the respondent that said "scheme legally implied the payment by said Southern Company of all the claims of the respondent against the Belt Company."

(*f*) That, if by the reorganization scheme and exchange of securities, it was intended by said reorganization Committee and the Southern Company to deprive respondent of its right to collect its claim from the Belt Company, while valuable interests were being secured by the operation of the reorganization plan, to the Belt stockholders, then that the foreclosure of the Belt properties, under such circumstances, would be a fraudulent scheme and should be held void as to respondent, and the property thereby acquired by the Southern Company should be held subject, and be subjected, to the payment of the debts and claims of the respondent, "even if it should be held by the Court that a legal consolidation, or actual or de-facto consolidation, was not brought about as hereinabove alleged, whereby the Southern Company became legally obligated to pay the claims of this respondent against said Belt Company."

Analysis of the Reorganization Plan and Agreement.

1. The liability, if anything, of the Southern Company, for the floating debt of the Belt Company, is created by the reorganization

plan and agreement, as shown in the record, and specific references are made herein to such parts thereof as are deemed material to the issues in this cause. The Trust Company was a large holder of the securities of the Gulf and Belt Companies, which were sur-
943 rendered by it under said plan and agreement, and in lieu thereof, it received and retained certain securities of the Southern Company. (Rec. Vol. 49, pp. 29973-29974).

It is claimed by the Southern Company that the Trust Company was a party to the reorganization plan and agreement, and received the benefits thereof, and agreed to become bound by its terms, and, hence, cannot now claim adversely to its provisions. The effect of this contention will be hereafter determined.

The reorganization Committee was composed of the said Harrity, Baker, Hecksher, Shipley, Pettit, Smith, Wagner, Sielcken and Max Pam and the Trust Company was designated by the Committee as one of the depositaries, named in the Modified Plan and Agreement for the reorganization of the Gulf Company, and its terminal companies. This plan is dated Philadelphia, November 7, 1899, and was addressed "to the holders of the bonds and stocks of the Gulf, Belt, Union, Consolidated, Air Line and Port Arthur Channel & Dock, Companies", (Rec. Vol. 13-6762 to 6776), and, the reorganization agreement between the Committee and the holders of the mortgage bonds, stocks, and evidences of indebtedness therein mentioned, who shall become parties to it, and therein called depositors, is dated June 14, 1899, (Vol. 13-6776); and it is specially recited in said plan that it shall form a part of the "agreement with the same force and effect" as though therein incorporated, and "the two are to be read together as forming parts of one and the same instrument."

It is contended by the Southern Company that said reorganization plan and agreement were both made solely for the benefit of the bondholders and stockholders of the companies involved therein, and not for the benefit of the other creditors of said companies.

After stating that the New York Committee had abandoned the plan theretofore formulated by it, and had approved and adopted the plan of the Philadelphia Committee, published on August 17, 1899, the last named Committee declared in said modified plan that it had formulated and adopted said plan as the basis of the reorganization of the railroad system composed of the Gulf and its associated companies, and that it "had for its ultimate purpose [*and*] unification of the main line and terminals into one ownership and under one management", and that such object was sought to be accomplished "by having the Gulf Company, when reorganized, acquire the capital stock of the other two companies, and, having thus acquired the control and possession, to thereafter adjust the bonded indebtedness standing against the properties of the Belt Com-
944 pany and the Port Arthur Channel & Dock Company, by retiring the present bonds and issuing in lieu thereof new 3½% bonds to be based upon and restricted to the net earnings of said prospective properties as they might appear on future operations."

The plan adopted for such a reorganization was drawn upon the following basis:

"The property of the existing Kansas City, Pittsburg & Gulf Railroad Company will be sold, and it is expected and intended that the same will be purchased by the Committee, and if so, a successor company will be organized, to which the same property will be conveyed, together with the stocks and bonds of the Port Arthur Channel & Dock Company deposited thereunder, and those of the Kansas City Suburban Belt Railroad Company and its constituent companies deposited hereunder, if sufficient are so deposited to warrant the retention of that property by the new company, and said new company will issue in payment therefor the new securities hereinafter mentioned, and which new securities will be disposed of as hereinafter stated.

By this means, therefore, the following results will be attained:

(*a*) That the new company, which will own the main line and property of the present Kansas City, Pittsburg & Gulf Railroad Company, will also own the bonds and capital stock of both the Kansas City Suburban Belt Railroad Company, the bonds of its constituent companies, and the bonds and capital stock of the Port Arthur Channel & Dock Company, and thereby all three properties will be under one corporate ownership, management and control. Said bonds and stocks so purchased will be pledged under the new first mortgage to be created.

(*b*) The payment of the floating debt and the existing Car Trust obligations.

(*c*) Adequate provision for working capital for future requirements.

(*d*) The reduction of the fixed annual charges to less than the minimum earnings under probable conditions.

(*e*) Such control of the reorganized system, until the earnings of the property shall have placed it in a satisfactory financial position, as shall render additionally secure the new first mortgage.

(*f*) Or, in the event that either or both of the said terminal properties are not so acquired, then, (under arrangements already provided) the requisite terminal facilities at Kansas City and
945 on the Gulf will be otherwise secured—in which event the amount of the new securities, to be issued, will, of course, be correspondingly reduced.

It is intended, as soon as practicable, that the new company acquire the properties of the terminal companies in fee, and bring them directly under the lien of the mortgage." (Rec. Vol. 13, pp. 6764-6765).

In the statement of "Conditions of Participation" in the benefits of the modified reorganization plan, there is a provision requiring the payment of $10 per share by each one of the depositing stockholders of the Gulf Company; and it is also provided therein "that all the stocks and bonds deposited under this plan are to remain in the hands of the Committee as existing obligations and securities of the respective companies issuing the same, to be hereafter disposed of in such manner as may be deemed expedient by said Committee for the reorganized or new company, or cancelled, if deemed proper by it." (Rec. Vol. 13-6767).

2. It is also stated that, as a consideration for the conveyance or delivery of the property and securities of the old companies to the reorganized or new company, it is contemplated that said reorganized or new company shall issue the following securities:

"First. First mortgage, 50 year, 3 per cent gold bonds, interest payable semi-annually, for $30,000,000.00.

These bonds to be secured by a first mortgage upon all property of the Kansas City, Pittsburg & Gulf Railroad Company and its branches, extensions, terminals, equipment and other property embraced in the reorganization as carried out, and also upon the stocks, bonds or other securities of the Kansas City Suburban Belt Railroad Company, and its constituent companies, and of the Port Arthur Channel & Dock Company, of and to the extent acquired as mentioned. These bonds are to be appropriated approximately as follows:

To provide for the conversion of the existing First Mortgage Bonds of the Kansas City, Pittsburg & Gulf Railroad Company at the rate of $750 of the new First Mortgage Bonds, for $1000 of the existing First Mortgage Bonds	$18,000,000.00
To provide for the conversion of the existing First Mortgage 6 per cent — of the Kansas City Suburban Railroad Company at 133 per cent.	1,330,000.00
946 To provide for the conversion of the existing First Mortgage 5 per cent Bonds of the Union Terminal Railroad Company at 100 per cent.	2,000,000.00
To provide for the conversion of the existing First Mortgage 5 per cent Bonds of the Consolidated Terminal Railroad Company at 100 per cent	750,000.00
To provide for the conversion of the existing First Mortgage 5 per cent Bonds of the Kansas City & Independence Air Line Railroad Company at 100 per cent	300,000.00
To provide for the conversion of the existing First Mortgage 5 per cent Bonds of Port Arthur Channel & Dock Company at 50 per cent	817,500.00
To be sold for the necessary cash requirements of the new company	3,000,000.00
To be reserved for the future requirements of the New Company	3,802,500.00
Total authorized issue	$30,000,000.00

Second. Preferred stock not to exceed $21,000,00, in shares of $100 each, entitled to non-cumulative dividends to the extent of but limited to 4 per cent per annum out of the surplus net earnings in each fiscal year, before any dividends for such year shall be paid on the common stock.

Stock trust certificates will be issued for said preferred stock and will be appropriated approximately as follows:

To provide for the conversion of the existing First Mortgage Bonds of the Kansas City, Pittsburg & Gulf Railroad Company at the rate of five shares (i. e., $500) of said preferred stock for $1,000 existing first mortgage bonds	$12,000,000.00
To those of the holders of the capital stock of the Kansas City, Pittsburg & Gulf Railroad Company who may pay the sum of $10.00 with each share deposited by them as condition for participation in the new company or to the syndicate who may pay the same	2,400,000.00
To provide for the conversion of the First Mortgage Bonds of the Kansas City Suburban Belt Railroad Company and its constituent companies at the rate of two and one half shares (i. e., $250) of said preferred stock for each $1,000 of existing First Mortgage bonds, viz:	
Kansas City Suburban Belt Railroad Company	250,000.00
Union Terminal Railroad Company	500,000.00
Consolidated Terminal Railroad Company	187,500.00
Kansas City & Independence Air Line Railroad Company	75,000.00
To provide for the acquisition of the capital stock of the Kansas City Suburban Belt Railroad Company at the rate of one share of new preferred stock for each four shares of said Belt Company stock	1,187,500.00
To provide for the conversion of the First Mort- Bonds of the Port Arthur Channel & Dock Company at the rate of five shares (i. e., $500) of said preferred stock for each $1,000 existing First Mortgage Bonds	817,500.00
To be sold for the necessary cash requirements of the new company	3,000,000.00
Balance	582,500.00
Total authorized issue	$21,000,000.00

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Third. Common stock to the amount of not exceeding $30,000,000, in shares of $100 each.

Stock trust certificates will be issued for said common stock and will be appropriated approximately as follows:

To those of the holders of the capital stock of the Kansas City, Pittsburg & Gulf Railroad Company, who may pay the sum of $10.00 with each share deposited by them as a condition for the participation in the new company, or to the syndicate who may pay the same	$24,000,000.00

To provide for the acquisition of the capital stock of Kansas City Suburban Belt Railroad Company at the rate of $75 (i. e., 75 per cent) for each share of stock of the Suburban Belt Railroad Company	3,562,500.00
948 To provide for the acquisition of the Bonds of the Port Arthur Channel & Dock Company at the rate of five shares (i. e., $500) of said common stock for each $1,000 of Existing First Mortgage Bonds	817,500.00
To provide for the acquisition of the capital stock of the Port Arthur Channel & Dock Company at the rate of 75 per cent (i. e., $75 per share) for each share of said stock	1,181,250.00
Balance	438.750.00
Total authorized issue	$30,000,000.00

3. The statement of the existing securities of the properties included in the reorganization, as appears in Rec. Vol. 13, pp. 6771 to 6772, is as follows:

"Bonds: Kansas City, Pittsburg & Gulf Railroad Company 5's issued	$23,000,000	
Due on Lake Charles and other tracks	1,000,000	
		$24,000,000
Kansas City Suburban 6's		1,000,000
Union Terminal 5's		2,000,000
Consolidated Terminal 5's		750,000
Kansas City & Independence Air Line 5's		300,000
Port Arthur Channel & Dock Company 5's		1,635,000
		$29,685.000
Shares: Kansas City, Pittsburg & Gulf Railroad	23,000,000	
Due for construction but not yet issued	1,000,000	
		$24,000,000
Kansas City Suburban Belt Company		4,750,000
Port Arthur Channel & Dock Company		1,575,000
		$30,352,000

Under this plan the holders of the present securities of the Kansas City, Pittsburg & Gulf Railroad and the two Terminal Companies who shall deposit the same under the plan and reorganization agreement will receive as follows:

949 Kansas City, Pittsburg & Gulf Railroad Company:

For present bonds, in addition to the payment in cash of the defaulted coupon of April 1st, 1899.

In New First Mortgage 3 per cent Bonds (75 per cent)	750
In new preferred stock (50 per cent)	500
	$1,250

For present stock: One share of new common stock for each share of present stock to those who may deposit hereunder and pay the sum of $10.00 with each share so deposited, and for which payments shares of new preferred stock will also be issued at par.

Kansas City Suburban Belt Railroad Company:

For present bonds	In new First Mortgage 3 per cent bonds (133 per cent)	$1,330
	In new Preferred stock (25 per cent)	250
		$1,580

For present stock. One-quarter of a share of new preferred stock and three-quarters of a share of new common stock of the company as reorganized for each share of the present stock to those who may deposit hereunder.

Union Terminal Company:

For present bonds.	In New First Mortgage 3 per cent bonds (100 per cent)	$1,000
	In new preferred stock (25 per cent)	250
		$1,250

Consolidated Terminal Railroad Company:

For present bonds.	In new First Mortgage 3 per cent bonds (100 per cent)	$1,000
	In new preferred stock (25 per cent)	250
		$1,250

950 Kansas City & Independence Air Line Railroad Company:

For present bonds.	In new First Mortgage 3 per cent bonds (100 per cent)	$1,000
	In new Preferred Stock (25 per cent)	250
		$1,250

Port Arthur Channel & Dock Company:

For present bonds.	In new First Mortgage 3 per cent bonds (50 per cent)	500
	In new Preferred Stock (50 per cent)	500
	In new Common Stock (50 per cent)	500
		$1,500

For present stock. Three-quarters of one share of new common stock of the company as reorganized for each share of the present stock to those who may deposit hereunder."

From the last statement, it will be seen that, for each share of Belt stock deposited with the Committee, the depositor was entitled to receive one-fourth share of the new preferred stock and three-fourths of a share of the new common stock of the reorganized company. In brief, it appears that the Gulf bondholders were to get for their bonds seventy-five cents on the dollar in new bonds, and fifty cents in preferred stock; and that Belt bondholders were to get thirty-three cents premium in new bonds, and twenty-five cents in preferred stock.

4. From the foregoing specific appropriations of the stocks and bonds issued in exchange for, or conversion of, those of the old companies, it appears that bonds, of the par value of $3,000,000.00, and preferred stock, of the par value of $3,000,000.00 were set apart to be sold for the necessary cash requirements of the new company, and, that bonds, of the par value of $3,802,500.00, were reserved for the future requirements of the new company; and, further, that there was a balance of unappropriated preferred stock of the par value of $582,500.00 and of $438,750.00, par value, of common stock.

The "future requirements of the company", for which bonds of the par value of $3,802,500.00 are reserved, included such extensions, betterments, and new equipments as might be required by the business of the company (Vol. 13-6774).

951 The proceeds of the securities to be devoted to the cash requirements of the company, together with payments of $10 per share by participating Gulf shareholders, are as follows:

By sale of $3,000,000 first mortgage 3 per cent bonds and $3,000,000 preferred stock	$3,500,000.00
From payments of $10 per share by participating stockholders or the syndicate	2,400,000.00
Total	$5,900,000.00

To be applied as follows:

For payment of car trusts and interests adjusted to date of payment, say	1,900,000.00
For payment of floating debts	475,000.00

For payment of receiver's certificates	800,000.00
For payment first mortgage coupons, due April 1, 1899,	575,000.00
Working capital and expenses of reorganization, ...	2,150,000.00
Total	$5,900,000.00

(Rec. Vol. 13-6774).

The reorganization plan certainly then provided for the possible payment of floating debts to the extent of, at least, $475,000.00 and, out of the proceeds to be derived from the disposition of the securities of the Southern Company, and from the assessment on the Gulf participating stockholders. It is shown in the record that more than one million dollars was paid out on account of floating debts, the particulars of which are hereinafter stated.

The reorganization plan clearly shows that the new securities, to be issued by the new company, "will be disposed of as hereafter stated", and that "by this means, that is, such disposition of the new securities, the following results will be obtained" * * * that is, "the payment of the floating debt and the existing car trust obligations," thereby clearly meaning that, from the proceeds of the disposition of the new securities, the floating debt and existing car trust obligations were to be paid.

It is also provided in said plan, (Vol. 13-6773), that if the "holders of the bonds and stocks of the companies forming the Kansas City Belt Line system elect not to join in the proposed reorganization", then that "the new company will secure complete terminal facilities at Kansas City, under arrangements already perfected, reaching the same industries by railroad connections and
952 communications fully equal to those it now has by means of the said Belt Line."

5. Counsel for both intervenor and respondent have called attention to certain parts of the reorganization agreement of June 14, 1899, and which are herein copied as being somewhat explanatory of the powers, duties and objects of the reorganization Committee.

Among the reasons assigned in the June 14, 1899, agreement for the then proposed reorganization plan, are the following:

(*a*) That the properties of the Gulf, Belt and Port Arthur Channel & Dock, Companies, formed a through and continuous line of communication from Kansas City to the Gulf of Mexico;

(*b*) That the Gulf had gone into a receivership, and that the other two might likewise become involved, and

(*c*) That it was "necessary for the protection of the interest of the holders of the stocks and bonds" of said companies that they should be "by means of consolidation or stock control, or in some way, united and legally placed under the practical management, direction and control of one corporate organization, with, if possible, but one class of encumbrance secured upon the whole system, and one set of shareholders." (Vol. 13-6776).

To become parties to said contract, the bondholders and stockholders were required to transfer and deposit their bonds and stocks

with the Committee, taking therefor certificates of deposit which could only be transferred subject to the contract. The depositors were also obligated to execute any of the papers necessary "in order to vest in them (the Committee) and to enable them to transfer the complete and absolute title to such stocks and bonds".

It is recited in the reorganization agreement that "the above and foregoing plan forms part of the annexed reorganization agreement with the same force and effect as though therein set forth at length and the two are to be read together as forming parts of one and the same instrument", and, in said agreement, it is further stated that the aforesaid plan and reorganization agreement "shall be read as parts of one and the same instrument, but no estimate, statement, explanation or suggestion contained in said plan or this agreement or in any circular issued by the Depositary or by the Committee is intended or is to be accepted as representation, warranty or condition under this agreement". (Rec. Vol. 13-6777).

The seventh paragraph of the agreement is as follows:

953 "The committee shall keep a record of its acts and proceedings. All notices of meetings of the committee shall be in writing, mailed or delivered to the post office address of each member of the committee as filed with the secretary thereof. Any member of the committee, by written appointment, may empower any other member of the committee to vote and act as his proxy with all the powers of the member making the appointment; and a majority of the members of the committee shall constitute a quorum; but no action shall be taken except with the consent of the majority of the whole committee, given in person or by proxy at a meeting, or in writing without a meeting, and such action of the majority shall constitute the action of the committee and shall have the same effect as if assented to by the whole committee. Any member of the committee may resign by giving notice in writing to the chairman or secretary thereof, and the committee may settle any account or transaction with such member and give a full release and discharge upon any such resignation, and any vacancy in the committee may be filled at any time by a designation in writing, signed by a majority of the remaining members, and the committee may in like manner add to its number of additional member or members."

The 12th paragraph of the June reorganization contract is as follows:

"The enumeration of specific powers hereby conferred shall not be construed to limit or to restrict general powers herein conferred or intended so to [*bo*]. It is hereby distinctly declared that it is intended to confer on the Committee, in respect to all securities deposited hereunder, and in all other respects, any and all powers which the Committee may deem necessary or expedient towards carrying out or promoting the purposes of said plan and this agreement, and the methods to be adopted for carrying out the reorganization consolidation or unification of the properties herein mentioned shall be entirely discretionary with the Committee.

Bonds and other obligations deposited under this agreement and said plan, and all securities purchased or otherwise acquired under this agreement, shall not be deemed satisfied, released or discharged by any delivery of new securities, but shall remain in full force and effect for all purposes * * *. No right is conferred, nor any trust, liability or obligation (except the agreements herein contained in favor of the holders of certificates of deposit hereunder), is created by this agreement or the plan, or is assumed here-
954 under, or by or for any new company in favor of any bondholder or any other creditor or [*or*] any holder of any claims whatsoever against the said companies, nor in favor of any company now existing or to be formed hereafter (whether such claim be based on any bonds, coupon stocks, securities, lease, guaranty or otherwise) with respect to any security deposited under this agreement or any moneys paid to or received by the Committee or by the depositor hereunder, or with respect to any property acquired by purchase at any foreclosure sale, or with respect to any new certificates to be issued hereunder, or with respect to any other matter or thing". (Rec. Vol. 13-6786-6787).

In the 13th paragraph of said agreement is the following:

"Any obligation in the nature of floating debt or otherwise against any company or property embraced in said plan, either as proposed or carried out, or any securities held as collateral for any such obligation, may be acquired or extinguished or held by the Committee at such time, in such manner, and upon such terms as they may deem proper for the purposes of carrying out this agreement, and nothing in said plan and this agreement contained is intended to or shall constitute any liability or trust in favor or in respect of any such obliga- [*to*] acquired or extinguished or held by the Committee". (Vol. 13-6787).

The reorganization agreement imposed a duty upon the Committee in the following terms:

"It shall be the special duty of said Committee, which they are hereby fully authorized and empowered to perform, to prepare and adopt a plan for the reorganization of the Kansas City, Pittsburg & Gulf Railroad Company, and its property, and also, if necessary, for the reorganization of the Kansas City Suburban Belt Railroad Company, and the Port Arthur Channel & Dock Company and their properties, and for the consolidation of said corporations, if such consolidation can be lawfully made and is found to be practicable, either with or without foreclosure of either or all of said properties, or by means of the acquisition of the stock or other securities, of either or all of said corporations, or in any other manner that may be deemed by said Committee to be most practicable and feasible; and said Committee are authorized to negotiate with bondholders, creditors and stockholders of said companies, or either or all of them, in devising and carrying out said plan, &c." (Vol. 13, p. 6779).

The contract of June 14, 1899, confers upon the Committee the powers possessed by stockholders and bondholders:

955 "The depositors hereby irrevocably request the Committee to endeavor to carry into practical operation any plan so adopted, and this agreement in its entirety, or in part, to such extent and in such manner as the Committee shall deem to be for the best interests of the depositors in the consolidation or acquisition and unification of the properties finally embraced in the readjustment * * * to purchase at any time, and at such prices as they shall deem proper, or to pay, compromise, or settle with the holders of coupon notes or other indebtedness, or car trusts or other obligations of any of the said companies * * * and to apply for that purpose any money received from the sale of stock or obligations of any new company to be formed * * * with plenary powers to enter into arrangements for decrees or for facilitating or hastening the course of litigation, or in any way to promote the consummation of said plan, and to do whatever in the judgment of the Committee may seem necessary to promote or procure the sale as an entirety, or the joint or separate sale, of any property or franchises herein concerned, wherever situated, * * * to adjourn any sale of any property or franchises * * * to bid, or refrain from bidding, at any sale * * * to hold any property or franchises purchased by them * * *. The Committee may procure the organization of one or more new companies, or *that* may adopt or use any existing or future companies, or they may cause to be made such consolidation, leases, sales, or other arrangements, conveyances or transfers of any properties or securities, acquired by them, and take such other proceedings as they may deem needful * * * for carrying out any or all the provisions thereof * * * and the Committee may vote upon all the stock of such new corporation for all purposes in their judgment necessary to carry out said plan, until the same shall be finally delivered to the depositors who shall be entitled to receive the same * * * the Committee may proceed under this plan * * * with or without foreclosure." (Vol. 13-6780-81).

As to the Liability of the Southern Company for Belt Debts upon a Theory of a Consolidation of the Two Companies.

The contention of the Trust Company, in the 17th paragraph of its answer to the intervening petition, is that the organization of the Southern Company, and the exchange of its stocks and bonds for those of the Belt Company, and the other steps taken, pursuant to the reorganization plan, effected a consolidation of the Southern and Belt Companies, under the Missouri Statute. The Southern Company, however, contends that the effect and operation of the reorganization plan and agreement did not, in any sense, create
956 either a statutory or an equitable consolidation of those two companies into the new one, and, hence, that there could be no statutory or other liability on the part of the Southern Company for the Belt debts.

In this connection, it is well to make a brief review of some of the underlying facts.

It is not controverted that the Gulf road defaulted in the payment of its interest April 1st, 1899, that receivers were then appointed, and that, thereupon, a decree of foreclosure and sale was rendered February 5, 1900, and the property sold at such foreclosure sale on March 19, 1900, to the Southern Company, which became the purchaser thereof, and took possession on April 1, 1900, and has been operating the property since that time. The Belt Railroad Company was placed in the hands of receivers September 6, 1900, in a suit instituted by the Provident Company, the trustee named in the first mortgage on the Belt property. A decree of foreclosure and sale was rendered on November 6, 1901, and the foreclosure sale had on December 31, 1901, the Southern Company becoming the purchaser thereof, and continuing to operate the property since that time. A Philadelphia Committee, on August 17, 1899, promulgated a plan, which, on November 7, 1899, was modified, and under which the stockholders and bondholders of the Gulf Company and its allied companies including the Belt, deposited their securities and in lieu thereof finally obtained new securities of the Southern Company. The Trust Company, being the owner of a large amount of these securities, including those of the Belt Company, deposited them with the reorganization Committee, and obtained in lieu thereof certain stocks and bonds of the Southern Company, which the Trust Company still retains. The Trust Company was also one of the depositaries in the modified plan or reorganization, and it is claimed by intervenor that it is abundantly shown by the testimony in the record, that the respondent actively co-operated in the reorganization of the Belt properties, and induced its correspondents to accept said plan and to exchange their securities for the Southern Company securities. The effect of the Trust Company's participation in the reorganization plan is hereinafter considered.

It is not controverted that the bondholders and stockholders of the Belt Company received the stocks and bonds of the Southern Company in the ratio provided by the reorganization plan, and that the Southern Company thereby became the owner in some capacity of practically all of the outstanding stocks and bonds issued by
957 the Belt Company, and the former bondholders and stockholders of the latter company became the owners by exchange of the stocks and bonds of the Southern Company.

Missouri Statutes Relating to Consolidation.

1. The sections of the Missouri statutes which bear upon this subject of railroad consolidations, are numbers 1059, 1060 and 1061, (R. S. No. 1899):

"Sec. 1059. Companies may consolidate, when. Any two or more railroad companies in this state, existing under either general or special laws, and owning railroads constructed wholly or in part, which, when completed and connected, will form in the whole or in the main one continuous line of railroad, are hereby authorized to consolidate in whole or in the main, and form one company owning

and controlling such continuous lines of road, with all the powers rights, privileges and immunities and subject to all the obligations and liabilities to the state, or otherwise, which belonged to or rested upon either of the companies making such consolidation. In order to accomplish such consolidation, the companies interested may enter into contract fixing the terms and conditions thereof, which shall first be ratified and approved by a majority in interest of all the stock held in each company or road proposing to consolidate, at a meeting of stockholders regularly called for the purpose, or by the approval in writing, of the persons or parties holding and representing a majority of such stock. A certified copy of such articles of agreement, with the corporate name to be assumed by the new company, shall be filed with the secretary of state, when the consolidation shall be considered duly consummated, and a certified copy from the office of the secretary of state shall be deemed conclusive evidence thereof. The board of directors of the several companies may then proceed to carry out such contract according to its provisions, calling in the certificates of stock then outstanding in the several companies or roads, and issuing certificates of stock in the new consolidated company, under such corporate name as may have been adopted."

(Here follows a prohibition against consolidation by competitive roads, either in whole or in part, and declaring that any such consolidation "shall be void," etc.)

"Before any railroad companies shall consolidate their roads, under the provisions of this article, they shall each file with the secretary of state a resolution accepting the provisions thereof, to be signed by their respective presidents and attested by their
958 respective secretaries, under the seal of their respective companies, which resolution shall have been passed by a majority vote of the stock of each, at a meeting of the stockholders to be called for the purpose of considering the same, sixty days' public notice of the time, place and purpose of such meeting having been given by advertisement in some newspaper printed in the county where the general offices of said company or companies of this state are situated."

This section contains a general authority for railroad companies to consolidate "in the whole or in the main" and casting a full liability upon the successor company in either case; it provides two general methods of consent in consolidation which "may" be adopted, viz: One under which the contract or terms of consolidation are fixed in the first instance by a majority vote of the stockholders of each company, and one needing only the approval in writing by such a majority; and a prohibition against consolidation of competitive roads (immaterial here).

Sec. 1060 provides (*a*) that any railroad company may "aid" a connecting line company by means of subscription to its capital stock "or otherwise"; (*b*) for extension of, intrastate railroads into adjoining states allowing the one company to "build, buy, sell, lease or consolidate" with any railroads in such adjoining state; (*c*) for "any railroad company" to "lease or purchase all or any part of a railroad, with all its privileges, rights, franchises, real estate and

other property, the whole or a part of which is in this state", if the lines connect "within or without this state" etc., and (*d*) that any railroad corporation (of another state) may extend its road "into and through this state, and for such purposes be treated as a domestic corporation" etc.

Then follows a provision for assent by a majority vote of the stockholders to such aiding, purchasing, etc., or other "arrangements" "or until the holders of a majority of the stock of such company shall have assented thereto in writing, and a certificate thereof signed by the president and secretary of said company or companies, shall have been filed in the office of the secretary of state", etc.

Sec. 1061 provides that any Missouri railroad corporation "may acquire any line of railroad within or without this state which shall form a continuous line", etc., "and may acquire and may hold the obligations and stock of other companies owning or operating such lines of road," etc., Provided, that no such line of railroad shall be so purchased until "a majority vote of the stockholders of the companies shall have been taken in regular meeting", or until a
959 majority of the holders of the stock of such company shall have consented thereto, in writing, and a certificate thereof, signed by the president and secretary of said company or companies shall have been filed in the office of the secretary of state."

The Southern Company claims that it had the express statutory power, by Sec. 1061, R. S. Mo., 1899, to acquire and hold the stocks and bonds of the Belt Company, and that the exchange of stocks and bonds was in effect a purchase and sale (citing Harriman v. Northern Securities Co., 197 U. S., 244); and, further, that none of the steps, provided for in Sec. 1059, R. S. Mo., 1899, in relation to the consolidation of railroad companies were taken by the companies involved in this cause, nor does the record show that there was any intention to invoke the provisions of that section, or to form a statutory consolidation.

Counsel for the Southern Company insists that, in order to effect a statutory consolidation under Sec. 1059 R. S. Mo., 1899, it is necessary that,

"(*a*) The Companies interested shall enter into a contract fixing the terms and conditions of such consolidation.

(*b*) Such contract shall be ratified and approved by a majority in interest of all stock held by each company proposing to consolidate, either

(*c*) At a meeting of the stockholders regularly called for the purpose, or

(*d*) By the approval in writing of the persons or parties holding and representing a majority of such stock.

(*e*) A certified copy of such articles of agreement with the corporate name to be assumed by the new company shall be filed with the secretary of state, when the consolidation shall be considered duly consummated, and a certified copy in the office of the secretary of state shall be deemed conclusive evidence thereof.

(*f*) The boards of directors of the several companies shall then proceed to carry out said contract according to its provisions, calling

in the certificates of stock then outstanding in the several companies or roads, and

(*g*) Issuing certificates of stock in the new consolidated company under such corporate name as may have been adopted.

(*h*) Before any railroad companies shall consolidate their roads under said statute, they shall each file with the secretary of
960 state a resolution accepting the provisions thereof to be signed by their respective presidents and attested by their respective secretaries under the seal of their respective companies, which resolution shall have been passed by a majority vote of the stock of each at a meeting of the stockholders to be called for the purpose of considering the same, sixty days' public notice of the time, place and purpose of such meeting having been given by advertisement in some newspaper printed in the county where the general office of said company or companies of this state are situated."

It is strongly contended by the intervenor that none of the foregoing requisite steps to bring about a consolidation were ever taken either by the Belt Company, or the Southern Company, and, further, that the record does not show, as required by the statute any contract between the companies contemplating the consolidation, nor any meeting of the stockholders to ratify any such contract, nor was there any approval in writing of such contract by parties holding and representing a majority of the stock, nor was there any certified copy of such contract, or articles of agreement, with the corporate name of the new company filed with the Secretary of State, nor, in fact, were any of the pre-requisites of a consolidation had or complied with by the companies interested. On the other hand the

2. Trust Company's Contentions, as presented by its learned counsel are, in substance and effect, that by reason of said reorganization plan and agreement, and the steps taken thereunder, there was, in fact, effected a consolidation between the Belt and Southern Companies, and that the reorganization Committee was authorized by said agreement to create a new corporation for the purpose of uniting the Gulf, Belt and Dock lines of road into one, as the interests of the bondholders and stockholders of said companies demanded it, that the new corporation was to be created whether the Belt properties were sold or not, under the mortgage covering them, the plan and agreement, however, expressly providing for such sale and the hastening of it, if the reorganization Committee deemed best; that these agreements contemplated that the old companies were to lose the actual control and management of their respective railroad lines, franchises and properties, which was done in carrying out the reorganization contract; and that, by obtaining the three lines of roads with their franchises the new company would have a connected and complete line from Kansas City to the Gulf; that the bondholders and stockholders of each company were to receive, and did receive, bonds and stocks in the new company based upon the com-
961 bined property of all the companies; and that, in order to determine how to issue the stocks and bonds of the new company to the stockholders and bondholders of the old companies, the

equities of each of the corporations in its respective properties had to be estimated and the stock and bonds issued accordingly; that when the reorganization agreements were fully executed, in the respects above mentioned, the new company had everything and the old companies had nothing, except the right to exist as corporations; that, in substance and effect, everything was done and accomplished in the way of carrying out the details of the reorganization plan and looking to a union, merger and consolidation, of the interests of said companies, that could possibly have been done in the case of a purely statutory consolidation; that, in substance and effect, this was not a case where purchasers under a mortgage unite to incorporate, but it was essentially a combination of bondholders and stockholders for the *purchase* of consolidation, and that the foreclosure sales of the properties of the different corporations interested were merely incidents in the general plan.

The question is, then, broadly presented, whether, under said plan and agreement adopted by the Philadelphia Committee, there was such a consolidation in this cause as would make the Southern Company liable for the unsecured debts of the Belt Company.

The proposed plan, however, did not, specifically, require that the terminals at Port Arthur and Kansas City should be brought into the reorganization; on the contrary, they might or might not be included, as appears by the following language:

"(*f*) Or in the event that either or both of said terminal properties are not so acquired, then (under arrangements already provided) the requisite terminal facilities at Kansas City, and on the gulf, will be otherwise secured—in which event, the amount of the new securities to be isued will, of course, be correspondingly reduced."

It is manifestly the fair intendment of that provision that, if sufficient of the securities of the terminal properties should be deposited to "warrant the retention of that (those properties) by the new company", then the plan contemplated that the terminal properties, together with the Gulf properties, should be operated in the same interests, and thereby, in the language of the plan, "all three properties will be under one corporate ownership management and control".

It was recited that "it was intended as soon as possible, that
962 the new company acquire the properties of the terminal companies in fee and bring them directly under the lien of the mortgage". The intention of the plan, in a general way, was that the properties, belonging to the terminal companies, should be brought into the reorganization, provided the necessary securities of those companies were deposited with the reorganization Committee, but, nevertheless, it is also true that the new company was to be organized to own the Gulf properties, regardless of whether the terminal properties should then or thereafter be acquired.

Respondent's Authorities on Consolidation Proposition.

3. In support of its contention in respect to the alleged consolidation between the Belt and Southern Companies, the respondent relies, among others, upon the following cases:

In U. S. v. N. S. Co., 120, F. R., 725, it is said:

"It is the common experience of mankind that the actions of corporations are dictated and that their policy is controlled by those who own the majority of their stock. Indeed, one of the familiar methods in these days, and about the only method of obtaining control of a corporation, is to purchase the greater part of its stock."

In the cast at bar, the Belt Company was not a party to the reorganization agreement, though perhaps, ninety-nine per cent of the stockholders were depositors of their stock with the Committee.

Morawetz on Corporations, in Section 939 and 947, says:

A distinguishing feature of a consolidation is the union of the shareholders of the two companies, thereby forming one company."

"A railroad company formed by the consolidation of several companies, and invested by law with all their property, rights and franchises, is entitled to enjoy the franchises of each of the several companies upon the road originally belonging to it."

In the U. S. v. W. 193 U. S., 197, in which the stock of two competing lines was put into the hands of a corporation as a holding company by the stockholders, who took therefor stock in the new company, the court said (p. 326):

"Necessarily by this combination or arrangement the holding company in the fullest sense dominates the situation in the interest of those who were stockholders of the consolidated Companies.

* * * Necessarily also the constituent companies ceased,
963 under such a combination, to be in active competition for trade and commerce along their respective lines, and have become practically one powerful consolidated corporation by the name of a holding corporation, the principal if not the sole object for the formation of which was to carry out the purpose of the original combinations under which competition between the constituent companies would cease."

The Court speaks of it as a "scheme or device" (p. 327).

In McCracken v. Robinson, 57 R. F., 377, it is said:

The corporate organization was the machinery which they had brought into existence for carrying out the enterprise."

In Pingree v. M. C. R. R., 118 Mich., 337, the court says:

"The intention to consolidate may be an important consideration."

Then he quotes from an author who says:

"A clear intention to consolidate, together with the performance of acts reasonably appropriate to that end, must be shown in order to establish a consolidation,"

if the act is consistent with a different intent. In State to use, &c., v. B. & L. R. Co., 77 Md., 492, the court says:

"The act of assembly enables two corporations to consolidate upon such terms as may be agreed upon. This agreement refers to the adjustment of the interests of the stockholders and the settlement of the terms on which they shall hold the stock in the new company, and to matters belonging to the organization of the new company and such like things."

Such agreements we have here elaborately drawn.

"Technically speaking, however, and for general purposes, it may

be conceded that the consolidated company is a new corporation; but, touching the business of the old companies and the rights of their respective creditors, we think the consolidated company ought to be regarded as the continuation of the old companies under a new name, and that, to that extent, it ought not to be regarded as a new corporation." And a similar statement of the law is to be found in State ex rel. v. Garroutte, 67 Mo., 445, and in Section 956 of 2 Morawetz on Private Corporations." 173 Mo., 410.

The Supreme Court of Illinois (160 Ill., 382), says:

"When the rights and franchises and effects of two or more
964 corporations are, by legal authority and agreement of the parties, combined and united into one whole and committed to a single corporation, the stockholders of which are comprised of those (so far as they choose to become such) of the companies thus agreeing, this is in law and according to a common understanding, a consolidation of such companies, whether such single corporation, called the Consolidated Company, be a new one then created or one of the original companies continuing in existence, with only larger rights, capacity and property."

Again:

"The consolidation of the stock and property of several corporations, into one was not a sale; and it did not affect real estate any, but included franchises and personal property."

Wabash Ry. v. Ham., 114 U. S., 597.

Williamson v. N. J. S. R. R., 26 N. J. Eq., 398.

"It cannot be doubted that under this agreement it was contemplated that the consolidated companies should go out of existence and that their officers should resign their trusts in favor of the new company; that their boards of directors should be supplanted by another board; the names of whose members were contained in the agreement; that the stock of the constituent companies should be surrendered and new stock taken therefor, or in lieu of that, that the old stock should be recognized as the stock of the new company; that the road should be operated by men holding their commissions from the new company, and that the entire administration of the functions of the constituent companies should be surrendered to the new corporation. In short, nothing was left of the constituent companies but the memory of their existence—the mere shadow of a name. But the new company which took their place suddenly sprang into life with a new corps of officers and a full equipment for the successful operation of the road."

Yazoo, &c., Ry. v. Adams, 180 U. S., 18.

If there was a consolidation, liability by the consolidated company results necessarily.

"Now, where one corporation goes entirely out of existence by being annexed to, or merged in another corporation, if no arrangements are made respecting the property and liabilities of the corporation, that ceases to exist, the subsisting corporation will be entitled to all the property and answerable for all the liabilities."

Thompson v. Abbott, 61 Mo., 177.

965 "The natural idea of such a statute, I take it, is that the new corporation which springs from the two consolidating ones represents each one, as well in its duties or obligations assumed to others, as in its right to enforce the performance by others of their obligations. The idea of a transfer of properties and franchises involves as the correlative idea an assumption of those duties and obligations which were predicated upon possession and operation of such properties and franchises, and which gave strength and inducement to corporate promises."

Polhemus v. R. R., 123 N. Y., 508.
Matter of Brewing Co., 154 N. Y., 273.
—— ——, 160 Ill., 373.

In Morrison v. Am. S. Co., 79 Miss., 723, the court, after a review of the authorities, says:

"The foundation of the liability of a consolidated corporation may rest on a statute or on agreement either express or implied; if the statute does not provide that the new company shall assume the debts and liabilities of the constituent company, and there is no expressed agreement respecting the same, the debts of the original company follow as an incident of the new consolidation, and become, by implication, the obligation of the new corporation."

"The new corporation thus created was in reality the embodiment under another name, of the two formerly existing. They had been joined together in every faculty and function, and moulded with an indivisible unity with none of their rights impaired and none of their responsibilities abated. If this were not the result of the consolidation, very great inconvenience and injustice could arise. The act enables two corporations to consolidate upon such terms as may be agreed upon. This agreement refers to the adjustment of the interest of the stockholders and the settlement of the terms on which they shall hold the stock of the new company, and to matters belonging to the organization of the new corporation, and such like things. Whatever else it may be competent to determine by agreement, the combining companies could not, by any contract between themselves, conclude the rights of persons who have been injured. Their agreement to consolidate brings the new corporation into existence, and then its liabilities are determined by the just construction of the statute which authorizes the consolidation".

State to use, &c., v. B. & L. R. R. Co., 77 Md. (1893), 492.

"Since by authority of law and the act of the parties, the consolidated corporations are moulded into one, with none of
966 their rights impaired and none of their responsibilities lessened, there is no good reason why the same proceedings may not be had against the new corporation as might have been had against the old, to compel payment of liabilities. It avoids circuity of action. It allows the party unto whom the contract was made, and to whom the injury was done, to proceed directly against the corporation, which by virtue of the consolidation proceedings is made liable for it."

Langhome v. R. R. Co., 91 Va., 375.

In the C. & S. F. & Co. v. Ashley, 43 N. E. 375, it is said:

"What was done must be considered in order to determine whether there was a consolidation or not. We must look to the results accomplished rather than to the means, steps or proceedings by which these results were reached." (Idem l. c. 375) and

"When the rights, franchises, and effects of two or more corporations are by legal authority and agreement of the parties combined and united into one whole and committed to one corporation the stockholders of which are composed of those (so far as they choose to become such) of the companies thus agreeing, this is in law and according to common understanding, a consolidation of such companies, whether such single corporation called the consolidated company, be a new one then created, or one of the original companies continued in existence with only larger rights, capacities and property. Meyer v. Johnson, 64 Ala., 656. This is true whether or not the old company have nominally continued in existence."

Berthold et al. v. Holladay-Klotz Land and Lumber Co., 91 Mo. App., 233.

In Wabash v. Ham., 114 U. S., 587, Mr. Justice Grey, rendering the opinion of the court, states the rule to be that the property of a corporation is a trust fund for the payment of its debts and all of its creditors are entitled to be paid before the shareholders get anything and where a new company was formed from the aggregation of four railroad companies, the creditors were given a preference over the stockholders in the new company to the extent of the assets coming into the hands of the new company from the old.

In Hawkins v. Central Ry. Co., 119 Ga., 159-163, decided in 1903, the court held that all rights of stockholders were inferior to those of creditors and that where shares had been issued to the stockholders of the old companies in exchange for shares in the companies consolidated, it would have been mere repudiation to preserve the
967 rights of the shareholders by issuing such stock of the consolidated company in exchange for their holdings in the old, without protecting or providing for the rights of the creditors in the old company.

In Shadford v. Detroit Railroad, 130 Mich., 300; 89 N. W., 969 (1902), we have a case where two companies were consolidated on the basis that the stockholders in the old companies received shares of stock in the new company and the bondholders of the old companies received bonds of the new company and the new company took over the properties of the old. In that case it was contended that the creditors had no remedy except by suit in equity, to compel the stockholders to pay assessments to the full value of their stock or to reach the stocks and bonds which had been received by the stockholders of the old company, but the court said, p. 306:

"The law will not permit the creditors of two corporations to be deprived of the assets of such corporations in payment of their debts and turn them over to suits in equity against the stockholders when the union or consolidation with another corporation is effected without the passage of a dollar or other valuable consideration between the corporation themselves."

And again, on p. 307:

"It is also contended that the old company was insolvent and that therefore plaintiff was not prejudiced by the consolidation or transfer. The consolidated company cannot raise this question. The question is not whether either of the old companies were solvent or insolvent, or whether both were solvent or insolvent. By the consolidation the new company is burdened with the debts of the old and the sole question then is, Has the new company sufficient assets to pay its debts, which will include those of the old companies?

Citing Grenell v. Detroit Gas Co., 112 Mich., 70:

"It paid nothing to its vendor for this plant, but dealt with its stockholders, paying to them in its own capital stock the price of its purchase, thus in effect closing out the corporate business and dividing its assets amongst its stockholders. * * * A corporation cannot sell all of its property and take in payment stock in a new corporation under an arrangement that has the effect of distributing the assets of the vendor amongst its stockholders to the exclusion and prejudice of its creditors; and a company making such a purchase, in consideration of an issue of its own stock to such stockholders, takes the property subject to the rights of the creditors. Such an arrangement is a diversion of a trust fund."

968 In Central Trust Co. v. Cincinnati Trust Co., 58 Fed., 500 and in 138 Fed. Rep. 804, Judge Taft, on p. 805 says,

"The well understood purpose of every reorganization agreement of this kind when entered into by all the stockholders and all the bondholders, is to wipe out all the obligations and readjust the debts and interests between the creditors and the stockholders, the bondholders thereby agreeing in effect to look to the railroad alone for the payment and accept the new mortgage deed on that in lieu, i. e., in payment of the old;" and the surplus funds from the sale were paid to the creditors and not to the bondholders.

In Higgins v. California Asphalt Co., 81 Pac., 1070, the Supreme Court of California held that the debts of a corporation cannot be avoided by any scheme of a new corporation organized by the incorporators or shareholders of the old corporation. Citing Hibernia Ins. Co. v. St. Louis & N. Co., 13 Fed. Rep., 516, which case is cited in Carson v. Hofins by the Supreme Court of Washington 87 Pac., 631-633, to the effect that the assets of an insolvent corporation constituted a trust fund for the benefit of its creditors, and no subterfuge will be permitted to prevent the distribution of such funds amongst the creditors.

Respondent claims that one of the clearest constructions of the questions before the Master is had in Chicago & Santa Fe Railroad Co. v. Ashling, 160 Ill. 373; 43 N. E.; where the court held that a consolidation and not a mere purchase by one corporation of the property of another, was effected by a transfer of all the property, stock and franchises of the latter under an arrangement by which the stock of the former is issued to the stockholders of the latter in exchange for their stock. And the court there held that a corporation which is in effect consolidated with another is estopped to assert that the proceedings for consolidation were not in accordance with the

terms of the suit in an action against it to recover the amount of judgment against the first corporation on the ground that there was a consolidation. The court said:

"It is true that what was done must be looked to in order to determine whether there was a consolidation or not, but we must look to the results accomplished rather than to the means, steps or procedure by which these results have been obtained. P. 381. There is no magic in words. Merely calling a transaction a purchase and sale will not prevent it from being a consolidation."

In Montgomery-Webb Co. v. Dienelt, 133 Pa. State 585, it was held that, where one corporation sells its property to another, thereby forming a new corporation composed mostly of the same persons, the transfer is fraudulent and void as to creditors of the old corporation and persons, who hold stock in the new corporation solely in consideration of their claims as creditors of the old, are charged with notice of the fraud and are not innocent purchasers as against creditors of the old corporation, who did not assent to the change. And it was held that the latter might follow the specific property of the old corporation as in other cases of transfers fraudulent as to creditors, the court saying:

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"This was a transfer of property by a debtor with the retention of an interest in himself within the settled rule of law that makes such transactions void as to creditors."

Thompson v. Abbott, 61 Mo., 176, has been cited as stating the proper rule of law, in Berry v. K. C. Railroad Co., 52 Kans., 759, Id. 774.

In State ex rel. v. Smith, 173 Mo., 398, it is held:

The new company is the heir to the obligations of the old and if the new refuse to carry out the obligations of the latter, the obligee can maintain an action against it for the resulting damages in its own name."

In Powell v. North Missouri Company, 42 Mo. 63, the action was to recover as secretary of one of several corporations, which had been consolidated into the defendant company. The syllabus stated concisely the decision of the court. (3) Although by the old common law the dissolution of a corporation extinguished its debts, yet courts of equity in such cases will consider the property and effects as a trust fund for the payment of creditors and for the shareholders, into whosoever hands they may come. (4) A corporation cannot give away the effects belonging to it to the prejudice of creditors. A court of equity will follow the trust into the hands of other than bona fide creditors and purchasers. The case of Thompton v. Abbott, 61 Mo., 176 (1875), is, perhaps, the leading case in the State of Missouri upon this subject. This was a suit where the plaintiff had been employed by the Board of Education to teach school in a certain district at a stipulated price and for a stipulated period. He began work and received a part of the stipulated salary, but before payment was completed, the district was disorganized and its territorial limits merged into the City of Springfield. The petition set up that the city received the moneys coming to the old district and had exclusive care and control of all school property and that it

succeeded to all the rights of the old district, and prayed judg-
970 ment for the money due from the old district. On demurrer, it was held that the city of Springfield was liable for this debt, the court saying by Wagner, Judge:

"Where one corporation goes entirely out of existence by being annexed to or merged into another corporation, if no arrangements are made respecting the property and liabilities of the corporation that ceased to exist, the subsisting corporation will be entitled to all the property and be answerable for all the liabilities. * * *. Its property passed into the hands of the defendant and when the benefits were taken the burdens were assumed."

In Hughes v. School District, 72 Mo., 643 (1880), Chief Justice Sherwood cites with approval the language of Judge Wagner; and in Evans v. Exchange Bank, 79 Mo., 182, the question coming again before the Supreme Court in 1883, was decided as before. The petition in this last case alleged a deposit by the plaintiff in a certain bank; that said bank went into liquidation; that thereafter the defendant bank was organized as a banking corporation and came into possession of and received for plaintiff's use as the successor of the first bank, the money so deposited. The court held that the petition stated a cause of action against the defendant. In the opinion, Judge Henry said:

"If, as alleged, defendant is the successor of the City National Bank, and the funds and property of the latter passed into the hands of the former, its liability, to depositors of money in the latter bank has been expressly held in Hopper v. Moore, 42 Ia., 563. * * * Any other doctrine, it seems to us, would be monstrous. As well contend that because one has changed his name by legislative enactment, he thereby avoids all obligations incurred in his former name. * * * To prevent an escape from its liabilities by such contrivances would not be very creditable to the law."

In Kinion v. Kansas City Ry. Co., 39 M. A., 382, the Court held:

"Technically speaking, however, and for general purposes, it may be conceded that the consolidated company is a new corporation but, touching the business of the old companies, and the rights of their respective creditors, we think the consolidated company ought to be regarded as the continuation of the old companies under a new name, and that, to that extent, it ought not to be regarded as a new corporation. Mr. Morawetz, in his treatise on the law of corporations in discussing this question said: 'In considering the rights of the creditors of the original companies, the consolidated company
971 may be regarded as a continuation of each of these companies with a change of its name and constitution, and of the amount of its capital stock.' 2 Morawetz on Private Corporations, Sec. 956."

In Berthold v. Land Co., 91 M. A., 233, Judge Goode said:

"It is a settled rule of equity jurisprudence that where one corporation is consolidated with another, or merged in another, which takes its property, such new corporation is bound to discharge the liabilities of the old one." (Citing Thompson v. Abbott, 61 Mo. 176; Hughes vs. School District, 72 Mo. 643; Eans vs. Exchange Bank,

79 Mo., 182). "The new company took those assets cum onere—impressed with a lien in favor of the creditors of the old; for they were acquired by a transaction outside the ordinary course of business."

The court further held to the same effect in Kearns v. Illinois Southern Ry. Co., 114 Mo. App., l. c., 167; Manny v. National Surety Co., 103 Mo. App., l. c., 721.

In Missouri Land Co. v. Reinhard, 114 Mo., 218 (1892), it was held that the capital stock and other property of a corporation are in equity as between creditors and stockholders, deemed to be a trust fund for the payments of its debts and where such property has been divided amongst the stockholders leaving debts unpaid, the stockholders are bound to refund; but the court says that the creditor of the corporation may enforce his claim against another corporation purchasing the property of the debtor, pending suit, in the absence of actual fraud in the sale, holding that the remedy against either the stockholders or the new corporation is by bill in equity (which is in the form in which relief is sought in the pending case).

In State ex rel. v. Smith, 173 Mo., 398 (1902), and in Springfield v. Hobart, 98 Mo., 227, it was held that the relator in becoming surety for the obligation of one company to another, was bound to a consolidated company when that other company and a third corporation were consolidated into a new corporation. In rendering the decision, Burgess, Judge, cited- Kinion v. Railroad, 39 Mo. App., 382, used the language:

"Literally speaking, it is a new corporation, but substantially it is but a continuation of the old companies under a new name."

In I Thompson on Corporations, Sec. 565, it is stated to be the general rule that the new company succeeds to the rights, duties obligations and liabilities of the constituent companies, whether arising ex contracto or ex dilecto; and it has been held
972 further that the new company is the heir to the obligations of the old and that if the former refuse to carry out the obligations of the latter, obligee can maintain an action against it for the resulting damages.

And in the case of Hageman v. Southern Electric Co., 202 Mo., 249:

"In the Wabash case, the Supreme Court of the United States said: 'It was contended that the property of the Toledo and Wabash Railway Company was a trust fund for all its creditors, and that upon the consolidation the Toledo, Wabash and Western Railway Company took the property of the Toledo and Wabash Railway Company charged with the payment of all its debts. The property of a corporation is doubtless a trust fund for the payment of its debts in the sense that when the corporation is lawfully dissolved and all its business wound up, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true, in the case of a corporation, as in that of a natural person, that any conveyance of property to the debtor, without authority of law, and in fraud of existing creditors, is void as against them.'

(Railroad v. Ham. 114 U. S., l. c., 594). To the same effect are the following cases: Milling Co. v. Commission Co., 128 Mo., 491-495; Atlas National Bank v. Moran Packing Co.; 138 Mo., 59; Calihan v. Powers, 133 Mo., 481-498; Schufeldt v. Smith, 131 Mo., l. c., 286; Meyer v. Folding Chair Co., 130 Mo., 195."

Status of Belt Company Before and After Foreclosure Sale.

4. It is not disputed that the Belt Company continued to be operated by its own officers and employees until September 6, 1900, when its properties were, by order of the United States Court at Kansas City, put in possession of Knott and Swinney, receivers, who continued their operations until the foreclosure sale and delivery of possession to the Southern Company in January, 1902. Knott subsequently resigning and Swinney continuing as receiver; and that, on April 27, 1903, said United States Circuit Court, in the Belt foreclosure suit, rendered a deficiency judgment for $242,854.40 against the Belt Company, and ordered execution thereon (Rec. Vol. —, p. —).

In the present suit, brought by the Cambria Company, September 6, 1900, the Belt Company, and the Trust Company, were made parties defendant, and, there was filed a stipulation signed by
973 the Trust Company and its receiver, providing for the filing of the ancillary bill in this case, and also providing that the Belt Company should be a party to the ancillary bill, so that the Trust Company might have any amount found due to it upon the accounting included in a judgment against the Belt Company. That stipulation, omitting the names of the parties, is as follows:

"It is hereby stipulated and agreed by and between Stuart R. Knott and Edward F. Swinney, receivers of the Kansas City Suburban Belt Railroad Company, complainants in the cross bill in the above entitled cause, and the defendants the Guardian Trust Company and Francis M. Black, its receiver, Second Street Improvement Company and Cambria Steel Company, as follows:

First. That the said complainants shall withdraw or dismiss their cross bill heretofore filed herein and shall file an amended cross bill, in the nature of an ancillary bill in this cause making the Kansas City Suburban Belt Railroad Company a co-plaintiff with them in said amended ancillary cross bill, and also making the Cambria Steel Company, the complainant in the original bill herein, a defendant in said amended ancillary crossbill, and that said amended ancillary cross bill shall be filed on or before the 15th day of November, 1901, and that the defendants the Guardian Trust Company and its receiver, and the Second Street Improvement Company and the Cambria Steel Company, shall have leave to plead or answer to said amended ancillary cross bill, on or before the first Monday in December, 1901.

Second. That the accounting between the Kansas City Suburban Belt Railroad Company, and its receivers, and the Guardian Trust Company, and its receiver, sought by said amended ancillary cross bill, shall be expedited by all of the parties hereto, and whatever bal-

ance, if any, that may be found due to the said Guardian Trust Company or its receiver from the Kansas City Suburban Belt Railroad Company or its receivers shall be entered up in this cause as a judgment in favor of the said Trust Company and its receiver and against the Suburban Belt Railroad Company and its receivers, without the necessity of presenting any claim therefor by way of cross bill, or other affirmative pleading; and whatever balance, if any, that may be found due to the said Suburban Belt Railroad Company, or its receivers, from said Guardian Trust Company, or its receivers, shall be entered up in this cause as a judgment in favor of the said Kansas City Suburban Belt Railroad Company and its receivers and against the Guardian Trust Company and its receiver.

974 Dated this — day of November, 1901."

Counsel for the Southern Company are insistent that a statutory consolidation of two companies must inevitably result in the extinction, as legal entities, of the constituent companies, and the creation, ipso facto, of a new company, and, hence, that, in view of the facts stated in regard to the continued existence of the Belt Company, it has not been extinguished in the sense that it would have been, had there been a statutory consolidation between it and another company into a new corporation.

Intervenor's Authorities on Consolidation Proposition.

5. The leading authorities cited by counsel for intervenor, against the alleged consolidation of the Belt and Southern Companies, are the following:

In construing the Missouri statutes, providing for the consolidation of corporations, Judge Pollock, in Jones v. Electric Co., 135 Fed., 153, says:

"It is fundamental law that the right to exercise such a vital power of a corporation as contemplates the turning over of all its corporate property, including its right to be a corporation and to hold and use its corporate powers, franchises and privileges, and which results, when employed, in the extinguishment of its corporative life, must be found in some positive plenary legislative grant either in the articles of association of the corporations consolidating or in the general law of the land. Such power cannot be implied. Nugent v. The Supervisors, 19 Wall., 241; Pearce v. Madison, etc., R. R. Co., 21 How., 441; Clearwater v. Meredith, 1 Wall., 25. It is also finaly settled by authority, if ample statutory power is found wanting authorizing either of the constituent companies to consolidate with each other, the entire consolidation is unauthorized and void. St. Louis Railroad v. Terre Haute Railroad, 145 U. S., 393; Louisville & Nashville R. Co. v. Kentucky, 161 U. S., 677."

In Pullman Company v. Missouri Pacific, 115 U. S., 587, the court says (page 595):

"This (consolidation under the Missouri statute) clearly contemplates the actual dissolution of the old corporations and the creation of a new one to take their place."

The Supreme Court of Missouri, in the case of State ex rel. v.

Lesueur, 145 Mo., 322, 328, in speaking of the consolidation of railroads under the Missouri statute, says:

"We are of the opinion that the consolidation, when completed in the manner provided, does create a new corporation,
975 just as effectually as any other mode allowed by our laws. The new corporation owns all the property, whereas the old companies only owned each its part. * * * By the consolidation the old companies are dissolved, and a new corporation formed."

The court there held that, upon the consolidation, the new company thus formed was required, by virtue of Section 21 of Article X of the Constitution, to pay into the State treasury the fees provided for upon the organization of corporations.

In Railroad Company v. Missouri, 152 U. S., 301, the court, in speaking of the Missouri statute, said:

"Looking at the act in question in this case, we find that by Section 1, any Missouri railroad company, whose track should connect with the road of an adjoining state, was authorized to make and enter into an agreement with such connecting company for the consolidation of the stock of the respective companies whose tracks should be so connected, making one company of the two, whose stock should be so consolidated upon such terms, conditions and stipulations as might be mutually agreed between them; that by Section 2 'such consolidation shall not be made unless the terms and provisions thereof shall be approved by a majority of the stock, or the holders of a majority of the capital stock in each of said companies whose stock shall be consolidated'; that by Section 3 the board of directors were authorized to adopt by resolution a new corporate name for the consolidated company, and call in the certificates of stock then outstanding in each company, and exchange them for stock in the new company; and, providing that a copy of the consolidation agreement and the name adopted for the new company 'shall be filed with the secretary of state, and shall be conclusive evidence of such consolidation, and of the corporate name of the consolidated company.' It is difficult to see how the legislature could provide more clearly for the extinguishment of the prior companies and the formation of a new one than by providing that the two companies shall became one, that new certificates of stock shall be issued in exchange for the stock of the constituent companies, and that the consolidation agreement shall be recorded with the secretary of state as the charter of the new company. In our opinion, this was the effect of the act in question."

In Adams v. Railroad Company, 24 So., 211, it is said:

"It is in the interest of clearness of definition that consolidation should be limited to signify such union of two or more corporations as necessarily results in the creation of a third new corpora-
976 tion, and, as we understand the decision, this is what is known as the American doctrine, and the better view."

In Vicksburg Telephone Co., v. Telephone Co., 30 So., 725, the court says (728):

"There seems to be a great confusion as to the differences between consolidation and merger and sale. Rightly understood, there never

can be a consolidation of corporations except where all the constituent companies cease to exist as separate corporations, and a new corporation, to-wit, the consolidated corporation, comes into being. A merger, rightly understood, is not the equivalent of consolidation at all, but exists where one of the constituent companies remains in being, absorbing or merging in itself all the other constituent companies."

In Lee v. Atlantic Coast Line Railroad Co., 150 Fed., 775, it is held:

"There is a distinct difference between a consolidation and a merger of two railroad companies. In a consolidation, both go out of existence as separate corporations, and a new corporation is created, which takes their place and property; while in case of a merger one loses its identity by absorption in the other, which remains in existence, and succeeds to its property, and issues its own stock to the stockholders of the merged company."

In this connection it may be stated that it has been persistently suggested by counsel for the intervenor, that if a statutory consolidation was effected of the Southern and Belt Companies, it would, under the authorities quoted, result in those two companies going out of existence, and the formation of a new corporation, which, of course, cannot be true, as the Southern Company is existent and operating its railroad system, and, the respondent is now here suing it and the Belt Companies, and seeking to obtain a judgment against one or both of them, which is at variance with their corporate nonexistence. In fairness, however, to the Trust Company, it should be stated that the real basis of its charge that there was a consolidation, arises not only from the ownership by the Southern of the stocks and bonds of the Belt, but, also, by reason of the reorganization proceedings, which resulted in the acquisition of all the Belt properties under circumstances, which, it is alleged, constituted a consolidation.

Intervenor's Ownership of Belt Stock.

6. The mere ownership by the Southern of stock in the Belt Company would not be sufficient to justify the conclusion that
977 there was either a partial or full statutory consolidation, merger or other union of corporate interests between the two companies. It is a well known fact that many railroad systems are interested, in greater or less degree, in the stocks and bonds of subsidiary companies. As one o fthe results of the modified plan or reorganization, the reorganization Committee became the holder, and afterwards the Southern Company became the owner of, nearly all of the stocks and bonds of the Belt Company, which was expressly authorized and permitted by said Section 1061 (R. S. Mo. 1899).

In Pullman Palace Car Co. v. Missouri Pacific Railway Co., 115 U. S., 587, it appears that the Missouri Pacific Railroad Company acquired and owned the capital stock of the St. Louis, Iron Mountain and Southern, and the question arose as to whether the Missouri Pacific road controlled the Iron Mountain by ownership, lease or other-

wise, and the Missouri statute concerning consolidation of corporations was drawn in question. The court held that both companies, notwithstanding such stock ownership, continued to be separate, independent companies, and that the obligations of one company were not enforcible against the other.

In Peterson v. Chicago, Rock Island & Pacific Railroad Company, 27 Sup. Ct. Rep., 515, decided by the Supreme Court of the United States in April, 1907, it appears that the Chicago, Rock Island & Pacific Railway Company owned a controlling interest in the stock in the Chicago, Rock Island & Gulf Railroad Company, a corporation of the State of Texas. Service of summons was had upon an agent of the latter in an action against the former upon the theory that there was an identity of interests, or an agency, sufficient to warrant the proceeding. The court held that the attempted service was not sufficient to give jurisdiction, saying:

"This record discloses that the officers and agents of the Gulf Company controlled its management. The fact that the Pacific Company owns the controlling amount of stock of the Gulf Company and has thus the power to change the management does not give it present control of the corporate property and business. * * * The conduct and control of the business in Texas was intrusted to the Gulf Company. As the largest stockholder the Pacific Company had an interest in that business, but a separate corporation had been legally created in Texas, with authority to make contracts and control its own affairs and carry on its own business. This separate corporation had its own officers, a large amount of its own property, was responsible for its contracts and to persons with whom it dealt."

978 In Atchison, Topeka & Santa Fe Railroad Co. v. Cochran, 43 Kan., 225, it appeared that the company owned the capital stock of the Southern Kansas Railway Company. An action was brought against the Santa Fe to recover for personal injuries occasioned by the employees of the Southern Kansas. It was held that the fact that the Santa Fe owned the capital stock of the Southern Kansas did not render it liable in the action, the court holding where the rights and powers of a railroad in relation to a connecting road are those of a stockholder merely, the former, as such stockholder, is not liable for the negligence of the latter.

To the same effect see:

Commonwealth v. Bridge Co., 64 Atl., 909, 911.
Ulmer v. Lime Rock Railroad Co., 57 Atl., 1001, 1006.
Exchange Bank v. Construction Co., 25 S. E., 326.
Jessup v. Illinois Central, 36 Fed., 735, 741."

It would seem, then, that the Southern Company had the lawful right to own and hold the stocks and bonds of the Belt Company and that such ownership of itself did not have the effect of constituting a consolidation of the two companies, as both corporations continued to exist, and each controlling its own property, through its own officers, until September 6, 1900, when the receivers were appointed for the Belt Company, and which receivers continued to operate the

property until January 1, 1902, at which time the Southern Company, as the purchaser at the foreclosure sale, received the commissioner's deed and entered into possession of the property and has continued its operation.

The distinction between a statutory consolidation, and the acquisition by one company of the securities of another company, as provided in said Sections 1059 and 1061 (R. S. Mo. 1899), is clearly stated in Burge v. Ry. Co., 100 M. A., 464, in which the court say:

"There are two methods recognized by the statutes of Missouri, by which railroad corporations may become associated or merged. By Section 1059 of the Revised Statutes of 1899, provision is made for the amalgamation of two or more railroad companies in this state, and the formation of one company. Section 1061 contemplates the manner adopted by defendant in this case, and expressly legalizes the extension of the line of any railroad company organized under the laws of this state, by acquiring by purchase any line of railroad within or without this state, and the acquisition and ownership of the assets and property of the company so bought. Under the section of consolidation (1059) the absorbing corporation succeeds to all the powers, rights and property of the consolidated companies and becomes subject to all their obligations and liabilities. Under the section making valid the purchase by one railroad company of the line and property of another railroad company, no responsibility is imposed on the purchasing company for the obligations of its vendor. It is manifest that no statutory liability resulted from the mere purchase by defendant, and in the absence of averment and proof that it acquired and succeeded to the line and property of the selling company otherwise than as a purchaser in good faith and for a valuable consideration, the transaction in no wise differs in legal effect from the purchase of any other property, realty or personalty and no duty is devolved by law upon defendant to respond to the liabilities, whether in tort or in contract, of the selling corporation. A mere purchase in good faith for value, imposes no such obligations. Howell v. North Mo. R. R. Co., 42 Mo., 63; Hoard v. C. O. R. R., 123 U. S., 222; Fogg v. Blair, 133 U. S., 534."

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In the Burge case, the court construes said section 1059 as providing for the amalgamation of two or more railroad companies in this state, and the formation of one company. The statutory corporate formalities, requisite to effect such purposes, are plainly stated, and, are such as to really appeal to one's intelligent judgment as being reasonably necessary to protect and safeguard both the corporate and individual interests involved in the consolidation of corporations, desiring to unite into one corporation. In the case at bar, the proofs in the record do not show the necessary corporate action, or in fact, any action whatever, on the part of the Belt Company, providing for the terms and conditions of a consolidation with the Southern Company, or any other company; in fact, there was no corporate action whatever as to the alleged consolidation. In as much as there was no contract between the two companies, it necessarily follows that there could not be any approval or ratification of

it by a majority in interest of the shareholders, either at a stockholders' meeting, called for that purpose, or by the approval in writing of such contract by a majority of the stock interested.

It is not pretended that the Belt Company, as a corporation, was a party to the reorganization plan and agreement, but simply that its stockholders became depositors thereunder. In other words, there *was* no regular corporate proceedings, as provided by the statute, but merely the individual stockholders' action, and, through which latter, it is claimed by the respondent, there was a substantial compliance with the Missouri Statute.

980 After a careful examination of all the authorities, cited by counsel, the Master is not convinced that there has been a statutory consolidation, as charged in respondent's answer to the intervening petition.

If he is right in such conclusion, then how can there be a de jure consolidation in this case, which could only arise from a compliance with the Missouri Statute? If merely a de facto consolidation, or some kind of amalgamation of interests has been effected between the Belt and Southern Companies, then other questions, affecting the Trust Company's connection with the reorganization plan and agreement, may be determinative of respondent's claim against the intervenor for the Belt indebtedness; and these questions are hereinafter considered.

There can be no doubt as to the soundness of the proposition that, where the assets of a company have been, by voluntary corporate action, removed beyond the reach of its creditors, the latter can, by bill in equity, follow such assets and subject them to the payment of their debt, as stated in Berthold v. Lumber Co., 91 M. A., 238, as follows:

"It is a settled rule of equity jurisprudence that where one corporation is consolidated with another, or merged in another, which takes its property, such new corporation is bound to discharge the liabilities of the old one."

The principle invoked by respondent is unquestionably applicable to all cases in which the assets of a corporation are by it voluntarily turned over to another company in disregard of the rights of the former's creditors, but, even in such cases, the liability of the company taking such assets would only extend to the value thereof in excess of any contract liens thereon.

In other words, there would not be created a general liability but simply a limited liability to the extent of the fair value of the assets, improperly or wrongly diverted from the payment of the claims of the creditors.

Effect of Foreclosure Sale and Intervenors' Purchase of Belt Properties.

7. If there was no strictly statutory consolidation in this case then the next question for consideration is whether a consolidation was effected by reason of the foreclosure of the Belt mortgage, the sale thereunder, and the purchase by the intervenor of the Belt properties.

It is not disputed that the respondent Trust Company was a party to the foreclosure proceedings, and that the decree of fore-
981 closure was and is in full force and effect and is conclusive as against the respondent in respect to the existence of the mortgage, the indebtedness secured thereby, and its non-payment. No issue has been made by the pleadings or otherwise as to the regularity or validity of the foreclosure sale, at which the intervenors acquired the mortgaged properties and assets of the Belt and allied companies, forming the Belt system. In the legal enforcement of the mortgage lien, securing the bondholders, the properties of these companies, respectively, were subjected to the payment of their bonded indebtedness, were sold at public vendue to the highest bidder, and the purchase price was paid therefor, as provided in and by the foreclosure decree made in this court, and, thereupon, the title to said properties was conveyed to the purchasers at such foreclosure sales. The proceeds of the sales were, as required by the decrees, paid into court and there constituted a trust fund, in lieu of the properties sold, and subject to distribution by the court, pursuant to the mortgage liens.

If the Southern Company had acquired the Belt's porperties outside of a foreclosure, and without giving sufficient consideration therefor, then equity would follow such properties into the intervenor's possession, and, to the extent of their value, as above stated, it would apply the same to the satisfaction of the Belt indebtedness; but that condition of things is not involved in this case.

As to the effect of foreclosure proceedings on the Belt roads, the following cases are in line, and, especially, the Wisconsin case, which is exhaustive in respect to many of the questions raised by the respondent, and, for that reason, it is copied more extensively than would otherwise have been done.

In Hoard v. Chesapeake & Ohio R. Co., 123 U. S., 222, it is held: "A railway company organized to receive, hold and operate a railroad sold under foreclosure of a mortgage, in the absence of a statute or contract, is not obliged to pay the debts and perform the obligations of the corporation whose property the purchasers buy."

The Supreme Court of this state in Dickey v. Railway Co., 122 Mo., 223, followed the ruling in the Hoard case, where there was a deed of conveyance by one railroad company to another, without the intervention of foreclosure proceedings.

In Holton v. Railroad Co., 25 Mo. App., 322, cited with approval in the Dickey case, supra, it appears that Holton conveyed to the Mississippi Valley & Western Railway Company, a right of way over his land for the consideration of $100.00 in money, and
982 the company's agreement to furnish him an annual pass during his natural life over its railway. Three years later, the property and franchises of the railway company were sold under foreclosure to one Stone, who thereafter sold the railroad property and franchises to the St. Louis Keokuk & Northwestern Railway Company, whose agents in recognition of plaintiff's claim, issued to him an annual pass until the first of January, 1885, when they declined to issue it to him any further. He then brought suit against the last named company for damages for failure to comply with his con-

tract with the Mississippi Valley & Western Railway Company, and, it was held that he could not recover; that the defendant, by purchasing the railway property from Stone, who had purchased it at the foreclosure sale, did not become liable to pay any of the debts of the Mississippi Valley & Western Railway Company, unless it agreed to pay them, and no such agreement had been alleged or shown.

In National Foundry Works v. Oconto Water Co., 105 Wis., 48, the language of the court, beginning at page 53, is as follows:

"Appellant's counsel mainly rely on the proposition that where one corporation goes out of existence by being annexed to or merged in another, no arrangements being made respecting the payment of the liabilities of the former, the latter will be entitled to all the property and answerable for all the liabilities. That is familiar. No need exists to go outside this state for authority to suppport it. Knight v Ashland, 61 Wis., 233. In that case, speaking of the devolution of liability of a town that had passed out of existence, upon an existing town to which the territory of the former had been attached, it was said that the authorities are that the simple vacation of a town by legislative enactment, and the attachment of its territory to another town without any direction as to the payment of the liabilities fo the former, renders the latter liable for such liabilities. Other cases are to the same effect. Schriber v. Langlade, 66 Wis., 616; Butternut v. O'Malley, 50 Wis., 333; Pennison v. C. M. & St. P. R. R. Co., 93 Wis., 344. However, the applicability of that principle to the facts of this case is not perceived. The Oconto Water Company did not go out of existence either by being annexed to or merged in another corporation. True, it went out of business, and for all the purposes of its organization was destroyed by the enforcement of the Andrews & Whitcomb mortgages, but not by any contract with the defendant corporation, or any arrangement with it or any person or party with whom or to which it was a party, by which the mere destruction of the corporation was of any benefit to such person or party, or by which such person or party
983 obtained any property or right not paid for at its full value by a cancellation of the mortgage indebtedness which antedated the lien of the plaintiff so far as relates to the owners of the mortgages or the persons claiming under them. There was no merger of corporate interests, or attachment of the rights of one to those of another; but one was, to all intents and purposes, destroyed as an artificial body, and another corporation, new and distinct from the old one, was created, with such powers as it was the bona fide purchaser of, under proceedings adverse to the old corporation, and which it had the right to exercise by force of the statu-e. A moment's consideration of the reason of the rule invoked by plaintiff will show that it has no room to operate here. It is a rule of equity and to prevent fraud; so, where all the property of one corporation is transferred to another without other consideration than that growing out of or incidental to the consolidation, the presumption arises either that it was the intention of the parties that the successor corporation would assume the payment of the debts that were equitably a claim upon the property succeeded to, or that the transaction

was a fraud on creditors and voidable as to them. The idea is that a successor corporation receives benefits from such a succession equitably applicable to the payment of the debts of the former proprietor and, therefore, to the extent of such benefits, is liable for such debts. From that, a contract liability is implied, which the successor corporation cannot be heard to deny, otherwise it would be allowed to defend on the ground of such wrong-doing as, of itself, would avoid the transaction altogether as to creditors, on the ground of fraud. As said in Mt. Pleasant v. Beckwith, 100 U. S., 514, 'The corporate property passes into the hands of its successor, and where the benefits are taken the liabilities are assumed, the rule being that the successor who takes the benefits must take the same cum onore, and it cannot deny that it is liable for the attendant burdens.' Here, if the Andrews & Whitcomb mortgages were valid liens upon the water works property paramount to plaintiff's claim, so that by the enforcement of the mortgages, the purchaser at the foreclosure sale only obtained the benefit of the mortgage security, they became possessed of no benefit that they did not fully pay for, or anything that was equitable applicable to the payment of plaintiff's claim. The essential or prior equity of plaintiff in the property, which is an absolute essential to the liability of the new owner of such property for the debts of its predecessor, does not exist, so the principle invoked does not apply.

The learned counsel for appellant, overlooking, as it seems, the reason of the rule which makes a successor corporation liable
984 for the debts of its predecessor, seek to apply it as broadly as the literal sense of the language of the proposition of law will permit, that is, to take in every case of a corporation that succeeds to the property of another, regardless of whether it thereby takes anything of value to which creditors have a legal or equitable right, or whether the succession is by contract and voluntary or adverse and involuntary as to the old proprietor. * * * The Court held that such proposition was directly contrary to the whole purpose of the statute; that the legislative intent was to give full full effect to the mortgage as security, while the construction contended for would destroy the security; that the proceedings under such a law are adverse to the old corporate organization, which, of itself, distinguishes them from those that render a successor corporation liable for the debts of its predecessor; and that there is no good reason why the two situations should ever be confounded. That was affirmed in Smith V. C. & N. W. R. Co., 18 Wis., 17. In that case there was the additional element that the mortgage sale was for the benefit of the stockholders and creditors under an agreement that there should be a reorganized corporation in which the stockholders and creditors of the old company might participate. Yet the court held that the sale cut off all the rights of the old company and its creditors; that the reorganized company was a new and entirely independent organization against which the creditors of the old company had no claim whatever except such as they obtained by the agreement entitling them to become stockholders in such company * * * If the learned circuit judge interpreted the

statute correctly, we cannot see why the defendant corporation is not liable for the debts of the old company, if it is indebted. If its liability goes to that extent, the act would be inoperative and useless in most cases; for no purchases of the assets of an insolvent corporation would take the risk of organizing under the act when to do so would make them liable for the debts of the old corporation. We think the purpose of the act was to secure to purchasers at judicial sales the right to use and enjoy the franchises which had been conveyed to them in form under a judgment or decree. To the same effect are Wright v. M. & St. P. R. Co., 25 Wis. 46; Gilman v. S. & F. du L. R. Co., 37 Wis., 317; Pennison v. C. M. & St. P. R. R. Co., 93 Wis., 344; Menasha v. M. & N. R. Co., 52 Wis., 414; Memphis W. Co., v. Magnes & Co., 83 Tenn., 37; Hoard v. C. & O. Ry., 123 U. S., 222; Chesapeake & O. R. Co., v. Miller, 114 U. S., 176; Cook v. D., G. H. & M. R. Co., 43 Mich., 349; Houston & T. C. R. Co. v. Shirley, 54 Tex., 125; Thornton v. Wabash R. Co., 81 N. Y., 462; Glenn v. Statler, 42 Iowa, 107.

985 The foregoing is but a small part of the numerous cases in the books on the question under consideration. They show how frequently the principle, which protects the right of creditors to be paid out of corporate property against schemes worked out by contract or by legislative enactment to merge one corporation or all the property of one corporation in another has been confounded with the circumstances of a corporation by adverse proceedings to enforce a mortgage upon corporate property, becoming legitimately possessed of it by a sale, cutting off the rights of creditors having a junior or no lien on said property. In the former case the new possessor of the property takes what the creditors have a right to resort to for the satisfaction of their claims; in the latter such possessor takes only that for which full value was parted with to the old company at the time the mortgage was placed on the property, or thereafter, pursuant to its terms. In the former circumstances the proceedings are all voluntary; in the latter, involuntary and adverse. The defendant became the bona fide owner for full value, of the property of the Oconto Water Company, and all the franchises possessed by it for the profitable use and enjoyment of such property. The purchasers at the foreclosure sale took title to the property with the incidental right conferred by Sec. 1788, Stats. 1898, to form a new corporation to take the same by assignment and possess the rights of the old organization. When the mortgages were given, Sec. 1788, Stats. 1898, became a part of them and a very material element in the value of the security. The right guaranteed by such section was as much a part of the mortgage security as the tangible property described. The theory of the appellant is that the statute, clothing a corporation, circumstanced as the defendant is, with the right to exercise the powers, privileges and franchises possessed by the old corporation, which it shall have acquired bona fide, by mortgage sale, or by assignment based on a title acquired through such sale, instead of adding to the value of a corporate mortgage covering all the property of the corporation, tangible and intangible, impairs it and may destroy it, because a new corporation cannot be organized

with the benefits of the statute without incurring the penalty of being liable for all unsecured indebtedness of the old corporation, whether before the foreclosure sale the owner of the mortgage indebtedness had a first lien on the property or not. In other words, that the statute not only operates to prevent the general creditors from being cut off by the foreclosure proceedings, but transposes the parties so as to give the general creditors a claim on the property paramount to the mortgage. The statute will not admit of a construction leading to such an absurd result even if the ques-
986 tion were an open one, and it is not, as we have seen. The manifest purpose of it, as indicated, is to add to the value of a corporate mortgage of the kind under consideration. That is too plain to admit of serious controversy. Candor compels us to say that we do not think that the contrary theory merits the consideration we have given to it, since its fallacy is so glaringly apparent and has so often been exposed in this and other courts."

Counsel for the Trust Company rely upon the case of Chicago Ry. Co., v. Ashling, 43 N. E., 373, in which it appears that the St. Louis Company conveyed all its physical property and franchises to the Santa Fe Company without consideration, and without making any provision whatever for the payment of its debts. Mary L. Ashling recovered a judgment against the St. Louis Company for the negligent killing of her husband, and in the suit against the Santa Fe Company it was held that the conveyance to it amounted to a consolidation under the Illinois statute, which, however, does not provide for a statutory consolidation, or state the method or manner in which consolidations are to be affected. The Santa Fe Company did not, as in the case at bar, acquire the St. Louis Company's properties at a foreclosure sale thereof, and pay the purchase price into court for the benefit of those entitled to it, nor as the result of a bona fide sale to it, in which the consideration passed to the St. Louis company, and stood in lieu of its property, and so became subject to the claim of creditors. Hence, it would seem that the Ashling case is distinguishable from this case, and could hardly be considered as an authority applicable to the construction of the Missouri consolidation statute, respecting the creation of a new company.

The Master has endeavored to make a critical examination of all the authorities submitted by counsel on the consolidation issue, distinguishing, as best he could, the conclusions of the court in each case by reference to the particular points involved therein, so as to reach a proper conclusion as to the legal significance of the specific transaction entered into by the Southern and Belt Companies, pursuant to the reorganization plan and agreement, and, including the foreclosure sales of the properties, comprising the Belt system. In his opinion, there was no consolidation effected by what was done by the corporations involved, but that the transaction, when considered in its entirety, was in fact a reorganization scheme, intended to bring about a certain union or combination of properties, by which combination additional strength would be given them as a whole, as they were all dependent upon each other for the present

as well as future railroad advantages and benefits; but such
987 combination or union of these properties was to be consummated only after their purchase at the foreclosure sales under the mortgage liens thereon, thereby intending to first acquire the titles, pursuant to the contract liens on the properties, and then utilize the properties so purchased by uniting and combining them in one corporation, which would be able to realize better results from the joint operation of the roads concerned than had been done in their separate operations. It will be readily conceded that, under the facts shown in evidence, in respect to the capitalization and bonded and other indebtedness of the different railroads, involved in the reorganization scheme, in connection with their earning capacities and expenses of operation, it was a wise policy that dictated the organization of one great corporation to manage the whole, and the only question in dispute at this time is as to the effect of such reorganization arrangement upon the rights of the Trust Company as a creditor of the Belt Company.

The equitable rule, to which respondent's counsel refer, aims at the prevention of fraud, and is applicable wherever corporate property is transferred to another corporation "without any other consideration than that growing out of, or incidental to, the consolidation" in which event the legal presumption arises, either that the successor corporation assumes the payment of the debts that should have been paid out of or from the property so transferred, or that the transaction was fraudulent and should be avoided as to creditors. The successor corporation, having received actual substantial benefits belonging to the company, transferring its property, and equitably applicable to the payment of its debts, should, to the extent of such benefits, be liable for such debts, but this principle cannot be invoked where the transfer is involuntary and for sufficient consideration, for in such case the creditors have no legal or equitable right to be protected in the absence of such fraud, actual or constructive, as should impeach the transaction in the interest of bona fide creditors.

The following authorities from the U. S. Circuit Court support these general propositions:

In Farmers Loan & Trust Co. v. Louisville Ry. Co., 103 Fed. 110, Circuit Judge Woods delivering the opinion, the syllabus is,

"A plan of reorganization made by railroad bondholders for the purpose of purchasing the property at foreclosure sale, and by which stockholders in the old company are permitted to convert their stock into stock of the new company on the payment of a stipulated difference, is not for that reason fraudulent and void as to general
creditors of the old company, where it does not appear that
988 any of the stockholders, as such, were parties to the plan, that it caused or in any way affected the foreclosure proceedings, or deprived the general creditors of any rights so that whatever rights, if any, are secured to the stockholders are at the expense of the bondholders and not the unsecured creditors."

In this case, it appears that a receiver was appointed for the purpose of preserving the unity of the railroad property in-

volved. Subsequently, default was made in the payment of interest on the company's bonds, but "before the filing of bills for foreclosure, a committee of bondholders was appointed, who devised a scheme of reorganiaztion, in pursuance of which they made a contract with a syndicate, which included some of the officers of the company by which such syndicate agreed to purchase for cash certain bonds and stocks of the new company, and to deliver certain of such stock to stockholders of the old company, who should elect to exchange their stock therefor, and to pay a stipulated sum per share in cash. The plan was carried into execution, and the bondholders' committee purchased the property at the sale under foreclosure decree for a sum much less than the mortgage indebtedness thereon. The company was unquestionably insolvent and it was not shown that such arrangement in any way affected the foreclosure proceedings; nor did it appear that stock in the new company received by the stockholders in the old was of any greater value than the cash payment required to be made by them therefor. Held that such arrangement did not constitute a fraud upon the unsecured creditors of the old company, nor operate to their injury, so as to entitle them to place the property again in the hands of a receiver, to be operated for their benefit until their claims were discharged."

In this case, Judge Woods cites with approval the statement of Judge Jenkins in Paton v. R. R. Co., (C. C.) 85 Fed., 838, as follows:

"The question is presented whether any plan of reorganization can be sustained, which does not comprehend the protection of the rights of general creditors of the corporation, or in other words, whether bondholders have the right to agree with stockholders upon terms, which may be agreed upon to give the latter an interest in the new corporation, without including creditors in such plan of reorganization or at least tendering them the chance of joining therein. I fail to see any just reason why, in the absence of fraud or oppression, such arrangements should not be upheld in a court of equity. It was competent for these bondholders to exclude stockholders from any agreement. It was also competent for them to exclude creditors. The bondholders, under different mortgages could agree among themselves, without reference to creditors or stockholders; and in case of agreement with stockholders, unless the scheme is clearly one to secure to the stockholders that which should justly go to the creditors—unless it can be said that it was a scheme to defraud creditors—I perceive no reason which should justify denunciation of the plan. To the contrary, such plans or reorganization have met with general approval, because they tend to avoid sacrifice and loss and are beneficial to the public. Robinson v. Railroad Co. (C. C.) 28 Fed., 340; McIntosh v. R. R. Co., (C. C.), 34 Fed., 582; Central Trust Co. of N. Y. v. U. S. Rolling Stock Co., (C. C.) 56 Fed., 5, 7; Penn Transp. Co.'s Appeal, 101 Pa. St. 576."

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In Armour v. Bennets' Sons (C. C.), 123 Fed., 56, Circuit Judge

Severens delivered the opinion, and it was held that a new corporation, regularly organized by the officers and stockholders of one existing for the purpose of acquiring its property and assets and which did acquire the same by purchase at judicial sales, cannot be treated as a continuance of the old corporation, and liable at law for its debts, whatever may be its liability in equity to creditors of the old corporation, in respect to the property, if fraud is shown in the transfer.

The Court said:

"They (meaning the stockholders) cannot gain profits from the assets of the corporation, to the detriment of the lawful rights of creditors any more than any other person can. To be sure the relation of the stockholders, and especially of the directors, to the subject matter, may afford reason for close scrutiny of such transactions; but in the end the question is one of fair dealings in the exercise of a legal right (1 Morawetz on Corp. par. 811). All this is inconsistent with the idea that a new corporation, organized with the intention of acquiring for it the assets of an existing one, must, upon acquiring them, be regarded as the old corporation in a new dress and so liable for the old debts."

The Southern was, and is, in all essentials, a new corporation, (and not the continuation of the old Belt Company), organized, primarily, to acquire, hold and operate the Gulf road, with the necessary terminals at Kansas City and the Gulf of Mexico, and, contemplating the ultimate ownership of the Belt system at Kansas City, if the same could be acquired in the manner provided in the reorganization plan; and it was understood that all these roads had to be bought by the reorganization Committee, at the
990 various foreclosure sales thereof, which were made subject to the proper orders of court providing therefor.

There was, then, no merger of corporate interests by corporate action, between the Belt and Southern Companies. There were no transfers of the properties of the Belt system by the corporations owning them, otherwise than through the foreclosure sales, regularly and legally made, and the considerations paid for such properties were large and sufficient; being approximately the full amount of the bonded indebtedness upon each railroad foreclosed; and, in this connection, it may be properly suggested that there has been produced in this cause, considerable testimony, tending to show that all the roads, forming the Belt system, were extravagantly built and were bonded largely in excess of their actual cost, though such fact, even if proven, does not determine their value at the time of the several foreclosure sales, but could only be considered along with all the other proofs, if any, as to the real actual values of the foreclosed properties, at the times they were sold.

Summarizing the proofs, as the Master finds them to be, he has reached the following conclusions, in respect to the effect of the foreclosure sales of the properties comprising the Belt system, and now owned by the Southern Company:

1. The foreclosure sales were legally made, and the Trust Com-

pany, though a party to the foreclosure proceedings, has not at any time objected to the regularity thereof, or the sufficiency of the amounts received for the properties sold.

2. In the record there is no direct testimony by either party showing the actual, fair, reasonable value of said properties at the time of, or prior to, the foreclosure of the mortgage liens thereon.

3. The union, or combination, of all the roads of the Belt system and Gulf road into the Southern Company, pursuant to the reorganiaztion scheme, created and gave to the reorganized system a much larger value than was the aggregate value of all said roads as separate institutions, managed as they were prior to the date they were sold to the reorganization Committee; and, further, that, by reason of the additional value given to said properties as parts of the reorganized railroad system, the Southern Company was enabled to issue its thirty million dollars of bonds, twenty-one million of preferred stock, and thirty million of common stock, the whole aggregating eighty-one million, par value, and approximately, more than four times the amount paid by the Committee for said properties at the foreclosure sales thereof.

991 4. There is no sufficient proof, in the record, showing what was the market or other value of the stocks and bonds of the Southern Company, which were given to the stockholders of the Belt Company, though such values, if shown, would be no fair criterion on which to base the actual value of the Belt property, turned over to the Southern Company, in the manner hereinabove stated.

5. If respondent's contention is correct to the effect that there was a consolidation, de facto, by which the intervenor became liable for the Belt indebtedness, still there is no proof in the record to show that the Belt properties, sold under the mortgage foreclosures, were worth anything in excess of what they brought at the sale; and in he absence of such proofs, the Master finds that the amounts, for which they were, respectively, sold, was and is their fair, market value at that time.

6. There is no evidence in the record showing actual frauds either at or in the inception of the reorganization scheme, or in any proceeding thereunder; including the foreclosures of the mortgage liens on the properties sold and the conveyance to the Southern Company.

7. That, for their mutual protection and self interest, the bondholders interested in all the railroad companies involved, had the right to combine together for the purpose of acquiring all the properties thereof, and then uniting them in one system, and without consulting either the stockholders or creditors of the constituent companies owning such railroads; and, furthermore, that it was competent for the bondholders, in furtherance of their own business interests, to use the stocks and bonds of the new company as they saw fit, provided, that it is not shown that in so doing, it was part of their scheme to give something of value to the stockholders that should have gone to the creditors..

8. It is not shown in the record that the reorganization scheme

in any way deprived the unsecured creditors of any rights they would otherwise have had in case such scheme had never been consummated. There is no pretense that the Trust Company was prevented from bidding on, or buying, said properties, because of any secret understandings, nor is there any satisfactory proof in the record to the effect that the conduct of the Trust Company, in respect to said foreclosure sales, was in any wise changed or altered on account of the reorganization plan and agreement.

992 *As to Reorganiaztion Plan and Agreement Expressly Providing for the Payment of the Floating Debt of the Constituent Companies.*

8.—It is claimed by the Trust Company that it appears from the reorganiztion plan and agreement that the floating debts of the constituent companies were to be paid, whether more or less than $475,000.00, the amount named therein, which was simply in the nature of an estimation. The intervenor contends that no such liability was intended to be, or was in fact, created by the reorganization plan. The relations of the parties interested will be helpful in determining the meaning of that part of the agreement. The reorganization Committee was merely an agency constituted by such bondholders and stockholders of the Gulf Company and its allied companies, as saw fit to act in concert under the proposed reorganization plan and agreement, which were expressed to be for the benefit of the participating bondholders and stockholders. General or unsecured creditors of those companies were not parties thereto, the manifest purpose and object being to protect the interests of the stockholders and bondholders of those companies, which had become insolvent, and which then or shortly afterwards would have to be administered by the court. It became necessary for them to devise some plan for the disposition of the properties belonging to those companies, which would preserve them for the benefit of stockholders and bondholders, which could only be done through concerted action on the part of the security holders, and hence, the modified Philadelphia Plan of November 7, 1899, was adopted for that purpose.

As heretofore stated, the reorganization agreement gave the Committee plenary power to alter or modify the terms as might seem necessary or desirable, the intention being to include the Belt terminals, as heretofore stated, if sufficient of its securities were deposited with the Committee, otherwise, arrangements for other terminals at Kansas City were to be made. The provision in the plan, as to using $475,000.00 for paying floating debts of the constituent companies, was, perhaps, more in the nature of a detail in the general plan, so as to advise the depositing security holders of the probable disposition of the moneys, to be realized from the securities to be issued by the new company, as there is nothing in the plan, or in the agreement, indicating the amount of the floating debts to be paid, or their nature, and certainly nothing as to the Belt indebt-

edness to the Trust Company. The provision in the plan relating to
certain securities, aggregating $3,000,000, and reserved in
993 the treasury for future requirements, might properly be con-
sidered as another such detail in the plan.

It is urged by counsel for the Southern Company, that, in as much as the reorganization plan and agreement were for the benefit solely of the security holders of the properties involved, it necessarily follows that the Trust Company can claim no privity of contract, nor can it maintain an action upon it or claim any right or benefit from it.

In St. Louis v. Contracting Co., 101 S. W., 6, the Supreme Court of Missouri held:

"There is a broad distinction between the principle involved where a contract is entered into between two parties for their own use and benefit, and where they made a similar contract for the benefit of a third party. A breach of the first would create no cause of action in favor of a third party, even though he was thereby deprived of large benefits which would have flown to him had the contract been performed: while in the latter case the breach would create a cause of action in his favor, even though the benefits he would have received from its performance might have been insignificant as compared to those he was deprived of by the breach of the former * * *. From what has thus been stated it can be seen that the character and value of the benefits and their loss or reception have no weight whatever in determining the question as to whether or not the contract was made for the benefit of third parties, who in this case are the property owners * * *. All of the well-considered cases start out by the assertion of the broad proposition that the contract must be made for the benefit of the third parties, as its object, and they must be the parties intended to be benefited thereby."

The Court continues:

"So it seems clear to us that whatever benefits that may accrue to the property owners as a result of street improvements is purely an incident to the improvement, and not an object intentionally sought to be obtained by the contract which was made for the improvements. Third persons who are only collaterally and incidentally benefited by the terms of a contract have no cause of action for its breach."

"The courts are not uniform in their opinions as to the principle upon which this class of actions are maintained. Many of them base their opinion upon the ground that the obligee in the contract owed the third party some debt or duty, either legal or equitable,
and that by accepting the contract the law creates a privity of
994 consideration between them upon which he could maintain
a cause of action for its breach. Vrooman v. Turner, 69 N. Y., 280. But in applying that principle to this case, we are confronted with the proposition that the city owed no duty to the property owners to increase the value of their property, but were merely creating a fund, or providing a means, out of which the

contemplated improvements could be paid. To this proposition the respondent might reply that while that may be true, yet the law required the city to let the contract at the lowest price obtainable, and that the property owners had the right to avail themselves of that price. In answer to that contention it may be said that, in all the cases where third parties have been permitted to recover upon a contract entered into for their benefit, said third parties had either adopted the contract or complied with the provisions thereof relating to them, or that the debt or duty which was owing to the third party had passed or vested in the obligee of the contract before the suit was instituted."

Neither the bondholders, stockholders, nor the reorganiaztion Committee, owed any legal or equitable duty to the Trust Company, unless such duty can be implied in some way from the reorganization plan and agreement. The Trust Company as a creditor was not intended to be, and was not in fact, a party to the reorganization agreements, though it received benefits therefrom in the exchange of its old securities for the new ones of the Southern Company; nor does the evidence in the record show that it ever changed or altered its position in any way on account of said floating debt provision.

In Howsman v. Water Co., 119 Mo., 304, a contract had been entered into between the town of Trenton and the Water Company, by which the Water Company agreed with the town to furnish, at all times an adequate supply of water for fire and other purposes for public and private use, and further agreed and "should said Water Company, from lack of water supply, or other cause, except providential or unavoidable accident, fail to furnish a reasonable or adequate supply of water to extinguish any fire, then it shall be liable for all damages occasioned by such fire or neglect."

The plaintiff's dwelling being destroyed by fire, he sued the Water Company, for a breach of its obligation above quoted. The court held that there could be no recovery by the reason that the contract was not *name* for the benefit of the plaintiff as its object; and the fact that he was indirectly or incidentally benefited by it did not give himthe right to sue upon it. The opinion has citation of many authorities. Similar cases are

995 Metropolitan Trust Co. v. Topeka Water Co., 132 Fed., 702.
Allen Mfg. Co. v. Shreveport Water Works Co., 37 So., 980.

In Sayward v. Dexter, 72 Fed., 758, the court applies the same rule, saying:

"But it is not every contract for the benefit of a third person that is enforceable by the beneficiary. It must appear that the contract was made and was intended for his benefit. The fact that he is incidentally named in the contract or that the contract, if carried out according to its terms, would inure to his benefit, is not sufficient to entitle him to demand its fulfillment. It must appear to have been the intention of the parties to secure to him personally the benefit of its provisions."

In American Bank v. Railroad Company, 75 Fed., 130, the syllabus is as follows:

"An agreement made by one person with another to pay a debt due by the latter to a third person is not the subject of suit by such third person, when there was no intention to benefit him, and nothing of value came under the contract within the control of the promisor, which, in equity, belonged to such third person, or is subject to a lien in his favor."

The Court said:

"The explicit language of the complaint makes it clear that the promise of the defendant was to pay an existing debt, and it was made for the benefit of the Chicago & Northern Pacific Railroad Company; and no facts are alleged from which an inference may be drawn that the parties to the contract were actuated by a desire to benefit the plaintiff, nor that the scope of their intentions included any provisions for rights or interests other than their own; and, there is no pretense that under the contract anything of value or assets have come to the promisor's hands, or under its control, which, in equity, belongs to plaintiff, or is subject to any lien existing in favor of the plaintiff. The case, therefore, comes fully and fairly within the rule of the decision of the Supreme Court in the case of National Bank v. Grand Lodge, 98 U. S., 123. The rule and the authority of the case cited have received express recognition in the Circuit Court of Appeals for the Ninth Circuit, in the case of Sayward v. Dexter, 72 Fed., 765."

In Freemen v. Pennsylvania Co., 173, Pa. St., 274, it is held:

"The holder of coupons representing interest upon railroad bonds had no right of action on an agreement by the lessee of
996 the railroad to apply the net earnings to the payment of the interest coupons, and to buy up the coupons if the net earnings should not be sufficient to pay them; such holder of coupons being a stranger to the contract and the consideration."

In McIlvaine v. Big Stony Lumber Company, 54 S. E., 473, it is held:

"Code 1904, Section 2660, authorizes the assignee of a bond or a chose in action to sue in his own name and to maintain any action which the original obligee party or contracting party might have brought. Held, that such action did not authorize an original creditor to sue at law on covenants of third persons to assume and pay the debt where there was no consideration passing from such creditors to such covenanters, and there was no privity between them."

The Court said:

"The test, therefore, in such a case, seems to be whether or not the promise or covenant sued on was made for the sole benefit of the plaintiff."

In Armour Company v. Construction Co., 78 Pac., 1106, it is held:

"One who furnishes provisions to a contractor doing work for a railroad cannot recover from one who gave a bond to the railroad

to pay persons supplying provisions to the contractor, there being no privity."

One of the leading cases on this question is Second National Bank v. Grand Lodge, 8 U. S. 9, 123, which was an action by the bank against the Grand Lodge of Missouri to compel the payment of certain coupons formerly attached to bonds issued by the Masonic Hall Association, a corporation existing under the laws of the State of Missouri, in relation to which bonds the Grand Lodge had adopted the following resolution:

"Resolved, that this Grand Lodge assume the payment of Two-Hundred Thousand Dollars bonds issued by the Masonic Hall Association provided that stock is issued to the Grand Lodge by said Association to the amount of said assumption of payment by this Grand Lodge as the said bonds are paid."

The Court held that the bank, as the holder of the bonds, was not in such privity with the contract as to warrant a suit upon it, saying:

"It was a contract made for the benefit of the Association and of the Grand Lodge—made that the latter might acquire the ownership of stock of the former, and that the former might
997 obtain a relief from its liabilities. The holders of the bonds were not parties to it and there was no privity between them and the lodge. They may have had an indirect interest in the performance of the undertakings of the parties, as they should have in any agreement by which the lodge should undertake to lend money to the association or contract to buy its stock to enable it to pay its debts; but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names. We do not propose to enter at large upon a consideration of the inquiry how far the privity of contract between a plaintiff and defendant is necessary to the maintenance of an action of assumpsit. The subject has been much debated and the decisions are not all reconcilable. No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come into the promisor's hands or under his control which in equity belong to a third person. In such a case it is [held] that a third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as to where one person contracts with another to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and, therefore, the rule is that the original creditor cannot sue. His

case is not an exception from the general rule that privity of contract is required. There are some other exceptions recognized, but they are unimportant now. The plaintiff's case is within none of them. Nor is he sole beneficiary of the contract between the association and the grand lodge. The contract was made, as we have said, for the benefit of the association, and if enforceable at all is enforceable by it. That the several bondholders of the association are not in a situation to sue upon it is apparent on its face."

The Trust Company is not within any of the enumerated exceptions, nor can it be claimed that assets came into the hands of the reorganization Committee or under its control, which in equity
998 belonged to the Trust Company, as the sole beneficiary interested in the provisions contained in the plan and agreement for the payment of the floating debt.

Another strong case in point is that of Meyer v. Ft. Wayne R. R. Co., 132 Indiana, 88, in which the plaintiff agreed to build a station for two companies, which he did, but was not paid by one of them, the road of which was afterwards sold under foreclosure and bought in by the bondholders, who organied a new corporation to own and run it. The new corporation used the station and plaintiff sued it for the amount which the former owners of the road agreed to pay him. It appeared that there was an agreement between the bondholders of the original company that a certain sum should be retained for the payment of small claims as required. The court held that plaintiff could not recover and that the agreement created no obligation in favor of the plaintiff, saying:

"The provision in the contract between the bondholders, which we have quoted, does not bind the appellee to pay the appellant any sum whatever. It simply authorizes the directors to use that sum as they may deem necessary in the payment of claims. But, if it were conceded that the provision does create an obligation in favor of the appellant, still there is no right to recover upon it, because it does not appear that the sum was not properly used to pay the claim specified, or other claims having rightful precedence of the appellant's claim."

From the undisputed facts in the record, it can hardly be claimed that the Trust Company, or any other unsecured creditor of the Belt Company, had a direct interest in the floating debt reservation provision of the reorganization plan, for the carrying out of such provision was clearly within the discretionary powers of the reorganiation Committee in every way whatever. The Committee was fully authoried to do as they thought best in respect to paying off such indebtedness as, in their judgment, was necessary or expedient, in furtherance of the purposes of the reorganization plan and agreement; and, hence it appears, in Ingel's testimony (Rec. Vol. 56, pp. 34354 to 34380) and particularly in his exhibit 192, in Vol. 56, pages 34357 to 34368, that the Committee and the Southern Company together paid out in connection with the obligation of $5,900,000.00 set out in the modified plan or reorganiation, the following amounts:

Car Trust Certificates.

Amount called for under the plan...	$1,900,000.00	
999		
Amount actually paid out by Committee and Southern Company.....		$2,192,580.40
First mortgage coupons and ad interim interest; amount called for in the plan.....	575,000.00	
Amount actually paid out by Committee		891,913.41
Receivers certificates; amount called for under the plan.....	800,000.00	
Amount actually paid out by Committee and Southern Company.....		821,543.74
Appropriated to floating belt; amount called for in modified plan.....	475,000.00	
Amount actually paid out by Committee and Southern Company.....		1,164,172.56

This statement shows that, as to each item, the amount paid out largely exceeded the original estimate, and, that the joint payments of the Committee and Southern Company, on account of the floating debt appropriation, exceeded the estimate to the extent of $689,172.56. This fact, certainly shows the exercise of the widest discretionary power as to shaping up the details of the reorganization scheme for the benefit of the new security holders, and, one of the largest of which is the Trust Company, as it received bonds and stock of the Southern Company in exchange for, approximately, $850,000.00, par value, of the securities of the old companies. (Rec. Vol. 49, pp. 29972 to 29974.)

In other words, the Trust Company, presumably, received its proportionate benefit from this large expenditure in payment of what are called the floating debts, but which in reality consists of all kinds of items, which the Committee deemed necessary to take care of, so as to secure absolutely the first mortgage lien on the properties transferred to the Southern Company.

By reference to the 13th paragraph of the "agreement", hereinbefore copied it will be observed that the Committee was authorized to acquire, extinguish or hold any obligation in the nature of floating debt, or otherwise, against the company or property embraced in said plan, either as proposed or carried out, or any securities held as collateral for any such obligations, etc.

The testimony of Shipley, Smith, Petitt, Pam, Harrity, Sielcken and Hecksher, members of the reorganization Committee,
1000 and found in Vol. 57 of the Record, is to the effect that the $475,000.00 appropriated, as above stated, for the payment of floating debts, was a lump sum set aside by the Committee to make provision for the payment and discharge of such obligations as the

Committee might find necessary to discharge in order to relieve the properties, to be included in the Southern mortgage, from any liens claimed thereon or from any interference as a matter of business policy, and that said $475,000.00 was simply an estimate or reservation to cover such charges, and further, that at no time did the Committee, in making such estimate, contemplate or include therein the indebtedness of the Belt Company to the Trust Company; but the contracting parties to the reorganization plan and agreement, made an express provision, intending to exclude, and excluding, the Trust Company or any other creditor of the constituent companies from enforcing against the new company to be formed, any right of action which such creditors might have had against the old companies.

The third section of the 12th paragraph of the reorganization agreement, hereinafter copied, provided that no right is conferred, nor any trust, liability or obligation, is created by or for a new company in favor of any claim whatever, against the companies involved, as to any matter or thing. The Trust Company executed said agreement as one of the depositaries thereunder, and also accepted the benefits of its provisions when it exchanged the old securities it held against the constituent companies for the new securities of the Southern Company, and by so doing, it has accepted and agreed to said provisions, and cannot now repudiate them, after receiving and enjoying the benefits thereof. In other words, the Trust Company might have refused to accept the benefits of the reorganization scheme and taken its chances on the outside, but it did not do so. It has, in effect, agreed that it would not assert its creditors' claim either against the Committee or the Southern Company, for if it did so, it would thereby be asserting a claim which would be adverse to the reorganiation plan and agreement, under which it had elected to take the benefits accruing to it as a depositor of its securities thereunder. It would seem, then, that under the circumstances above stated, the Trust Company cannot now maintain an action against the Southern Company to enforce a right or trust in contravention of the terms of said agreement.

It is claimed, however, by counsel for the Trust Company, that it is not attempting to obtain any right inconsistent with the provisions of said agreement, but that, by the terms thereof, it is entitled to be paid by the Southern Company, as the purchaser of the
1001 Belt properties, under the reorganization scheme.

For the reasons above stated, the Master is of the opinion that the Trust Company, in its capacity as creditor, is not directly interested in the floating debt provision of the reorganization plan, but, that any right, which it may have therein is collateral and incidental to the main purpose and object of such plan, and, that the respondent had no such legal or equitable right as entitled it to avail itself of said floating debt provision.

As to any Agreement on the Part of the Reorganization Committee, or the Southern Company, to Pay the Belt Indebtedness to the Trust Company.

9. The alleged liability of the Southern Company arising on account of any promise or agreement by either the Committee or the Southern Company, to pay the Belt debt to the Trust Company, *if* not satisfactorily supported by the proofs in the record.

(1). The evidence relied upon by the Trust Company, to maintain its contention that the Southern Company agreed to pay such indebtedness, is founded principally upon the testimony of Thomas L. Chadbourne. Chadbourne became a general counsel for the Trust Company in October, 1899, and in December, 1899, or January, 1900, he was made the acting president of the Executive Committee of the Trust Company (Rec. 57, pp. 34688 to 34721).

He stated, in substance, that he appeared before the reorganization Committee, on behalf of the Trust Company, and that the Committee promised to pay the Belt indebtedness at that time claimed to be due to the Trust Company; that some time in December, 1899, and before the organization of the Southern Company, he was present at the office of John W. Gates in Chicago, and there were also present Gates, Pam and others, and at which time the assets of the Trust Company were being examined, and when the Belt indebtedness was reached, Gates marked it down as "good" at Pam's suggestion, because it would be taken care of in the reorganization of the road; that he had other interviews with Pam, in which the latter agreed, on behalf of the reorganization Committee, or the Southern Company, to pay the Belt indebtedness to the Trust Company. Chadbourne further stated that later on, Pam, on behalf of the reorganization Committee, or the Southern Company, modified his agreement to the extent that he wished to have an audit made of the books of the Trust Company, and, he stated that, after this audit was
1002 made, he, Pam, in behalf of the reorganization Committee, or the Southern Company, would agree to pay whatever was found to be due the Trust Company from the Belt Company, and, that thereafter, one Hills, acting for the reorganization Committee, and R. J. McCarty, who was to make an examination for the Southern Company, made an examination and audit of the books, and that Hills stated that he had found the amounts all correct. On cross-examination, Chadbourne stated that he did not know what books of the Trust Company McCarty examined, nor did he know anything about the examination; that Pam finally agreed, on behalf of the Southern Company, to pay the debt of the Belt Company, as evidenced by its notes of June 16, 1900, and, further, that at a meeting of the Guardian Trust Company, in the fall of 1900, when Stilwell was trying to get back into the Trust Company, Pam again said he would pay, or cause to be paid, the claims of the Trust Company against the Belt (Rec. Vol. 57-34688 to 34721).

R. J. McCarty stated (Rec. Vol. 56-34267) that, at no time prior to 1905, did he ever make an examination of the books of the Trust

Company at Chicago, or elsewhere, and that no one connected with the Southern Company, or the Belt Company, or its receivers, in so far as he knew, ever made an examination of the books of the Trust Company (Rec. Vol. 56-34267); that Pam never requested him to make any audit of the Trust Company's account, but that he received from Willey (Auditor of the Trust Company), in July, 1900, a detailed statement of the amount the Trust Company claimed against the Belt Company, which Pam requested him to check against the records of the Belt Company for the purpose of seeing how it corresponded as a matter of book-keeping, and that his only object in checking it was to discover what the balances were, and that he did not go into the merits or demerits of the items; that Hills was here in May, 1900, for about ten days, having come to investigate the Belt books, but he never heard of his investigating the Trust Company books (Rec. Vol. 56-34318 to 34323). All of which tends to show that Chadbourne was likely mistaken in his statement as to any promise being made by Pam to pay the Trust Company's claim against the Belt on June 16, 1900.

Max Pam stated that, on behalf of the reorganization Committee, he never promised to pay the obligations of the Belt to the Trust Company, nor were any claims therefor ever presented to the Committee; that on one occasion he was called into a meeting of the Executive Committee or Board of Directors of the Trust Com-
1003 pany, then being held in Chicago, at which were present directors Lambert, Gates and himself, and in answer to a question asked him as to what he knew about the claims of the Trust Company against the Belt, and as to the Trust Company collecting them, he stated that, as a matter of law and fact, the Belt Company did not owe the Trust Company anything, and that, if an accounting was had, it would appear that the Trust Company was indebted to the Belt; that an examination of the Belt books was being made by McCarty, and, also of the Trust Company books, and that, when done, he would take up the question of whether anything could be done towards an equitable adjustment of the claim, and that, as the gentlemen present indicated a desire to litigate the matter instead of waiting until the examination was completed, he then stated that the Belt Company would insist upon its legal defense, and that thereupon he withdrew from the meeting. (Rec. Vol. 57-34947 to 34970). Pam further stated that at that time, he made no promise or statement in behalf of the reorganization Committee (Rec. Vol. 57-34956-34960), nor did he make a promise, on June 16, 1900, to settle the Belt indebtedness, nor was the question reached of making payment of the Trust Company's claims. (Rec. Vol. 57-34961-62 and 34974-75).

He further stated that in answer to a question by Chadbourne as to when he could take up the matter of the Belt indebtedness to the Trust Company, he told Chadbourne that he would do so as soon as McCarty made the investigation, and had time to go over the accounts from the beginning. Pam denied the statements made by Chadbourne and Waterall, to the effect that, in the fall of 1900, at the Baltimore Hotel in Kansas City, he promised to pay the Belt

indebtedness, or that the reorganization Committee had agreed to pay it, or that he had stated that the claim had been approved by the reorganization Committee. (Rec. Vol. 57-34978-'79).

He further stated that, in Washington, D. C., Waterall asked him about the Trust Company recovering against the Belt, and he stated that in his judgment there was very little prospect of its doing so, because, upon a full investigation of the accounts, it would be found that the Trust Company was obligated to the Belt. That no statement could have been made to Waterall to the effect that the claim had been approved by the reorganization Committee, because it had never been presented to the Committee, and hence the Committee had never ben asked to act upon it, nor had it ever acted upon it.

The testimony of J. McD. Trimble (Rec. Vol. 56-34400 to 34402), and of H. H. Harris (Vol. 57-34404 to 34411) as to conversations with Max Pam, substantiate the latter's statements
1004 in the main, to the effect that there would be a fair adjustment with the Trust Company after the proper expert examinations were made of the books of account, to see whether the claim of the Trust Company was a just one.

John W. Gates denied the statement made by Stilwell that he was told by Gates and Lambert that, when the Committee met, there was no doubt that they would pay the Belt debt to the Trust Company, but, on the contrary, Gates stated that he never agreed or consented to pay that debt, nor did he know of any promise on the part of the Committee, or any member of it, to pay the Belt floating debts, or any debts against the Belt held by the Trust Company, nor did he ever hear of any claim or agreement to that effect until the commencement of this litigation. (Rec. Vol. 57-35051-35053).

John V. Loughney, secretary of the reorganization Committee stated that he kept its minutes in writing, and that these minutes show all persons appearing before the Committee, all the claims considered and allowed, and agreements made, and that, by reference to the minutes of the Committee, appearing in Vol. 41-22048-22412, it will be seen that at no time did the Committee, either directly or indirectly, ever agree to pay, in part or in whole, any of the indebtedness of the Belt to the Trust Company. (Rec. Vol. 57-35042-35046).

It is not deemed necessary to refer more at length to the testimony produced on the question of the alleged agreement of the Committee to pay this Belt indebtedness, for the reason that, even if Max Pam did make statements, which led Chadbourne and others to believe that the Committee, in the exercise of the plenary discretion possessed by it, would pay such indebtedness, still his promise did not bind the Committee, unless specially authorized by it to make an agreement on its behalf.

The record in this case nowhere discloses that Pam was authorized by the Committee, or the Southern Company, to agree to pay the Belt indebtedness, or any part of it, to the Trust Company, as fully appears from the testimony of Shipley and others, members of the reorganization Committee, every one of whom states, that at no time did the Committee as a whole, or they, individually, ever agree

to pay said Belt debt to the Trust Company. (Rec. Vol. 57-34857 to 34994).

(2.) There is nothing in the agreement between the reorganization Committee and the Southern Company, by which the latter agreed, or obligated itself to become liable to pay the Belt
1005 indebtedness to the Trust Company. By reference to said agreement, bearing date of October 19th, 1900, and appearing in Rec. Vol. 57, pp. 35091 to 35100, the following provisions will be found:

"And whereas, all the moneys and securities paid into or deposited with said Committee were received by it in trust for the purpose of the reorganization mentioned in the aforesaid agreement of June 14th, 1899, and the plan or reorganization of November 7th, 1899, that is to say, in trust for the parties paying or depositing the same and for the company as reorganized, to-wit: The Kansas City Southern Railway Company, and for the making payment and discharge of the obligations lawfully made or incurred by said Committee in the exercise of the power and discretion conferred upon it, and said reorganization has been so nearly accomplished that the final completion of the same may now properly be by the Committee turned over and assumed by the said The Kansas City Southern Railway Company, and which said Company has already agreed, as part of the consideration for the conveyance to it of the property purchased by said Committee at foreclosure sale as aforesaid, to assume and discharge all the obligations of the said Committee incurred as aforesaid; a list whereof, so far as known, is hereto attached marked "Exhibit A" as a part of this contract."

"6. The Kansas City Southern Railway Company hereby agrees that it will assume and pay all obligations lawfully incurred by said Committee in the purchase of the property of the said Kansas City, Pittsburg & Gulf Railroad Company, under the decree of the Court under which said sale was made and confirmed, or in pursuance and execution of the powers upon it conferred, or otherwise howsoever as such reorganization Committee, and will forever indemnify and save harmless the said William F. Harrity, A. Heckscher, Herman Sielcken, William Edenborn, Max Pam, Samuel R. Shipley, Silas W. Pettit and Winthrop Smith, and each of them, his and their heirs, executors, and administrators, of and from all suits, claims and demands whatsoever arising by reason of anything done or suffered to be done by him, them, or either of them, in or about his and their execution of the duty, power and authority in them vested as such Committee as aforesaid by the agreement of reorganization of June 14th, 1899, and the plan or reorganization of November 7th, 1899, hereinabove mentioned, except only for his or their individual malfeasance or neglect."

In "Exhibit A", which is at p. 35098 of Vol. 57 of the record the only claim of the Trust Company, considered as an obliga-
1006 tion in that connection, is one for $8847.72, being for compensation claimed by the Trust Company as a depositary, in the reorganization plan, and which claim was then disputed by the Committee.

In respect to the Southern Company's paying any of the obligations of the Committee, it will be observed that, in said paragraph 6, the Southern Company only agrees to assume and pay all obligations lawfully incurred by the Committee.

It is evident that this contract of October 19, 1900, cannot be construed to apply to the Belt indebtedness in controversy in this cause, and, that none of the claims of the Trust Company in its answer to the intervening petition, wherein it attempts to fasten upon the Southern Company a liability for said Belt indebtedness are well founded in fact or law, under the terms of the contract.

The Master is convinced that the contention of the Trust Company, in this respect, is without merit, for the following reasons:

(*a*) There is no sufficient evidence in the record of the making of any legal agreement, or even of an attempt to do so, by the reorganiation Committee, or by any person authorized to represent them, or by the Southern Company, by which the Belt indebtedness to them, or by the Southern Company, by which the Belt indebtedness to the Trust Company would be discharged, either by the Committee, or the Southern Company.

(*b*) The 7th paragraph of the reorganization agreement provides, as hereinbefore stated, that the Committee shall keep a record of its acts and proceedings, that a majority of its members shall constitute a quorum, and that no action shall be taken except with the consent of a majority of the whole Committee, either at a meeting thereof, or in writing without a meeting. There is no proof nor is it claimed, that the Committee as a whole, ever agreed to pay any part of the Belt debt to the Trust Company. There is no proof in the records of the Committee, or elsewhere in the record in this cause, of any authority having been given by the Committee to Max Pam, or to any other person, by which he, or such person, would be warranted in making a promise or representation, which would be binding on the Committee, even if any such promise or representation had been attempted to be made, and for a sufficient consideration.

(*c*) The testimony of each and all the members of the reorganization Committee in the record is explicit, to the effect that
1007 none of them, at any time, ever promised or agreed to pay the claim of the Trust Company in controversy.

(*d*) There is nothing in the agreement between the reorganization Committee and the Southern Company which binds the latter to pay the Belt indebtedness to the Trust Company.

The Position of the Trust Company in its Contention that the Reorganization Plan and Agreement Were Fraudulent as Against it; Also as to Laches.

10. It has been strongly insisted by counsel for the intervenor that, in as much as the Trust Company executed the reorganization plan and agreement as a party thereto, and exchanged its old securities for the new securities of the Southern Company, which it ac-

cepted and held, regardless of this litigation, the Trust Company is equitably estopped to now claim that the reorganization scheme was fraudulent as to creditors; and in support of such contention, the following authorities are cited:

Crawshay v. Soutter, 6 Wall., 739.
Matthews v. Murchison, 15 Fed., 691.
Symmes v. Union Trust Co., 60 Fed., 830.
First National Bank v. Radford Trust Co., 80 Fed., 569.
Farmers Loan etc. Co. v. Central etc. Co., 120 Fed., 1006.
Vose v. Cowdry, 49 N. Y., 336.
Union Canal Co. v. Young, 1 Whar., 410.
State ex rel. Pope v. Germania Bank, 90 Minn., 150.
In re Peaslee's Will, 25 N. Y. Supp., 940.

On the other hand, counsel for the Trust Company with equal insistence, say that its right to hold the Southern Company liable, either at law or in equity, has been specially preserved in and by a certain stipulation, filed November 6, 1901, in the consolidated Belt foreclosure suit, the last paragraph of which is as follows:

"This decree is entered on the express condition, to which the complainant has assented, that it shall be without prejudice to and shall not bar the right of the Guardian Trust Company, or its receiver, to plead and insist in any litigation now pending or hereafter brought, that the Kansas City Southern Railway Company, by virtue of the manner in which it was organized or for any other reason, is legally or equitably liable for and bound to pay the unsecured debts of the Kansas City Suburban Belt Railway Company, either in full or to pay them to the extent of the value of any property heretofore acquired by it from the Kansas City Sub-
1008 urban Belt Railroad Company, or that hereafter may be acquired by it from said company by virtue of these foreclosure proceedings; and without prejudice to the right of said Guardian Trust Company or its receiver, to plead and insist, in any pending litigation or litigation hereafter brought, that the members of the reorganization Committee of the Kansas City, Pittsburg & Gulf Railroad Company assumed to pay and are liable to pay the unsecured debts of the Kansas City Suburban Railroad Company existing at the time the alleged reorganization was undertaken."

It appears by Ingel's exhibit No. 133 (Rec. Vol. 49-29972 to 29974), that the resultant new Southern securities were received by the Trust Company, on July 26, 1900, in lieu of the old securities owned by it and deposited under the reorganization plan; that the new securities consisted of 614-981.50/1000 Southern bonds, 2951-96.70/100 Southern preferred shares, and 5707-31/100 Southern common shares; and that the old securities exchanged were 410 Union Company bonds, 42 Air Line bonds, 325 Port Arthur Channel or Dock Company bonds, fractional 642/1000 Gulf Company bonds, 13-27/100 Gulf Company shares, 769-72/100 Belt Company shares, and 4389 Port Arthur Channel & Dock Company shares.

This stipulation was entered of record on November 6, 1901, which was after the exchange of securities, which had theretofore

taken place on July 26, 1900; and, the effect of the making of such stipulation, with the assent of the complainant, upon the rights of both the Southern and Trust Companies, is naturally presented for consideration, that is, (*a*) whether the Southern has thereby waived or lost its right to contend that the Trust Company was then, and is now, estopped to claim that it (the Southern) was liable for the Belt indebtedness, and, (*b*) whether the Trust Company has, by reason of the stipulation, acquired any new right, or simply retained its status, whatever it was, in respect to its relations with the Southern.

The history of the stipulation and the circumstances of its making are important for the purpose of showing what was intended to be done. It is not disputed that, just prior to or at the time that the Belt foreclosure decree in the consolidated cause was entered up, the Trust Company asked leave in this court, to file an amended and supplemental answer, stating in effect that the reorganization plan had been promulgated in the interest of creditors of the Belt Company, as well as bondholders and stockholders, and that it had been intended to pay the Trust Company's debt, the reorganization Committee having often promised to pay it until about the time
1009 of the institution of the foreclosure suits, and, that the purpose of such suits was to vest in the Southern Company title to all the Belt property, free from the payment of that Company's floating debt, which was a fraudulent purpose. It was asked that the Southern Company be made a party to the cause, etc. In the Court's order, denying the leave to file such answer, it was provided, however, as a condition of the denial, that the complainant should, within five days thereafter, file in the consolidated cause, the stipulation hereinabove mentioned, which was accordingly done.

It was clearly the object of the stipulation to safe-guard and preserve whatever rights the Trust Company then had "to plead and insist in any litigation" then pending or thereafter to brought, that the Southern Company had, by reason of the manner of its organization, or for any reason, become or was legally or equitably liable to pay the unsecured debts of the Belt Company, either in full or to the extent of the value of any property theretofore acquired by the Southern from the Belt Company, or that might thereafter be acquired by reason of the foreclosure proceedings; and, it was also provided that the Trust Company's rights as against the reorganization Committee, should not be prejudiced in any wise, by reason of the foreclosure decree, then about to be entered up in the consolidated cause. It can hardly be reasonably claimed by the respondent that the effect of the stipulation was to create in it a new right, or to enlarge or revive an old one for its benefit, for there is nothing in the stipulation, or the circumstances of its making, to justify any such conclusion, but, on the contrary, the evident purpose was simply to preserve any rights, then possessed by the Trust Company, in respect to the matters mentioned in the stipulation, so that they could thereafter be enforced, regardless of anything appearing in the foreclosure decree; in other words, that the Trust Company would not, on account of such decree, be con-

sidered as having waived any of its rights, whatever they were, as against the Southern Company, for the payment of the Belt indebtedness. The right to bring and prosecute an action to establish a claim, without prejudice on account of another proceedings (the effect of which might be prejudical to such right), is one thing, and the right to recover on the merits of such action is an entirely different thing. The Trust Company's right to sue was preserved by the stipulation, in so far as such right would otherwise have been effected by foreclosure decree, but, the right to recover on the merits, in any suit which might be brought, was necessarily left an open question. If the Trust Company, before the exe-
1010 cutionof the stipulation, had done anything which had already destroyed any legal or equitable right of recovery, which it might otherwise have had against the Southern Company or the Committee, it will not be seriously contended that the purpose of the stipulation was to cut off the intervenor's right to set up such fact in bar of the prosecution of any suit, which might be brought by the Trust Company, affecting the matter so in controversy.

This Court was not called upon to do so, and did not, in fact, pass upon any of the questions of fact or law involved in this floating debt proposition, and in any way affecting the rights of the intervenor or respondent in their relations to or with each other; on the contrary, while respondent's right to sue was preserved to it, regardless of the Belt decree, there was no other restriction placed upon either intervenor or respondent.

If right in the foregoing conclusions, then it follows that the question raised by intervenor as to the respondent being estopped, by its conduct in the premises, to now assert and claim that the reorganization plan and scheme were fraudulent as to Belt creditors, is wholly unaffected by said stipulation, and can be considered the same as if it had never been made. In this connection, it may properly be again suggested that respondent insists that it is not attacking the foreclosure decree and the sale thereunder, but it is bound by it; and further, that its claim in this cause is not against the property sold under the decree, nor any funds arising therefrom, but, such claim is founded upon the assumption by the intervenor of the Belt debts, by force of the consolidation statute, or other agreements shown in evidence. On that theory, counsel for respondent contend that the doctorine of laches is not involved, for the reason that the issue is merely as to the assumption by the new Company of the debt of the old Company, which is a legal liability, and uncontrolled by any equitable considerations; and further, that the new company, under such circumstances, could hardly be heard to complain because it was not sued sooner (the statute of limitations not having run).

It is not controverted that the Trust Company, a depositary in the reorganization plan, co-operated with the Committee, and used its influence, by correspondence and otherwise, to induce other bondholders and stockholders to deposit their securities with the Committee, as will more fully appear by reference to letters, passing

between it and the Committee, during the reorganization period, and found in Vol. 55, pp. 34488 to 34564 of the Record. The respondent was well acquainted with the purposes of the reorganization scheme, and with such knowledge, entered into the same,
depositing its own securities and exchanging them for the
1011 new Southern securities, and advising others to make like
exchanges. If so, then how can it now be heard to complain that the scheme was fraudulent as to Belt creditors, notwithstanding respondent's own active and beneficial participation therein.

It has received substantial benefits thereform, by way of compensation for its services and in the exchange of securities, all of which it has retained, and, by reason of which, it is not in position, after many years of seeming acquiescence in the consummation and carrying out of the reorganization plan, to contend that such plan was fraudulent as to respondent as a Belt creditor. It cannot, under the circumstances shown in evidence, enjoy the benefits of the very scheme it seeks to attack, either directly or indirectly. This principle is well stated in Farmers Loan & Trust Co. v. Central R. Co. of Ga. 120 Fed 1006, in which the intervenor therein recovered judgment against a company, which became involved and was reorganized under a new charter. He thereupon deposited his stock under the reorganization plan and received preference bonds of the new company, and it was held that he was bound by his action in entering into the reorganization, and could not assert his judgment, which was obtained against the old company, against the assets of the new company, to the prejudice of the other creditors.

The Court said:

"He therefore became a party to the reorganization, by means of which his equity against the assets of the old company became merged into the assets of the new company. The intervenor cannot be permitted to 'blow hot and cold', and, having entered into the reorganization he must be held to be bound by its action."

In Matthews v. Murchison, 15 Fed., 691, it was held, in substance, that a bondholder of a former organization has no standing in chancery to dissolve the new organization of a railroad company, for which his agent had voted his bonds, though in excess of authority, &c., in as much as he had accepted his share of the new bonds; and, also, that such conduct ratified the act, and "inducing others to believe hs had acquiesced in the reorganization, worked an estoppel."

In Symmes v. Union Trust Co. of N. Y., 60 Fed., 830, it is stated in the syllabus that

"Stockholders who have had full knowledge of a plan or reorganization, and have given it their approval, and subscribed to its provisions in respect of part of the stock owned by them, are
estopped, after the reorganization is complete, to main-
1012 tain a suit, as owners of the stock on which they did not
subscribe, to overthrow the same on the ground of fraud and conspiracy."

Laches of Respondent Trust Company.

In respect to the contention of intervenor that the respondent is barred by laches from asserting its Belt indebtedness claim against intervenor, it is well to reiterate that the reorganization agreement was promulgated November 7th, 1899, that the Southern Company took possession of January 1, 1902, of the properties formely belonging to the Belt system, and, also, that the Trust Company failed to assert its claim against the Southern until it was done in this cause in 1905. The Southern securities, which were issued and exchanged for those of the Belt, were promptly listed on the New York Stock Exchange, as well as elsewhere, and, since then, have been sold and resold in this country and Europe, during the period, intervening between the incorporation of the Southern in 1900, and the assertion, in 1905, of respondent's claim against it, as the respondent well knew. In the meantime, the Southern Company was engaged in working out the details of the reorganization plan, and developing its combined railway system, thereby appreciating the value of the very Southern bonds and stocks acquired by the Trust Company under said plan. It is evident that, if the intervenor should have been held liable for all the unsecured indebtedness of the constituent companies of the old Belt system, including the large amount claimed by respondent, the effect of such liability would necessarily have been to depreciate the value of all the Southern securities, and, to that extent, operate to the injury of the security holders.

In view of the intimate connection and knowledge of respondent, as heretofore shown, with the practical working out of the reorganization scheme, and the large financial interests it had in the successful carrying out thereof, it is manifest that its conduct in the premises should not be of such nature as to be prejudicial to the rights of others interested in the Southern, and its securities, that is, should not be such as to influence or cause them to do things, which they would not otherwise have done, provided the Trust Company, at the outset, had promptly asserted the claim in controversy, before the position of others interested had been materially influenced and changed by its conduct in the premises.

In reaching this conclusion, the Master is not unmindful of the controversy between the Trust Company and certain members of the reorganization Committee, in respect to the latter paying, or causing to be paid, the Belt debt to the respondent, all of which preceded the Belt foreclosure. In his judgment, the fact of
1013 such controvery accentuated the importance of active measures by the Trust Company against the Southern, and affords no reason whatever for the respondent's long delay in asserting its claim in this cause. In support of intervenor's contention, the following authorities have been cited, and, in the main, they are influential in that direction:

New York, etc., Co. v. Louisville, etc., R. Co., 97 Fed., 226;
Harriman v. Northern Securities Co., 197 U. S., 244;

Carey v. Houston, etc., Ry. Co., 52 Fed., 671;
Wenger et al. v. Chicago, etc., R. Co., 105 Fed., 796;
Anthony v. Campbell, 112 Fed., 212;
Cutter v. Iowa Water Co., 128 Fed., 505;
Spencer v. Seaboard Air Line, 137 N. C., 107.

In Wenger v. Chicago & E. R. Co., 105 Fed., 796, it was stated, in effect, that the holder of an unliquidated claim for damages against a railroad company was held barred, by laches, from the right to charge a liability upon a reorganized company, succeeding to the property on the ground that it had issued the stocks and bonds to the stockholders of the old company, and the transaction had been completed, before the claim holder asserted his claim against the new company, though he had ample opportunity to do so.

In Anthony v. Campbell, 112 Fed., 212, Judge Thayer, delivering the opinion, said:

"A man cannot remain silent for three or four years, knowing that one corporation, of which he is a creditor, has wrongfully transferred its property to another, and that third parties are dealing with the new corporation, and trusting it on the supposition that the transfer was lawful, and then be heard to assert in a court of equity that because of the alleged unlawful transaction he has an equitable lien on all the corporate assets, which is superior to other creditors. Such conduct evinces an intention or a desire to profit by the mistakes of innocent third parties and ought not to be encouraged. * * * In the present instance the testimony shows that the intervenor took no action until nearly four years after he was advised of the transaction—a period of silence and inactivity, which must be deemed more than sufficient to bar his right to equitable relief on the ground that he has a general lien."

In the opinion of the Master, the surroundings, conduct, and laches, of the Trust Company in this matter, have been such as to preclude it, (a) from claiming that the reorganization scheme
1014 was fraudulent as against it, and, also, (b) from asserting its claim in controversy against the Southern Company.

XIII.

As to the Claim of the Intervenor for $773,246.00 for Damages to the Bondholders Arising from Misconduct of the Trust Company as Co-Trustee of the Union Company Mortgage.

In paragraph 13 of the intervening petition, the intervenor, in substance states that the Union Company duly executed its mortgage, or deed of trust, dated February 1, 1893, to the Trust Company, and to the Provident Company of Philadelphia as trustees, to secure its bonds for Two Million Dollars ($2,000,000.00), and that at that time the Union Company had not constructed its railroad but was only the owner of a franchise for the construction and operation of a railroad along the left bank of the Kaw River from

a point at or near Argentine, Kansas, to a point in Kansas City on the State Line between the states of Kansas and Missouri, the purpose of the bond issue being, as expressed in the mortgage, to provide funds with which to construct said railroad, and which was well known to the Trust Company; that said bonds, in the sum of Two Million Dollars, were duly issued and placed in the custody of the Trust Company and that "it then became the duty of the Trust Company under the express terms of said mortgage, as well as by law, to see that, as the bonds of the Union Company were sold, the proceeds thereof, were used in the construction, completion and equipment of the railroad of the Union Company", so that, as the bonds were sold, the proceeds thereof should be added to the Union Company's property, the intention being that the value of the property mortgaged as security for said bonds should increase, approximately, to the full extent of the bonds' proceeds invested in such property, thereby amply securing such bonded indebtedness, from time to time, as the bonds were issued; but, it is alleged, that the Trust Company was unmindful of its duties, and, from time to time, sold said bonds to innocent purchasers for value, and improperly diverted their proceeds from the purposes intended, as above stated, and unlawfully used the same to diminish the alleged Belt indebtedness to the Trust Company, thereby, in no wise, increasing or augmenting the value of the Union property covered by said mortgage; that the Trust Company thus diverted thirteen hundred and fifty of said Union bonds, of the par value of One Million three hundred and fifty thousand dollars, and of the actual value of One Million two hundred and fifteen thousand dollars, from the purposes
for which they were issued, as the Trust Company well knew,
1015 and wrongfully neglected or refused to use the bond proceeds in adding to the value of the Union Company's physical property; and, further, that, in breach of its duty as trustee, the Trust Company, from time to time, sold Union bonds after the completion and equipment of the Union railroad, and when there was no necessity for then selling or disposing thereof for the construction, completion and equipment of said railroad; and that by reason thereof, the conduct of the Trust Company, in that respect, constituted a breach of trust, and was fraudulent against the Union bondholders.

Intervenor further stated that it is the owner of all the outstanding Union bonds by purchase from bona fide holders, that the properties and franchises of the Union Company were sold at a foreclosure sale for $1,500,000.00, which was in excess of their full value, and that, after crediting such proceeds upon said bonds, held by intervenor, there remained and still remain due to intervenor the sum of $773,246.00, and interest thereon from January 2, 1902, at five per cent per annum; that if the Trust Company had not wrongfully diverted said bond proceeds from the uses and purposes intended for their application, as set forth in the Union mortgage, then the mortgaged property would have sold for an amount sufficient to have paid said bonds in full, that intervenor was not advised of the acts of the Trust Company in diverting the bond

proceeds, until the facts relating thereto were developed in taking of testimony in this cause. Intervenor asked judgment against the Trust Company for the amount of said deficiency and interest thereon.

Afterwards, on May 20, 1905, the Trust Company filed its answer to the intervening petition, and, in paragraph 13 of such answer, it admits the execution of the Union Company mortgage, that it was one of the trustees therein, and that the purpose of the bond issue was to provide funds to construct its railroad, but otherwise denies all the averments of the intervening petition. It further alleges that the amount of the Union Company bonds delivered to it, and the prices, at which they were so delivered, are fully set forth in its answer to the amended supplemental and ancillary bill, and, that said bonds were in the main acquired by the Belt Company, which had guaranteed the payment of the principal and interest thereof, and was the owner of all the capital stock of the Union Company and operated its line, and, that afterwards, the Belt Company, in the usual course of business, sold said bonds for full value to the Trust Company, and to others, and the Trust Company states that such bonds, as were bought by it from either the Belt Company,
1016 or the Union Company, were bought for full value and in most cases for more than their full value.

Further answering, the Trust Company states "that most of the transactions, in respect to said Union bonds, were done more than ten years prior to the filing of the first intervening petition in this cause, and that all of said transactions occurred more than five years prior to the filing of the original bill herein, and, also, more than five years prior to the filing of said intervening petition, and that, if any rights, equities or causes of action accrued to the intervenor, by reason of such transactions, or any of them, the same accrued to it more than five years before the institution of this suit, and, hence, the respondent pleads, to each and all of said transactions, all the statutes of limitations of the State of Missouri, and particularly Sections 4271, 4272 and 4273, (Rev. Stat. 1899), which sections are now and were, at all times herein mentioned, in full force and effect; that, since the organization of intervenor, it has possessed full knowledge of all the facts and circumstances in respect to the handling and sale of Union bonds by respondent, but, notwithstanding such knowledge, the intervenor has made no protest nor taken any steps to enforce any rights, which it had in and to said bonds or the proceeds thereof, and, by reason of which, the intervenor has been guilty of laches and should not now be permitted to come into a court of equity and assert any claims against respondent on account of said transactions; that the intervenor acquired whatever Union bonds it may hold, through the reorganization Committee and in consummation of the reorganization plan and agreement, pursuant to which the intervenor was caused to be incorporated by the Committee for the purpose, among other things, of issuing its stocks and bonds in exchange for those of the Union Company and other companies, as in said plan and agreement is set forth, and, that the intervenor is the successor company which was proposed to be organ-

ized by said plan, and further, that the owners and holders of Union bonds, from which the Committee acquired the same, were at all times, familiar with all the facts and circumstances surrounding their issuance and of respondent's transactions in reference thereto, and that the Committee, after it acquired said Union bonds and up to the time they were delivered to the intervenor, was at all times familiar with all the facts and circumstances surrounding the same, and, that no steps were ever taken by either the bondholders or the Committee to enforce any rights, which are now claimed in respect to said union bonds or in respect to respondent's transactions in regard thereto.

1017 *Nature of Intervenor's Claim.*

1. Briefly stated, the cause of action is one at law, sounding in tort and praying for a money judgment against the Trust Company as a co-trustee, for alleged breach by it of the alleged duty, created under the terms of the mortgage as well as by law, to see that the Union Company used the proceeds of the bonds issued, in the construction and equipment of its railroad.

The Trust Company, in substance, sets up the following defenses:

(*a*) Denials in substance of all the allegations of the petition;

(*b*) A plea of the ten year statute of limitations;

(*c*) A plea of the five year statute of limitations;

(*d*) A plea of laches;

(*e*) A denial is made that, either by law or the express terms of the mortgage, there was any duty imposed upon the Trust Company to supervise the use or disposition by the Union Company of the proceeds of its bonds;

(*f*) That the Union Company, in furtherance of its own purposes, sold its bonds mainly to the Belt Company, which, as the owner of all the capital stock of the Union Company, had guaranteed its bonds, principal and interest, and had constructed valuable extensions and improvements, and operated its road; and that, thereafter, in the usual course of business, the Belt Company sold said bonds for their full value to the Trust Company and others;

(*g*) It is further denied that the intervenor is entitled to assert any rights as the bona fide holder of said Union bonds for the reason, so it is charged, that it came into the possession of such bonds solely as the result of an exchange thereof for those of the Southern Company, and pursuant to the reorganization scheme hereinbefore referred to, and, further, that the reorganization Committee, before acquiring the Union bonds, examined the property and accounts of the Union Company, and was fully advised in respect to the facts surrounding their issuance and the consideration therefor.

The mortgage executed by the Union Company will be found in Vol. 21, p. 11022, and Article X thereof provides that, "neither of said trustees shall be answerable for any act, omission or default, to which it does not expressly assent, of its co-trustee, or of any agent or attorney selected with reasonable care."

1018 Article XII thereof is as follows:

"Upon the execution and recording of these presents, all the bonds secured hereby shall be executed by the company and delivered to the trustees, and the trustees shall thereupon certify and return to the company, of the said bonds, those numbered 1 to 1850, both inclusive, aggregating the principle sum of One Million Eight Hundred and Fifty Thousand Dollars, without any formality, record, requisition, proof or requirement, and the receipt therefor of the treasurer of the company shall be full acquittance and authority to the trustees for such certification and delivery. And One Hundred and Fifty of said bonds, numbered from 1851 to 2000, both inclusive, aggregating the principal sum of One Hundred and Fifty Thousand Dollars, shall be issued, certified, and held in trust by the Missouri, Kansas & Texas Trust Company, one of said trustees, and the same shall not be negotiated and sold on or before February 1st, 1898, except for the purpose of procuring funds for the payment of any interest coupon or any interest that may before said date become due and delinquent on such of said 2000 bonds as may then be outstanding." (Vol. 21-11025).

The plain provisions of the mortgage would seem to be explicit in relieving the trustees from the duty of inquiring into the use the railroad company intended to make of the bonds.

It became and was obligatory upon the trustees to certify and return to the mortgagor the bonds "without any formality, record requisition, proof or requirement," and it would seem to necessarily follow that the Union Company, so far as the trustees were concerned had the right to do with its bonds as it saw fit, and of which fact every bondholder was advised as he is presumed to have notice of the provisions inserted in the mortgage.

The express terms of the mortgage did not, then, place upon the Trust Company the duties, alleged by the intervenor in paragraph 13, and if any such existed, they must have arisen from implied covenants, and not express ones, on the part of the Trust Company as a co-trustee; in other words, that these alleged duties, (if any), will have to be implied from the relation of the parties, but, in as much as the provisions of the mortgage are explicit as to the requirements made of the trustees, it would seem to be clear that there can be no implied duties, which are inconsistent with the express covenants.

1019 It is contended by the Trust Company that covenants are not to be inferred in a contract under seal, unless it clearly appears therein that the party, against whom the implication is sought to be made, plainly intended to do the act, in respect to which the covenant is sought to be implied.

Frismuth v. Farmers L. & T. Co., 107 Fed., 169;

Fleisher v. Farmers Loan & Trust Company, 58 App., Div. (N. Y.) 473, 619; same case 172 N. Y., 519.

National Water Works Company v. K. C., 78 Fed., l. c., 433, per Brewer J.

In the case last cited Judge Brewer said:

"There are in existence certain trust companies who are engaged

in the business of acting as trustees in mortgages, especially railroad mortgages. They are often trustees in successive mortgages from the same grantor, or from different corporations, having a common interest and control. Any question as to the extent of the notice which these trustees take of the transactions of their mortgagors, and the effect of such notice upon parties purchasing bonds from them, is of vast importance. I am unable to concur in the view of the master. I do not think the duty of this trustee was a continuing duty to the extent that it took notice of whatever its mortgagor did with the moneys which it received upon the sale of the bonds, or of the property which it purchased. If there were such continuing duty, then included in it was the obligation to see that the mortgagor expended the moneys which it received in accordance with the expressed purpose of the mortgage, and to take legal measures to compel execution thereof, a failure to do which would make itself responsible to the parties purchasing bonds for all losses occasioned thereby. There is in the mortgage no clause expressly casting such a duty upon the trustee. It contains some 13 articles providing for certifying the bonds in the first instance, the keeping of a registry for the entry of transfers, and for action in case of a default in the payment of either principal or interest. The only other article is the one containing the covenant for further assurance, heretofore quoted. Unless from it a duty of continuing supervision can be implied, the mortgage casts no such duty, although, as indicated, it specially provides for what the trustees shall do, and when it shall act. Now, I think I am warranted in saying that a mere covenant for further assurance, such as is here found, has not been generally understood as casting a special duty upon the trustee or supervising the action of the mortgagor. It must be borne in mind that the trustee was selected and the terms of the trust prescribed by the mortgagor alone, and that, until after the bonds were negotiated, it was acting only as the latter's agent."

1020 The intervenor cited and relied upon Frismuth v. Farmer's L. & T. Co., 95 Fed., 9, affirmed in 107 Fed., 169. The facts in that case were, however, very different from those in the case at bar. The cause of action stated therein was not so much on account of any covenant, express or implied, as it was for neglect of duty imposed by law, and arising from the peculiar terms of the mortgage, then before the court; and it was held that the six years statute of limitations of New York, covering questions sounding in tort, and not the twenty years statute as to questions of sealed instruments applied, and that therefore the cause of action, if any, in that case, was barred.

In the Frismuth case, the mortgage provided that the trustee should certify the bonds, and retain the proceeds thereof, which were to be paid out only on written orders of the railroad company, stating for what purpose such proceeds were to be used, and that the bonds should be delivered to the company only on like orders. The trustee, however, went ahead and issued and delivered the bonds to the company without requiring it to furnish the written statement or orders required by the mortgage, specifying the purposes for

which the bonds were to be used, and the decision is based on that fact, as will more fully appear from the following extract from Judge Wallace's opinion (95 Fed., l. c., 9):

"The only possible object of the provision, restricting the trustee from delivering the bonds or their proceeds to the Oregon Company except on orders declaring the purposes, for which they were to be used, was to satisfy investors that the trustee was to supervise the operations of the Oregon Company in respect to the purposes to which it intended to make application of the proceeds, and thus effectuate the promises of that company. The several provisions imply the power and the duty of the trustee to refuse to issue bonds except when supplied with evidence that the avails are to be used conformably with the promises of the Oregon Company. The defendant cannot escape responsibility to those who have brought the bonds upon the theory that the mortgage does not contain any covenants by the trustee prescribing its conduct, except in the event of a default in payment. They are entitled to hold the defendant to the performance of the duties which, from the import of the provisions, that — had a right to suppose the trustee would perform. While its terms exonerate the trustee for a misapplication after it has delivered the bonds or proceeds to the Oregon Company, upon orders of the requisite character, they do not absolve it further. They certainly do not protect the trustee in delivering bonds or proceeds which it knows, or has reason to believe, are not to be
1021 applied properly. The instrument is not to be construed as authorizing the trustee to deliver the bonds or their proceeds upon orders containing such vague and indefinite declarations as were inserted in those given by the Oregon Company. Upon such a construction the provision conferring authority would afford no security for the bondholders, and they would be a mere sham. It was intended to restrict the trustee from delivering bonds or proceeds without information of the specific uses to which, from time to time, they were being applied, in order to enable the trustee to ascertain whether they were being expended comfortably to the promises of the Oregon Company."

By reference to the Union Company mortgage, it will be seen that no such provision is inserted therein, and no such duty is devolved upon the trustee. On the contrary, the Trust Company is required to certify and return the bonds to the railroad company without any formality, record, requisition, proof or requirement, and the Trust Company was neither given the right, nor did it otherwise have the right to supervise the action of the Union Company with respect to its use of the bonds. Until there was a default, the trustee had no other duty except simply to certify and return the bonds to the mortgagor.

In a similar suit brought by other bondholders, and involving the same mortgage, the Appellate Division of the Supreme Court of New York, disagreed with the conclusions of both Judge Wallace (97 Fed., 7) and the United States Circuit Court of Appeals (107 Fed. 139) as to their having been any neglect on the part of the trustee, the court saying:

"Our attention has been called to an opinion of the learned Judge of the Circuit Court of the United States (Frismuth v. Farmer's Loan and Trust Company, (95 Fed. Rep., pp 5, 6, 7, 8, 9) giving a general construction to the very mortgage now before us. We agree in the main with the view taken of the duties of the trustee, as stated by that learned Judge, but we do not construe particular provisions of the mortgage as he does. According to the condition of the mortgage under which these bonds were issued, there was no duty of supervision of the trustee such as would require it to see to the appropriation of the money realized by their sale. To import such an obligation, is to contradict the provisions of the mortgage. Nor do we [*thing*] that the statements delivered by the Oregon Pacific Railroad Company, and upon which the bonds were issued, are so vague and indefinite in their declarations as to have required the trustee to refuse to deliver the bonds upon them."

1022 *As to the Intervenor's Claim Being Barred by Statute of Limitations.*

2. The claim of the intervenor that the Trust Company was guilty of misconduct as co-trustee, even if supported by the proofs in the record, would be barred by the statute of limitations in this state. Both the five and ten year statutes are pleaded. Sections 4271, 4272, 4273, R. S. Mo., 1899, are as follows:

"SEC. 4271. Period of limitation prescribed.—Civil actions other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued.

SEC. 4272. What actions shall be commenced within ten years.—Within ten years: First, an action upon any writing, whether sealed or unsealed, for the payment of money or property; second, actions brought on any covenant of warranty contained in any deed of conveyance of land shall be brought within ten years next after there shall have been a final decision against the title of the covenanter in such deed, and actions on any covenant of seizin contained in any such deed shall be brought within ten years after the cause of such action shall accrue; third, actions for relief, not herein otherwise provided for.

SEC. 4273. What within five years.—Within five years: First, all actions upon contracts, obligations or liabilities, express or implied, except those mention in Section 4272, and except upon judgment or decrees of a court of record, and except where a different time is herein limited; second, an action upon a liability created by a statute other than a penalty or forfeiture; third, an action for trespass upon real estate; fourth, an action for taking, detaining or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated; fifth, an action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the dis-

covery by the aggrieved party, at any time within ten years, of the facts constituting the fraud."

If any cause of action at all is stated by the intervenor, it is for an injury to the rights of another not arising on contract which is included in the five year statute. (Sec. 4273 R. S. Mo. 1899).

Frismuth v. Trust Co., 95 Fed., 5, affirmed in 107 Fed., 169.

1023 Under the authorities it would seem to be clear that it is not an action on a covenant, express or implied.

In Frismuth v. Trust Co., 107 Fed., 169, it is held:

"Where a railroad mortgage contained no covenant on the part of the trustee, one cannot be implied unless clearly growing out of the language or the obvious intent of the parties; and a suit by the bondholders secured, against the trustee, for its failure to properly protect their interests, is one for a breach of duty implied by law, and not for a breach of covenant for the purpose of determining the statute of limitations applicable to such suit."

In the case at bar the gravaman of the intervening petition is a breach of trust on the part of the trustee, and counsel for respondent properly contend that the real nature of the charge cannot readily be changed by simply adding to or making use of the words "fraudulent", "Wrongfully", and "unlawfully" for the purpose of converting the petition into a bill for fraud, and as to which the statutory limitation would not begin to run until the discovery of the fraud by the party complaining thereof. In courts, both of law and equity, it is well settled that the facts from which legal inferences are to be drawn, must be stated and mere conclusions not based upon a sufficient showing of facts must be disregarded. This principle is supported by the following cases:

Frismuth v. Trust Co., 107 Fed., 169.
Fogg v. Blair, 139 U. S., 118, 127.
Ambler v. Choteau, 107 U. S., 586, 591.
Kent v. Canal Co., 144 U. S., 75, 91.
Van Weel v. Winston, 115 U. S., 228.

Hence, it follows that averments of the petition to the effect that the Trust Company "did unlawfully and improperly divert the proceeds of said sales" and "did unlawfully use the said proceeds" and "did unlawfully, in breach of its duty as trustee, from time to time, sell and put afloat the said bonds", cannot be regarded as determinative of the question that the intervening petition is, in fact, a bill for fraud and not an action at law for a mere breach of trust on the part of the trustees.

To be more explicit, this is not an action for relief on the ground of fraud so as to bring the action within the ten year limitation after the discovery of the facts constituting the fraud, for the reason, first, that the averments as to the alleged fraud are not sufficiently pleaded to constitute the action a bill for fraud,

1024 and, second, that the real gist of the intervenor's action is simply a breach of duty, on the part of the Trust Company as trustee, in delivering the bonds of the mortgagor, and the fraud,

if any, would be wholly immaterial, for if the duty existed, and the respondent failed to discharge such duty, the liability would be created, regardless of whether the responded acted fraudulently or otherwise.

Frismuth v. Trust Co., 107 Fed., 169.

The statute, permitting an action to be brought within ten years after the discovery of the facts, constituting the fraud, is aimed especially against concealed or undiscovered fraud, for if the fraud was open or of such nature that it must necessarily be discovered, by reason of the relation of the parties, then the doctrine of laches could be invoked. The fraud must be such a material element in the cause of action that, if the allegations of fraud were stricken out, the right of action itself would no longer exist.

The following cases will bear out these conclusions:

Michoud v. Girod, 4 How., 503.
Veazie v. Williams, 8 How., 134.
Rosenthal v. Walker, 111 U. S., 185.
Meader v. Morton, 11 Wall., 442.
McIntyre v. Pryor, 33 Fed., 632.

In the case at bar, the right of action to which the intervenor claims it succeeded, and which it now asserts accrued when the respondent, as trustee, delivered the bonds to the mortgagor, for if, as such trustee, it committed a breach of duty in so delivering the bonds to the mortgagor, then the right of action was complete at that time and the statute began to run.

Frismuth v. Trust Co., 95 Fed., 5; 107 Fed., 169.
Mills v. Vivian, 79 Fed., 848,

It is true that in the intervening petition, the statement occurs that "your intervenor was not advised of the foregoing acts of the Trust Company in diverting the proceeds of said bonds until the facts in relation thereto were developed recently in the taking of testimony in support of the ancillary bill in this case;" but it is contended by respondent's counsel that such statement is insufficient, because it does not disclose that any efforts were made to discover the alleged fraud at an earlier day, nor that any means were used by the Trust Company to prevent such discovery.

Woods v. Carpenter, 101 U. S., 135.
Bank v. Carpenter, 101 U. S., 567.
1025 Badger v. Badger, 2 Wall., 87, 95.
Brown v. Buena Vista County, 95 U. S., 157.
Bent v. Priest, 86 Mo., 475.

The chancery courts of the United States recognize the statutes of limitations of the State, in which the court is sitting and adopt them.

Miles v. Vivian, 79 Fed., 848, 852.
Harpending v. Dutch Church, 16 Pet., 455.

This action, being for breach of an implied trust, the doctrine as to the limitation statutes not applying to express trusts, has no bearing upon the claim of the intervenor.

Frismuth v. Trust Co., 95 Fed., 5.
Miles v. Vivian, 79 Fed., 848, 852.

Now, as to the disclosures by the proofs in this cause, it is not controverted that the Union Company was incorporated on December 29, 1891, (Vol. 15-7867) and on February 1, 1893, executed its mortgage to the Missouri, Kansas & Texas Trust Company, changed to Guardian Trust Company, and the Provident Company, as trustee, to secure bonds in the sum of two million dollars, nor that the Belt Company constructed and equipped the Union Railroad, built extensions established valuable connections, and guaranteed the Union Company's bonds, negotiating them through sales to the Trust Company and others from time to time, nor that the only and real consideration to the Belt Company for such services was the issuance to it by the Union Company, of all its bonds except, perhaps, one hundred and fifty of them, which were sold by the respondent, in order to pay interest on outstanding bonds. The contracts, under which the Belt Company acquired these bonds, are set out in Vol. 14, p. 7308, Vol. 15, p. 7874-7890 et seq. It is charged by the intervenor that the arrangement by which the Belt Company received the Union bonds, in consideration of having guaranteed them, and of having built and equipped the Union Company's road, was of a fraudulent character. A very similar claim was made by the complainant in the case of Teller v. Tonopah & Goldfield R. R., 155 Fed., 482, where an arrangement very much like the one in controversy was sustained, and held to be beneficial to all concerned, and an attempt to set aside the transaction was said by the Court to be a "little better than an attempted financial holdup."

From the testimony of Mr. Johnson, one of the principal witnesses for the intervenor, it appears that the Belt books show that the Belt Company received the bonds of the Union Company at the
1026 times, for the considerations, and in amounts as follows:

Date and consideration.	Bonds, par val.	Vol. P. of Rec.
Sept. 1892, to Jan. 1893 under construction contract of Aug. 24 1892	$690,000.00	(15–7937)
Jan. 1893, issued to Trust Co. for services	60,000.00	(15–7939)
April, 1893, under contract of April 1893, for extending road to Turner, Kansas	250,000.00	(15–7938)
Nov. 1893, issued to Belt Co., and deposited with Trust Co., to pay interest on Union bonds as per mortgage	150,000.00	(15–7939–40)
May, 1894, issued to Belt Co. to cover cost of building extension to stock yards	150,000.00	(15–7940)

Aug. 1895, securing valuable connections and locating industries, etc.	250,000.00	(15–7938)
July, 1898, under contract of July 26, 1898	100,000.00	(15–7939)
Nov. 1898, issued to Belt Co. for purposes of clearing up floating indebtedness of Northern..	350,000.00	(15–7940)
Total	$2,000,000.00	

In compliance with said Article XII of the mortgage, providing that immediately upon its recording, the trustee shall certify the bonds and return them to the company, the proof shows that the mortgage was recorded in February, 1893, and the bonds delivered shortly thereafter, all of which was more than twelve years before the intervening petition was filed. If it should be held that the cause of action arose when the Union Company negotiated its bonds, then it appears from the above table that the Union Company had issued to the Belt Company the last of the Union bonds prior to November, 1898, whereas, the amended intervening petition in this cause, charging breach of duty, was not filed until more than seven years thereafter.

It also appears from witness Willey's exhibit of the Trust Company's transactions in Union securities (Vol. 1-188) that the last purchase of Union bonds made by the Trust Company was 100 bonds at 95 cts. on February 15, 1899, which was more than six years prior to the filing of the intervening petition; hence, if the action of the Trust Company, in buying Union bonds from the Belt, constituted a breach of duty, on its part as trustee, it would follow that such breach was barred by the five year statutory limitation.

As to Intervenor's Claim Being Barred by Laches.

1027 It is a well known principle of equity jurisprudence that, independently of any statute of limitations, courts of equity have a right to, and do, apply the law of laches, according to the peculiar conditions and surroundings of each individual case, and, that their uniform practice is to decline to assist any person who has slept upon his rights unreasonably long, unless a sufficiently good excuse is shown for the delay.

Miles v. Vivian, 79 Fed., 848-853.

It is shown by the proofs in the record (Vol. 15-7887-88), that the Belt Company kept in its own books a full account of all monies expended by it in the construction and equipment of the Union Terminal railroad, in extending its lines, etc., and showing in detail what the Union Company received for its bonds, and such other facts in connection with the various bond transactions between the Belt and Union companies, as would reasonably explain all such transactions.

It also appears from the record that, pursuant to the modified reorganization plan of November, 1899, promulgated by the Philadelphia Committee, sufficient bonds had been deposited with the Committee before the end of December, 1899, and, thereupon, the plan was delared operative. (Vol. 41-22200.)

The Gulf road was sold at foreclosure sale and purchased by the Committee, on March 19, 1900, and its bid was duly assigned to the Southern, which was incorporated on the same day, (Vol. 41-22224 et seq.,); and, on April 1, 1900, there followed, at the request of the Committee, resignations of the directors under the Stilwell management, the acceptance thereof, and the election of new directors for the Southern Company, all of whom were nominees of that Company and selected by Stuart R. Knott, holding proxies for substantially all the stock of the Belt Company, and the new directors at once took possession of all the books, papers, and property of the Belt and its constituent companies, including the Union Company, (Vol. 52-31433 et seq.). One of these new directors was the witness Johnson, then an auditor of the Southern, and he and witness McCarty, also an auditor of the Southern, have had possession of the Belt and Union Company books since April 1, 1900, (Rec. p. 7115). Both Johnson and McCarty state, however, that, prior to the year 1905, they did not know, nor had they heard, that the Union bonds, or their proceeds, had been misapplied or used contrary to the purposes set forth in the mortgage, (Rec. Vol. 49, p. 30243 and 30198 to 30201).

1028 In the spring of 1900, one Hill, audited the Belt books for the reorganization Committee (Rec. p. 6586).

The general mortgage of the Southern, dated April 2, 1900, recites that it then held and owned 1933 out of a total of 2000 bonds of the Union Company, all of which it had received from the reorganization Committee, (Rec. Vol. 53-35197).

The bill of the Provident Company, for the foreclosure of the Union Company mortgage, was filed on September 6, 1900, and, on December 31, 1900, the sale was made under the decree of foreclosure, and the Southern became the purchaser. It appears from the record that Johnson and McCarty, auditors of the Southern, had access to the Union and Belt books and records from April 1, 1900, and until the amended intervening petition was filed on May 1, 1905, and afterwards. It would seem, then, that, in view of the careful efforts of the reorganization Committee to ascertain the value of the railroads involved, as shown by their proceedings in the record, it is unreasonable to suppose that they were ignorant of the value of the Union Terminal railroad when they acquired the Union bonds; and, being the owner of large amount of Union bonds, deposited with the Committee, actively participated in promoting the reorganization plan, and was one of the depositaries under that plan; in other words, the Trust Company co-operated with the Committee in promoting and bringing about the [*consumption*] of the reorganization scheme, and, under such circumstances, it would be inequitable to permit the Southern Company, as the successor of the Committee, to

assert and maintain in a court of equity the claim of the intervenor in paragraph 13 of its petition.

There can be no question as to the Southern Company, being chargeable with all the knowledge possessed by the reorganization Committee, which promoted it and caused its incorporation.

The Master is of the opinion that, under the proofs in this cause, the Southern Company should have asserted its alleged claim against the Trust Company long before it did in its amended intervening petition; and, further that, in justice to the Trust Company, the in-
intervenor should have asserted such claim before the railroad of the Union Company was foreclosed, so that the Trust Company could have protected itself by purchasing the road at the foreclosure sale, if it so elected, for, otherwise, the Southern Company could wait to know the result of a sale of the mortgaged property, as it did do, in fact, before calling upon the Trust Company, as trustee, to take up
its Union bonds, or make good any deficiency in the pay-
1029 ment thereof. It is evident that such a course put the trus-
tee in such position as to make it powerless to protect itself, if it had desired to do so.

As to the Southern Being a Bona Fide Holder of the Union Bonds.

4. As a part of the reorganization plan, the Southern Company, through the exchange of its own bonds, for those of the Union Company, acquired the Union bonds; and, for that reason, the Trust Company claims that the Southern does not stand in the attitude of an innocent purchaser of the Union bonds, and, further, that they have been paid and extinguished by the consummation of the reorganization plan, and, hence, that the Southern Company cannot assert any rights to such bonds as the holder thereof.

Central Trust Co. v. R. R., 58 Fed., 500.
Branch v. Jessup 106 U. S., 476, 484.
Vilas v. Page, 106 N. Y., 439.
The Key City, 14 Wallace, 673.

In Central Trust Co. v. R. R., 58 Fed. 500, Judge Taft said that when a reorganization agreement, to which all the bondholders and stockholders of the mortgagor company are parties, provides for an exchange of new securities, to be issued after the purchase of the road at judicial sale, for existing securities, the consummation of the plan operates as a payment of the old bonds, which are extinguished and no rights can be asserted by the holders thereof under them.

In the case at bar, it was provided in and by the reorganization plan, that the capital stock and bonds of the constituent companies, comprising the Belt system, should be purchased by the Southern Company and pledged under its new first mortgage, to be placed upon all its properties, as hereinbefore stated; but said plan also contained a provision to the effect that, after acquiring said stocks and bonds, in furtherance of the unification of the main line (Gulf) and its associated terminal companies (the Belt and Dock systems),

and, in that way, getting the control and possession of said companies, it was proposed to "thereafter adjust the bonded indebtedness, standing against the properties of the Belt and Dock companies, by retiring the present bonds and issuing, in lieu thereof, new 3½ per cent bonds to be based upon and restricted to the net earnings of said prospective properties, as they might appear on future operations."

The Southern Company was the owner, on December 31, 1901, of 1995 of the 2000 Union Terminal bonds, the same having
1030 been obtained in exchange for securities of the Southern Company. (Ingel's exhibit 6, Rec. 48-28820).

As shown by the foreclosure order and decree of the Union Terminal property, on November 6, 1901, there was then due, in principal and interest, the total sum of $2,273,246.43 (Rec. 48-28775 to 28810), and, for which the Union railroad property was sold by the Commissioner, on December 31, 1901, to the Kansas City Southern Railway Company for $1,500,000.00, thus leaving a deficiency of $773,246.43, being the amount due as of date November 6, 1901 (Rec. 57-34839 to 34847); but the additional interest, up to December 31, 1901 would swell the deficiency on that date to $790,528.13. (See Ingel's exhibit 6, Rec. 48-28820 to 28822.)

It is not disputed that the new bonds were issued pursuant to the terms of the reorganization scheme. The foreclosure sale of the Union railroad had, however, already been made, and the amount of said deficiency in the payment of the bonded indebtedness had been fixed thereby before the Union railroad property became legally subject to the lien of the new Southern mortgage.

In so far as concerned the mortgage lien securing the bonds it was extinguished by the foreclosure sale, regardless of said deficiency, and the holder of the unpaid bonds had the right to enforce the payment of the balance due thereon by all proper legal measures, unless the enforcement of such right was abridged or controlled in some way, by the reorganization plan.

The evident intention of said plan was to harmonize, unify and centralize all the interests involved in the Gulf and allied terminal companies, into one great corporation, the combined properties of which should be encumbered with the general mortgage securing the new 3½ per cent Southern bonds; and there is nothing in the reorganization scheme, which tends to show any intention to acquire or obtain any advantages from the ownership of the bonds of the constituent companies, other than required for the consummation and carrying out of the modified reorganization plan. Certain it is, that the Trust Company, when depositing its own Union bonds with the Committee, and otherwise co-operating with it in bringing about the reorganization, had no intimation that the Union bonds were to be used for the purpose of establishing a large liability against the respondent, as now attempted by intervenor, to the extent of said bond deficiency of $790,528.13, on December 31, 1901.

The Master is of the opinion that, under the facts and circumstances, shown in the record, and hereinbefore set forth, in
1031 respect to the reorganization scheme and the connection of the respondent therewith, the acquisition of the Union bonds

by the Committee did not carry with it the legal or equitable right to require the respondent to make good said bond reficiency, even though, under the circumstances, the respondent might be held liable therefor to other parties.

If, however, the findings of — Master, against the validity of the alleged claim on its merits, are correct, then it is immaterial whether or not the ownership of the Union bonds by the Committee and the intervenor imparted the right of action claimed by the intervenor herein.

General Findings and Recommendations of the Master Upon the Whole Cause.

First. It is the opinion of the Master, and he so recommends, that each and all of the paragraphs of the second ancillary bill, respecting the different items of complaints or charges therein contained, should be dismissed, as being without equity, excepting the following:

(*a*) Paragraph 13, in respect to the West Kansas City Land Company transaction, and as to which the complainants are entitled to a credit on the Trust Company's account with the Belt Company of $5,600.00, with six per cent interest thereon, from and after November 28th, 1892;

(*b*) The Zumwalt transaction, in paragraph 14, wherein $5,000.00 was deposited with the defendant Trust Company, to cover its liability as surety on an appeal bond, and for which, with six per cent interest from and after May 19, 1903, the complainants are entitled to have a credit on the Trust Company's statement of account with the Belt Company;

(*c*) Also as to the item of $11,250.00, mentioned in paragraph 21, being the amount received by Mark Hubbert, treasurer of the defendant Trust Company, from the reorganization Committee, in payment of 450 additional coupons (being other coupons than the 1,527 also mentioned in said paragraph, these 450 coupons belonging at that time to the Trust Company), and by reason of which payment to the Trust Company, the complainants are entitled to be credited on the Trust Company's account with the Belt Company, for said sum of $11,250.00, with six per cent interest thereon from and after July 14, 1900.

Second. That each and all of the paragraphs of the intervening petition should be dismissed, as being without either law or equity to maintain them, excepting paragraph 6, in respect to the Cen-
1032 tral Improvement Company lands; and that the Trust Company is entitled to hold, and subject to the payment of its indebtedness against the Belt Company, all the securities held in pledge by it, described in the intervening petition..

Third. That the Southern Company is not liable in any way for the floating indebtedness of the Belt Company.

Fourth. That there is no equity in the Cambria bill as against the Guardian Trust Company, and that the allegations in said bill, in respect to the domination and control by the Trust Company over the Belt, and also over the so-called allied or subsidiary companies,

all fail, for the reasons hereinbefore stated in respect to the issues upon the second ancillary bill; and hence, the injunction heretofore issued in this cause restraining the Trust Company from disposing of the stocks, bonds, accounts, and other properties held by it as collateral, should be dissolved, and the moneys on deposit in the National Bank of Commerce, or the securities which stand in place thereof, should be returned to the Trust Company, together with any interest or profits that may have accrued thereon; and the bill of complaint of the Cambria Company should be dismissed as to the Guardian Trust Company for want of equity.

Fifth. That the Guardian Trust Company now owns and holds the promissory notes described in paragraph 123 of its answer to the amended and supplemental ancillary bill of Knott and Swinney, receivers of the Belt Company, and it also holds an account against the Belt Company, being Exhibit "A", attached to its said answer, and on which the balance due the Trust Company is $31,809.49; and for the payment of the aggregate amount of said notes and balance of account, with interest thereon, less the amounts hereinbefore stated as being due to the Belt Company from the Trust Company, the Trust Company is entitled to subject all the collaterals pledged to it by the Belt Company as security for said indebtedness, and being the same collateral securities mentioned and described in paragraph 125 of defendant's said answer to the amended and supplemental ancillary bill of complaint.

Sixth. That the Trust Company is entitled to a judgment against the complainants for the sum of $34,061.46, paid by the Trust Company to the First National Bank of Kansas City, Missouri, on March 27, 1905, in satisfaction of a certain judgment rendered by the Circuit Court of Jackson County, Missouri, in cause No. 1604, entitled The First National Bank of Kansas City v. The Guardian Trust Company, and affirmed by the Supreme Court of Missouri on

March 16, 1905, which said judgment was entered against
1033 the defendant on a certain promissory note made by the Belt Company on March 26, 1900, in favor of said bank for $25,000.00, due sixty days after date, with interest after maturity at seven per cent per annum until paid, which said note was indorsed by the defendant Trust Company solely for the accommodation of the Belt Company, and the full proceeds of said note having been paid by said bank to the Belt Company, which derived the sole benefit thereof; and hence, the defendant Trust Company is entitled to be reimbursed by the Belt Company and its receiver for said sum of $34,061.46, with seven per cent interest thereon from and after March 27, 1907.

Seventh. During the argument before the Master in this cause, it was stated by counsel for complainants that a dismissal would be entered as to the Second Street Improvement Company, but, as this has not been done, the master recommends that this action, in all its parts, be dismissed as to said company.

Respectfully submitted,

SHANNON C. DOUGLASS,
Special Master.

Afterwards, to-wit, on the 22nd day of June, 1910, the Supplemental Report of Shannon C. Douglass, Special Master was filed. Said Supplemental Report is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2468. In Equity.

CAMBRIA STEEL COMPANY
v.
KANSAS CITY SUBURBAN BELT RAILROAD COMPANY et al.

E. F. SWINNEY, Receiver,
v.
CAMBRIA STEEL COMPANY et al.

Ancillary Bill.

Additional Report of Special Master.

Now comes Shannon C. Douglass, Special Master, and in addition to the report heretofore filed, further reports:

On November 20, 1901, a stipulation was filed herein, a copy of which is hereto attached as Exhibit 1. All costs incurred by the Cambria Steel Company prior to that date have been paid excepting the Master's compensation. From that date the accounting and taking of the testimony has been as between parties other than the Cambria Steel Company, and pursuant to such stipulation. Coun-
1034 sel for the Cambria Steel Company contends that no costs after that date should be taxed to that company.

June 21, 1901.

SHANNON C. DOUGLASS,
Special Master.

EXHIBIT 1.

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

STUART R. KNOTT and EDWARD F. SWINNEY, as Receivers of the Kansas City Suburban Belt Railroad Company, Complainants,

vs.

GUARDIAN TRUST COMPANY and FRANCIS M. BLACK, Its Receiver; Missouri Elevator & Terminal Company and Wash Adams, Its Receiver; Central Improvement Company and Wash Adams, Its Receiver; Second Street Improvement Company, Fairmount Amusement Company and Northern Townsite Company, Defendants.

Cross Bill.

Stipulation.

It is hereby stipulated and agreed by and between Stuart R. Knott and Edward F. Swinney, Receivers of the Kansas City Suburban Belt Railroad Company, complainants in the cross bill in the above entitled cause, and the defendants the Guardian Trust Company and Francis M. Black, Its Receiver, Second Street Improvement Company and Cambria Steel Company, as follows:

First. That the said complainants shall withdraw or dismiss their cross bill heretofore filed herein and shall file an amended cross-bill, in the nature of an ancillary bill in this cause, making the Kansas City Suburban Belt Railroad Company a co-plaintiff with them in said amended ancillary cross bill, and that said amended ancillary cross bill shall be filed on or before the 15th day of November, 1901,

1035 and that the defendants the Guardian Trust Company and its receiver, and the Second Street Improvement Company and the Cambria Steel Company, shall have leave to plead or answer to said amended ancillary cross bill on or before the first Monday in December, 1901.

Second. That the accounting between the Kansas City Suburban Belt Railroad Company and its receivers, and the Guardian Trust

Company and its receiver, sought by the said amended ancillary cross bill, shall be expedited by all of the parties hereto, and whatever balance, if any, that may be found due to the said Guardian Trust Company or its receiver, from the said Kansas City Suburban Belt Railroad Company or its receivers shall be entered up in this cause as a judgment in favor of the said Trust Company and its receiver and against the Suburban Belt Railroad Company and its receivers, without the necessity of presenting any claim therefor by way of cross bill; or other affirmative pleading; and whatever balance, if any, that may be found due to the said Suburban Belt Railroad Company or its receivers, from said Guardian Trust Company, or its receivers shall be entered up in this cause as a judgment in favor of the said Kansas City Suburban Belt Railroad Company and its receivers and against the Guardian Trust Company and its receiver.

Dated this 12th day of November, 1901.

STUART R. KNOTT AND
EDWARD F. SWINNEY,
Receivers of the Kansas City Suburban Belt Railroad Co.,

By THOMAS R. MORROW,
S. W. MOORE, *Their Solicitors.*
GUARDIAN TRUST COMPANY AND
FRANCIS M. BLACK, *Its Receiver.*
F. M. BLACK AND
TRIMBLE & BRALEY, *Its Solicitors.*
SECOND STREET IMPROVEMENT COMPANY,
By TRIMBLE & BRALEY, *Its Solicitors.*

The Cambria Steel Company consents and agrees to the foregoing stipulation with the understanding that it shall in no way prejudice the right, if any, which the Cambria Steel Company has, to subject any debt found to be due from the Guardian Trust Company or to subject any property or collateral or the proceeds thereof, heretofore or now in the hands of the Guardian Trust Company or its receiver, or his or its assigns, towards the satisfaction of the Cambria
1036 Steel Company's judgment against the Kansas City Suburban Belt Railroad Company, and that all testimony introduced by any party herein shall be with the understanding that the Cambria Steel Company or any party to the original cause can, if it or they so desire, use the same upon the final hearing of the issues joined in the original cause, and that the issues joined in the original cause and also the issues to be joined on the said ancillary cross bill referred to in the foregoing stipulation shall be heard together and tried and determined at the same time.

CAMBRIA STEEL COMPANY,
By FRANK HAGERMAN,
Its Solicitor.

I make no objection to the foregoing.

WASH ADAMS, *Deft.,*
Receiver Mo. Elevator & Term. Co. &
The Central Improvement Co.

Afterwards, to-wit, on the 17th day of June, 1910, the Exceptions of Guardian Trust Company to the Report of the Honorable Shannon C. Douglass, Special Master was filed. Said Exceptions are in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

No. 2468.

EDWARD F. SWINNEY, as Receiver of the KANSAS CITY SUBURBAN Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver, Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

Kansas City Southern Railway Company, Intervenor.

1037 *Exceptions of Guardian Trust Company to the Report of the Honorable Shannon C. Douglass, Special Master.*

And now comes Guardian Trust Company, defendant, and excepts to the report of the Honorable Shannon C. Douglass, Special Master, filed in this cause on the 21st day of May, 1910, and for cause for exception shows:

First. That the Master has in said report (pages 341 to 346) stated and certified that he finds that "the titles to the following tracts of land should be vested by decree in the Belt Company, to-wit: Real Estate Purchases No. 1, No. 2, No. 3, No. 4, No. 6, No. 9, No. 10, the unsold part of No. 11, Nos. 12 and 13, No. 20, an undivided half of No. 21, Nos. 22 and 23, No. 24, No. 27, No. 29, and real estate purchases "A" and "B", and also that the "Intervenor (mean-

ing thereby the Kansas City Southern Belt Railroad Company) is entitled to the judgment, order and decree of this Court requiring the Central Company and its receiver to convey to said Intervenor those portions of said real estate hereinbefore found to be appurtenant to said railroads and included within the after-acquired real estate clause of their mortgage (page 346), (meaning thereby the real estate purchases next hereinbefore described in the Master's said report, and which are more particularly described in the inventory of Wash Adams, Receiver for said Central Improvement Company, filed in this cause on April 15, 1901, which descriptions are, by reference, made a part of these exceptions as fully as if set forth herein at length) whereas the Master ought to have found:

(*a*) That by reason of the law and the evidence, as stated in the report of said Master, requiring the dismissal of the original bill of the Cambria Steel Company in this cause, said Intervenor is not entitled to relief under the intervening petitions filed herein by the Kansas City Southern Railway Company, and that said petitions as to each and all of the parts thereof should be dismissed.

(*b*) That the facts do not support the allegations of said intervening petitions of said Southern Railway Company, and that said real estate hereinbefore, and in the Master's report described, and each and every part and parcel of the same, was not appurtenant to the railroads described in said Master's report, was not necessary for railroad purposes at the time it was purchased, and was not included within the after-acquired property clause of the mortgages of the Gulf, Union Terminal and Belt Companies, and that said
1038 intervening petitions should in these respects and for these reasons [*should*] be dismissed as to each and all the parties thereof.

(*c*) That by reason of the fact and for the cause that said Real Estate Purchases No. 1, No. 2, No. 3, No. 4, and No. 11 are located within the State of Kansas it is beyond the jurisdiction of this Court to decree the divesting of the title to the same out of the said Central Improvement Company, or requiring it to convey the same.

(*d*) That by reason of the fact and for the cause that the Central Improvement Company, the Union Terminal Railroad Company, the Kansas City, Pittsburg & Gulf Railroad Company, and the Kansas City Suburban Belt Railroad Company were not made parties to the intervening petition of the Kansas City Southern Railway Company, did not consent to such intervention, were not served with process thereunder, and never appeared to the same, there is a defect of parties necessary for such decree as is recommended and this Court is without jurisdiction to render a decree divesting title to said property out of said Central Improvement Company, or requiring it to convey the same.

(*e*) That by reason of the laches of the Southern Company and the Statute of Limitations, the intervening petitions of the Kansas City Southern Railway should be dismissed in all their parts.

Second. The Master has in said report stated (on page 461 thereof) as follows: "That the Southern Company is not in any way liable for the floating indebtedness of the Belt Company", whereas

the Master in his report should have omitted reference to or recommendation concerning the question of the liability of the Southern for said floating indebtedness of the Belt for the following reasons:

(*a*) The Master having found and stated in his report that by reason of the laches of the Southern Company and the Statute of Limitations said intervening bill was not maintainable against this defendant, therefore the said bill should be dismissed as to each and all the parts thereof.

(*b*) That said finding is unnecessary for the determination of this cause upon the facts found by him, and its incorporation in a decree in this cause would be unnecessary and immaterial.

(*c*) That by reason of the fact and for the cause that no relief was asked by this defendant against said intervenor and because the Master found that the other defenses interposed by this defendant to the intervention of the Southern were valid, such
1039 finding is unnecessary and immaterial in the rendition of the decree in this cause.

(*d*) That in a cause determined on a supplemental petition in this cause exhibited by said intervenor and said Belt Company against this defendant which was finally decided by the United States Circuit Court of Appeals for the Eighth Circuit in a cause entitled Guardian Trust Company, Appellant, v. Kansas City Southern Railroad Company, et al., Appellees, numbered 2827, and reported in Federal Reporter Volume 171, page 43, the law of this case was enunciated by said United States Circuit Court of Appeals that the personal liability of said intervenor was not in issue in this cause and that said matter was for the determination of the Circuit Court of Jackson County, Missouri, in three causes then and now pending in said Circuit Court of Jackson County, Missouri, at Kansas City, and that said ruling and determination is binding upon all the parties to this cause, and upon this Court and upon the Master appointed by this Court. Said finding and decision of said Circuit Court of Appeals is as follows:

"The liability of the Southern Company to pay the debts which the Trust Company alleges in the actions at law it has promised to pay, is not in issue and cannot be determined in the suit in equity, and the state court has no jurisdiction over and cannot interfere in those actions in personam with the specific property which is the subject of the litigation in the federal court."

(*e*) That by reason of the law and the evidence, as stated in the report of said Master, requiring the dismissal of the original bill of the Cambria Steel Company in this cause, said Intervenor is not entitled to relief under the intervening petition filed herein by the Kansas City Southern Railway Company, and that said petitions as to each and all of the parts thereof should be dismissed.

GUARDIAN TRUST COMPANY,
By EDWARD P. GATES,
Its Solicitor.

GEO. H. ENGLISH, JR.
Of Counsel.

June 17th, 1910. Filed and overruled by me.
SHANNON C. DOUGLASS,
Special Master.

Afterwards, to wit, on the 17th day of June, 1910, the Exceptions of Central Improvement Company to the Report of the
1040 Honorable Shannon C. Douglass, Special Master was filed. Said Exceptions *is* in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,
vs.
THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

No. 2468.

EDWARD F. SWINNEY, as Receiver of the KANSAS CITY SUBURBAN Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,
vs.
CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver, Northern Townsite Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

Kansas City Southern Railway Company, Intervenor.

Exceptions of Central Improvement Company to the Report of the Honorable Shannon C. Douglass, Special Master.

And now comes the Central Improvement Company by Huston Crittenden, its receiver, and excepts to the report of the Honorable Shannon C. Douglass, Special Master, filed in this cause on the 21st day of May, 1910, and for cause of exception shows:

First. That the Master in said report (on page 341 thereof) stated and certified that:

"he finds that the titles to the following tracts should be vested by a decree in the Southern Company, to-wit:

Real Estate Purchases No. 1, No. 2, No. 3, No. 4, No. 6, No. 9, No. 10, and the unsold part of No. 11, Nos. 12 and 13, No. 20, an undivided half of No. 21, Nos. 22 and 23, No. 24, No. 27, No. 29, and real estate purchases 'A' and 'B'."

and also (on page 346 thereof) that:

"The intervenor is entitled to the judgment order and decree of this Court, requiring the Central Company and its receiver,
1041 to convey to said intervenor those portions of said real estate hereinbefore found to be appurtenant to said railroads, and included within the after-acquired property clause of their mortgages."

and also (on page 346 thereof) that:

"Each and all of the paragraphs of the intervening petition should be dismissed, as being without either law or equity to support them, excepting paragraph 8, in respect to the Central Improvement Company lands."

This defendant says that instead of said findings the Master should have found as follows, namely:

(*a*) That by reason of the fact and for the cause that this defendant neither stipulated nor consented to the filing of the intervening petition of the Kansas City Southern in this cause, and that it never was served with process issued upon said intervening petition, and that it never filed answer to said petition, nor in any manner appeared thereto, this Court is without jurisdiction under said intervening petition to divest from this defendant the title to the properties in said intervening petition described, (which properties are more particularly described in the inventory of Wash Adams, Receiver of said Central Improvement Company, filed in this cause on April 15, 1901, which descriptions are by reference hereby made a part of these exceptions as fully as if herein set forth at length) and which properties are, as hereinbefore stated, referred to and described by the Master as real estate purchases No. 1, No. 2, No. 3, No. 4, No. 6, No. 9, No. 10, the unsold part of No. 11, Nos. 12 and 13, an undivided half of No. 21, Nos. 22 and 23, No. 24, No. 27, No. 29, and real estate purchases "A" and "B".

(*b*) The Master having found in his general findings and recommendations upon the whole cause (page 460) that each and all of the paragraphs specifically named on page 460 of said report, which do not relate to this defendant) has found that the prayer of the Belt for the transfer of the property of this defendant to the Belt should be denied and that the second ancillary bill of said Belt should be dismissed in respect to said matters. Therefore, the Master's statement on said page 341 of his said report stating in substance that said property hereinbefore described should be vested by decree in the Belt Company is in conflict with and inconsistent with his finding that the prayer of the intervenor the Kansas City Southern should be sustained as respects the above described properties of the Central.

1042 (*c*) The Master should have found in respect to real estate purchase Number 1 (page 327 of his report) that said real estate purchase was not necesary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the Union Terminal Company, that it did not pass under the after-acquired property clause of the Union Terminal Company's mortgage, and that by reason of the fact that said Union Terminal Company was not made a party either to the second (or any other) ancillary bill or to the amended or original intervening petition of the Kansas City Southern Railroad Company, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest said real estate purchase No. 1 out of this defendant and invest the title to the same in the Southern. And further, because said land described as real estate purchase No. 1 is located in the State of Kansas, it is not within the jurisdiction of this Court to divest the title of the same out of this defendant and invest it in either said Belt or said Southern Company.

(*d*) The Master should have found in respect to real estate purchase No. 2, (page 328 of his report) that said real estate purchase was not necessary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the Union Terminal Company, that it did not pass under the after-acquired property clause of the Union Terminal Company's mortgage, and that by reason of the fact that said Union Terminal Company was not made a party either to the second (or any other) ancillary bill or to the amended or original intervening petition of the Kansas City Southern Railroad Company, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest said real estate purchase No. 2 out of this defendant and invest the title to the same in the Southern. And further, because said land described as real estate purchase No. 2 is located in the State of Kansas, it is not within the jurisdiction of this Court to divest the title of the same out of this defendant and invest it in either said Belt or said Southern Company.

(*e*) The Master should have found in respect to real estate purchase No. 3 (page 329 of his report) that said real estate purchase was not necessary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the Union Terminal Company, that it did not pass under the after-acquired property clause of the Union Terminal Company's mortgage, and that by reason of the fact that said Union Terminal Company was not made a party either to the second (or any other) ancillary bill or to
1043 the amended or original intervening petition of the Kansas City Southern Railroad Company, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest said real estate purchase No. 3 out of this defendant and invest the title to the same in the Southern. And further, because said land described as real estate purchase No. 3 is located in the state of Kansas, it is not within the jurisdiction of this Court to divest the title of the same out of this defendant and invest it in either said Belt or said Southern Company.

(*f*) The Master should have found in respect to real estate purchase No. 4 (page 330 of his report) that said real estate purchase was not necessary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the Union Terminal Company, that it did not pass under the after-acquired property clause of the Union Terminal Company's mortgage, and that by reason of the fact that said Union Terminal Company was not made a party either to the second (or any other) ancillary bill or to the amended or original intervening petition of the Kansas City Southern Railroad Company, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest said real estate purchase No. 4 out of this defendant and invest the title to the same in the Southern. And further, because said land described as real estate purchase No. 4 is located in the state of Kansas, it is not within the jurisdiction of this court to divest the title of the same out of this defendant and invest it in either said Belt or said Southern Company.

(*g*) The Master should have found in respect to real estate purchase No. 6 (page 327 of his report) that said real estate purchase was not necesary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the Gulf Company, that it did not pass under the after-acquired property clause of the Gulf Company's mortgage, and that by reason of the fact and for the cause that said Gulf Company was not made a party to this suit or to the amended or original intervening petition of the Kansas City Southern Railroad Company, did not consent to the filing of the same, was not served with process, nor appeared in said intervention, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest the said real estate purchase No. 6 out of this defendant and invest the title to the same in the Southern.

(*h*) The Master should have found in respect to real estate purchase No. 9 (page 332 of his report) that said real estate
1044 purchase was not necessary for railroad purchases at the time it was purchased, that it was not appurtenant to the property of the Belt Company, that it did not pass under the after acquired property clause of the Belt Company's mortgage, and that by reason of the fact and for the cause that said Belt Company was not made a party to the amended or original intervening petition of the Kansas City Southern Railroad Company, did not consent to the filing of the same, was not served with process, nor appeared in said intervention, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest the title to the said real estate purchase No. 9 out of this defendant and invest the title to the same in the Southern.

(*i*) The Master should have found in respect to real estate purchase No. 10, (Page 333 of his report) that said real estate purchase was not necessary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the Belt Company, that it did not pass under the after-acquired property clause of the Belt Company's mortgage, and that by reason of the fact and

for the cause that said Belt Company was not made a party to the amended or original intervening petition of the Kansas City Southern Railroad Company, did not consent to the filing of the same, was not served with process, nor appeared in said intervention, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest the said real estate purchase No. 10 out of this defendant and invest the title to the same in the Southern.

(*j*) The Master should have found in respect to the unsold part of Real Estate Purchase No. 11 (page 334 of his report) that the said real estate purchase was not necessary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the Union Terminal Company, that it did not pass under the after-acquired property clause of the Union Terminal Company's mortgage, and that by reason of the fact that said Union Terminal Company was not made a party either to the second (or any other) ancillary bill or to the amended or original intervening petition of the Kansas City Southern Railroad Company, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest said real estate purchase No. 11 out of this defendant and invest the title to the same in the Southern. And further because said land described as the unsold part of real estate purchase No. 11 is located in the state of Kansas, it is not within the jurisdiction of this Court to divest the title of the same out of this defendant and invest it in either said Belt or said Southern
1045 Company.

(*k*) The Master should have found in respect to real estate purchase No. 12 (page 335 of his report) that said real estate purchase was not necessary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the Belt Company, that it did not pass under the after-acquired property clause of the Belt Company's mortgage, and that by reason of the fact and for the cause that said Belt Company was not made a party to the amended or original intervening petition of the Kansas City Southern Railroad Company, did not consent to the filing of the same, was not served with process, nor appeared in said intervention, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest the real estate purchase No. 12 out of this defendant and invest the title to the same in the Southern.

(*l*) The Master should have found in respect to real estate purchase No. 13 (page 335 of his report) that said real estate purchase was not necessary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the Belt Company, that it did not pass under the after-acquired property clause of the Belt Company's mortgage, and that by reason of the fact and for the cause that said Belt Company was not made a party to the amended or original intervening petition of the Kansas City Southern Railroad Company, did not consent of the filing of the same, was not served with process, nor appeared in said intervention, and that there was no relief prayed for against it, there was a lack of juris-

diction of the Court to divest the said real estate purchase No. 13 out of this defendant and invest the title to the same in the Southern.

(*m*) The Master should have found in respect to real estate purchase No. 20 (page 336 of his report) that said real estate purchase was not necessary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the Belt Company, that it did not pass under the after-acquired property clause of the Belt Company's mortgage, and that by reason of the fact and for the cause that said Belt Company was not made a party to the amended or original intervening petition of the Kansas City Southern Railroad Company, did not consent to the filing of the same, was not served with process, nor appeared in said intervention, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Coprt to divest the said real estate purchase No. 20 out of this defendant and invest the title to the same in the Southern.

(*n*) The Master should have found in respect to real estate purchase No. 21 (page 336 of his report) that said real estate
1046 purchase was not necessary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the Belt Company, that it did not pass under the after-acquired property clause of the Belt Company's mortgage, and that by reason of the fact and for the cause that said Belt Company was not made a party to the amended or original intervening petition of the Kansas City Southern Railroad Company, did not consent to the filing of the same, was not served with process, nor appeared in said intervention, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest the said real estate purchase No. 21 out of this defendant and invest the title to the same in the Southern.

(*o*) The Master should have found in respect to the unsold part of real estate purchase No. 22 (page 337 of his report) that said real estate purchase was not necessary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the Belt Company, that it did not pass under the after-acquired property clause of the Belt Company's mortgage, and that by reason of the fact and for the cause that said Belt Company was not made a party to the amended or original intervening petition of the Kansas City Southern Railroad Company, did not consent to the filing of the same, was not served with process, nor appeared in said intervention, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest the unsold part of real estate purchase No. 22 out of this defendant and invest the title to the same in the Southern.

(*p*) The Master should have found as respects the unsold part of real estate purchase No. 23 (page 337 of his report) that said real estate purchase was not necesary for railroad purposes, at the time it was purchased, that it was not appurtenant to the property of the Belt Company, that it did not pass under the after-acquired property clause of the Belt Company's mortgage, and that by reason of the fact that for the cause that said Belt Company was not made a party

to the amended or original intervening petition of the Kansas City Southern Railroad Company, did not consent to the filing of the same, was not served with process, nor appeared in said intervention, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest the unsold part of said real estate purchase No. 23 out of this defendant and invest the title to the same in the Southern.

(*q*) That the Master should have found in respect to real estate purchase No. 24 (page 338 of his report) that said real estate purchase was not necessary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the
1047 Belt Company, that it did not pass under the after-acquired property clause of the Belt Company's mortgage, and that by reason of the fact and for the cause that said Belt Company was not made a party to the amended or intervening petition of the Kansas City Southern Railroad Company, did not consent to the filing of the same, was not served with process, nor appeared in said intervention, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest the real estate purchase No. 24 out of this defendant and invest the title to the same in the Southern.

(*r*) The Master should have found in respect to real estate purchase No. 27 (page 339 of his report) that said real estate purchase was not necessary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the Belt Company, that it did not pass under the after-acquired property clause of the Belt Company's mortgage, and that by reason of the fact and for the cause that said Belt Company was not made a party to the amended or original intervening petition of the Kansas City Southern Railroad Company, did not consent to the filing of the same, was not served with process, nor appeared in said intervention, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest the real estate purchase No. 27 out of this defendant and invest the title to the same in the Southern.

(*s*) The Master should have found in respect to real estate purchase No. 29 (page 339 of his report) that said real estate purchase was not necessary for railroad purposes at the time it was purchased, that it was not appurtenant to the property of the Belt Company, that it did not pass under the after-acquired property clause of the Belt Company's mortgage, and that by reason of the fact and for the cause that said Belt Company was not made a party to the amended or original intervening petition of the Kansas City Southern Railroad Company, did not consent to the filing of the same, was not served with process, nor appeared in said interention, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest the real estate purchase No. 29 out of this defendant and invest the title to the same in the Southern.

(*t*) The Master should have found in respect to real estate purchases "A" and "B" (page 340 of his report) that said real estate purchases were not necessary for railroad purposes at the time they

1048 were purchased, that they were not appurtenant to the property of the Belt Company, that they did not pass under the after-acquired property clause of the Belt Company's mortgage, and that by reason of the fact and for the cause that said Belt Company was not made a party to the amended or original intervening petition of the Kansas City Southern Railroad Company, did not consent to the filing of the same, was not served with process, nor appeared in said intervention, and that there was no relief prayed for against it, there was a lack of jurisdiction of the Court to divest the real estate purchases "A" and "B" out of this defendant and invest the title to the same in the Southern.

Second. The Master should have found that by reason of the want of equity in the original bill in this case, and his recommendation that said original complaint of the Cambria Steel Company should be dismissed, (page 461 of said report) that all the ancillary and intervening bills based thereon should also be dismissed and that this defendant should be discharged at the cost of said Cambria Company.

ED P. GATES & GEO. H. ENGLISH, JR.,
Solicitor for Huston Crittenden, Receiver for Central Improvement Company.

Of Counsel.

June 17, 1910. Filed and overruled by me.

SHANNON C. DOUGLASS,
Special Master.

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, THE UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

No. 2468.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improveme[illegible]om-
1949 pany and T. T. Crittenden, Its Receiver, Northern T[illegible]site Company, and Fairmount Amusement Company, Defendants.

Ancillary Bill.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Complainant,

vs.

GUARDIAN TRUST COMPANY, KANSAS CITY SUBURBAN BELT RAILroad Company and Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company; Central Improvement Company and T. T. Crittenden, its Receiver; Cambria Steel Company, Northern Townsite Company and its Receiver, Fairmount Amusement Company, and Missouri Elevator & Terminal Company, Defendants.

Intervening Petition.

Final Decree.

This cause, coming on to be heard upon the original bill of complaint of the Cambria Steel Company, the original, first and second amended and supplemental ancillary bills of complaint of Kansas City Suburban Belt Railroad Company and its receivers, the original and amended intervening petitions of the Kansas City Southern Railway Company, and the answers of the defendants in said bills and petitions respectively, and all the papers and

proceedings filed and taken in this cause, including the evidence taken before the Special Master, Hon. Shannon C. Douglass, and the Master's report thereon, and all exceptions heretofore filed to said report, was thereupon argued by Frank Hagerman of counsel for the Cambria Steel Company, S. W. Moore and Thomas R. Marks of counsel for the Kansas City Suburban Belt Railroad Company and Edward F. Swinney, its Receiver, and S. W. Moore and Thomas R. Marks of counsel for The Kansas City Southern Railway Company and E. P. Gates and Geo. H. English, Jr., of counsel for the Guardian Trust Company and Central Improvement Company, and its Receiver, and Thomas B. Buckner, of counsel for Northern Townsite Company and its Receiver, Fairmount Amusement Company, Missouri Elevator & Terminal Company, The Union Terminal Railroad Company, Kansas City & Independence Air Line; and the court being fully advised in the premises doth thereupon upon consideration thereof order, adjudge and decree as follows, to-wit:

I. That all and singular the exceptions filed by each and all of the parties to this cause to the report of Shannon C. Douglass Special Master, filed herein on May 21st, 1910, be and the same are hereby overruled; and the said report of the Special Master is hereby in all things approved and confirmed.

1050 II. That there is no equity in the original bill of the Cambria Steel Company as against any of the parties to this cause and that said bill be and the same is hereby dismissed; and that the injunction heretofore issued in this cause restraining the defendant, Guardian Trust Company from disposing of the stocks, bonds, accounts and other properties held by it as collateral and described in said order of injunction, be and the same is hereby dissolved.

III. That all and singular the allegations of the ancillary bill of complaint of Kansas City Suburban Belt Railroad Company and Stuart R. Knott and Edward F. Swinney, its Receivers, filed herein November 20th, 1901, and of the first and second amended and supplemental ancillary bills of complaint of Kansas City Suburban Belt Railroad Company and E. F. Swinney, its sole Receiver, filed herein March 22nd, 1905, and July 2nd, 1906, respectively, are true in respect to the following complaints or charges therein contained:

(*a*) Paragraph 13 of said second amended and supplemental ancillary bill of complaint in respect to the West Kansas City Land Company transaction, as to which the complainants therein are entitled to a credit on the Guardian Trust Company's account with the Kansas City Suburban Belt Railroad Company of $5600.00 with 6% interest thereon from and after November 28th, 1892.

(*b*) Paragraph 14 of said second amended and supplemental ancillary bill of complaint in respect to the Zumwalt transaction, as to which the complainants therein are entitled to a credit, on the Guardian Trust Company's account with the Kansas City Suburban Belt Railroad Company, of $5,000 with 6% interest thereon from and after May 19th, 1903.

(*c*) Paragraph 21 (Item *c*) of said second amended and supplemental ancillary bill of complaint in respect to the amount re-

ceived by Mark Hubbert, Treasurer of the Guardian Trust Company, from the Reorganization Committee in payment of 450 additional coupons, as to which the complainants therein are entitled to a credit, on the Guardian Trust Company's account with the Kansas City Suburban Belt Railroad Company of $11,250 with 6% interest thereon from and after July 14th, 1900.

As to all and singular the other allegations in the original and first and second amended and supplemental, ancillary bills of complaint, the said bills are without equity and are hereby dismissed.

1051 IV. That all and singular the allegations contained in paragraphs 123 and 124 and the supplemental account of the Guardian Trust Company in connection with said paragraph 124 filed September 22nd, 1905, of the answer of the Guardian Trust Company, to the second amended and supplemental ancillary bill of complaint, except as stated in paragraph III hereof, are true, and that the Kansas City Suburban Belt Railroad Company is indebted to the Guardian Trust Company, upon the following promissory notes, open account, and judgment described in said paragraphs:

One note dated March 31, 1899, due July 2, 1899, for $50,000.00, with interest from date at the rate of six per cent per annum, on which there has been paid and credited on June 14, 1900, $12,500.09 and which note with interest at this date amounts to $65,848.67.

One note dated July 26, 1899, due on demand for $203,900.00 with interest at six per cent per annum from date, upon which there was paid and credited on June 11, 1900, $9,996.65, and which note with interest at this date amounts to $327,423.90.

One note dated October 23, 1899, due on demand, for $7,162.40, with interest at six per cent per annum from date, which with interest at this date amounts to $11,748.70.

One note dated November 7, 1899, due January 8, 1900, for $50,000.00 with interest after maturity at eight per cent per annum, upon which there was paid and credited June 14th, 1900, $12,500.00, and which note with interest at this date amounts to $70,715.87.

One note dated January 25, 1900, due May 25, 1900, for $25,000.00 with interest after maturity at six per cent per annum; interest paid to September 1, 1901, and which with interest at this date amounts to $38,225.00.

One note dated February 8, 1900, due May 13, 1900, for $109,500.00 with interest from maturity at eight per cent per annum, on which there was paid and credited October 23, 1900, as proceeds of sale of collateral made by the National Bank of Commerce, $110,250.00, leaving a balance due on October 23, 1900, of $3,240.66 and which with interest at this date amounts to $5,748.14.

One note dated September 21, 1899, for $23,056.48, with interest after date at eight per cent per annum, and which with interest at this date amounts to $42,905.50.

One note dated February 9, 1900, due June 11, 1900, for $10,400,000 with interest from maturity at six per cent per annum

1052 and which with interest at this date amounts to $16,664.26.

Also an item of $34,061.46 for and on account of a certain judgment paid by the Guardian Trust Company to the First National

Bank of Kansas City, Missouri, on March 27th, 1905, which with interest at seven per cent, from and after March 27th, 1905, aggregates at this date $46,565.76.

Also, upon an open account, on which the balance due said Guardian Trust Company on September 26, 1909, was $31,809.49, and which with interest at this date amounts to $50,412.62; and upon which account said Kansas City Suburban Belt Railroad Company is entitled to the credits mentioned and described in paragraph III of this decree.

That after allowing said credits on said account there is justly due and payable from said Kansas City Suburban Belt Railroad Company to Guardian Trust Company, at this date, the total sum of $639,658.86 of which sum $473,723.59 shall bear interest at six per cent per annum, $46,565.76 shall bear interest at seven per cent per annum, and $119,369.51 shall bear interest at eight per cent per annum; and for the collection and enforcement of said total sum due and owing by said Kansas City Suburban Belt Railroad Company to the Guardian Trust Company, the latter is entitled to have execution issued in the form used in the Circuit Courts in suits at common law in actions of assumpsit.

V. That as security for said indebtedness of said Kansas City Suburban Belt Railroad Company to said Guardian Trust Company, said Guardian Trust Company is entitled to subject all of the collateral pledged to it by Kansas City Suburban Belt Railroad Company as security for said indebtedness, or the proceeds thereof, namely:

10,000 shares of the capital stock of the Union Company.

4,997 shares of capital stock of the Union Company.

4,994 shares of capital stock of the Air Line.

1,120 shares of the capital stock of the Central Improvement Company.

439 shares of stock of the Northern Townsite Company.

425 shares of stock of the Missouri Elevator and Terminal Company.

25 shares of stock of the Fairmount Amusement Company.

13920 shares of stock of the Kansas City and Northern Connecting Railroad Company.

67 9/10 second mortgage bonds of the said Northern Connecting Company.

1053 23 First Mortgage Bonds of the Kansas City and Northern Connecting Railroad Company.

26 First Mortgage bonds of the Kansas City and Northern Connecting Railroad Company.

315 first mortgage bonds of the Kansas City and Northern Connecting Railroad Company; also,

A certain account and claim of the Belt Company against the Kansas City, Pittsburg & Gulf Railroad Company, consisting of charges for material furnished and labor performed, switching charges and terminal rentals, due from the said Gulf Railroad Company to the said Belt Company, and which account on its face amounts to approximately $132,805.44, but inasmuch as the Kan-

sas City, Pittsburg & Gulf Railroad Company is not a party to this proceeding, no finding is intended to be made as to the exact amount of this claim.

343 1940/2240 tons of steel rails, also,

16 1712/2000 tons of fastenings.

It is further ordered, adjudged and decreed that the act of Guardian Trust Company in heretofore selling certain of said collateral securities and applying the same upon the account of said Belt Company to said Guardian Trust Company as hereinbefore set forth, be and the same is hereby approved, and the Guardian Trust Company is hereby authorized to retain as its own the proceeds of ninety-nine first mortgage bonds and coupons of the Kansas City and Northern Connecting Railroad Company, together with the interest accrued thereon, which bonds were heretofore on November 1, 1901, sold for the sum of $40,001.25, under an order of this Court in the cause of Bierce v. Guardian Trust Company, et al., dated October 30, 1901, and which sum was under said order, by the Receiver of the Guardian Trust Company appointed in that case, placed in a separate fund to await the outcome of this litigation.

VI. It is further ordered, adjudged and decreed that all and singular the allegations in the intervening petition of The Kansas City Southern Railway Company filed herein February 27th, 1905, and in the amended intervening petition filed herein May 1st, 1905, are true in so far as they relate to the title, and ownership of the property of the Central Improvement Company, hereinafter specifically described.

That the Kansas City Suburban Belt Railroad Company, Kansas City and Independence Air Line, Kansas City, Pittsburg & Gulf Railroad Company and The Union Terminal Railroad Com-
1054 pany were railway companies and each owned and operated a standard gauge railroad in or about Kansas City, Missouri, and Kansas City, Kansas; and that between October 1892 and November 1898 each of said railway companies purchased certain lands in Jackson County, Missouri, and in Wyandotte County, Kansas, hereinafter specifically described, for the purposes of its railroad, and the said lands so purchased by each of said railway companies, respectively, constituted a part of its railroad and were reasonably necessary for the transaction of its business and the operation of its railroad; that the lands so purchased by each of said railway companies were paid for by the railway company so purchasing the same but the title to the said lands so purchased by each of said companies was for convenience taken in the name of defendant, Central Improvement Company, which last named corporation was organized for the purpose of holding such title and did in fact hold the same as trustee for the said railway companies, respectively; that after each of said railway companies purchased said lands, respectively, and paid for the same, the said Central Improvement Company, as a matter of convenience, issued its capital stock to the railway company making the payment in an amount approximately equal to the amount so paid.

That the railroad property and franchises of each of said railway

companies were encumbered with a mortgage or deed of trust duly executed, delivered and recorded prior to the date of the purchase or acquisition of the said lands, each of which mortgages or deeds of trust covered all the franchises and property of every name and description then owned or possessed by the railway company executing the same and also all property and assets, legal or equitable, which such company should acquire in the future as a part of its railroad; that each of said mortgages or deeds of trust was a valid and subsisting lien upon the property existing and to be acquired of the railway company executing the same at the time of the purchase and acquisition of the said lands by such company and the lien of the mortgage and of the after acquired property clause thereof of each of said railway companies attached to the lands purchased by the company executing the same and constituted a valid and subsisting mortgage lien thereon; that in the years 1899, 1900, 1901 and 1902 each of said mortgages was duly foreclosed in actions brought for that purpose in the Circuit Court of the United States for the Western District of Missouri and for the District of Kansas, and all of the property of each of said companies was, under the decree of foreclosure and sale rendered therein, duly sold, and the intervenor, The Kansas City Southern Railway Company, duly
1055 purchased the same at the foreclosure sales and became the lawful owner and holder of each and all of said properties and is now the lawful owner and entitled to the possession thereof, which said properties are more particularly described as follows, to-wit:

Real Estate Purchase #1 being all that part commencing at a point in the South line of Cheyenne Avenue, Kansas City, Kansas, 30 feet West of the North and South ½ Section line through the center of Section 22, Township 11, Range 25; thence west along said South line of Cheyenne avenue, 37.8 feet; thence in a Southwest direction on a straight line forming an angle of 56″ 9′ with said South line of Cheyenne Avenue, 680 feet more or less, to the Northerly boundary line of a tract of land owned by the Chicago, Milwaukee & St. Paul Railway Co.; thence in a northeasterly direction along said Northerly boundary line (the same being a curved line to the left) 575 feet, more or less, to a point in the West line of a 60 foot street, (the center line of which street is the North and South ½ Section line through the center of Section 22, Township 11, Range 25); thence along the West line of said street 197 feet to the place of beginning and containing an area of 1.65 acres.

All in Wyandotte County, Kansas.

Real Estate Purchase #2 being a certain strip or piece of land situated partly in the Southeast quarter of Section 21, and partly in the Southwest quarter of Section 22, Township 11, Range 25, in Wyandotte County, Kansas, and bounded and described as follows: Beginning at a point in the South line of the right of way of the Union Terminal Railroad, as said right of way is described in the deed to the Union Terminal Railroad Co., recorded in book 204 at page 418, and following, of the Real Estate Records of Wyandotte County, Kansas, where said South line would be intersected by the

prolongation or extension Southward of the East line of Tenth Street (formerly 20th Street), in Kansas City, Kansas; thence in an Easterly direction along said line of right of way 2178 feet; thence South 208.3 feet; thence in a Westerly direction on a line parallel to the South line of said right of way of the Union Terminal Railroad, and at the uniform distance of 200 feet from same, 2178 feet to a point in the East line extended Southward, of the aforesaid 10th Street, in Kansas City, Kansas; thence North along said line 200 feet to place of beginning, containing 10 acres.

All in Wyandotte County, Kansas.

1056 Real Estate Purchase #3 being a certain lot or piece of land situated in the Northeast quarter of Section 22, Township 11, Range 25, in Wyandotte County, Kansas, bounded and described as follows: Beginning at a point in the East line of Railroad Street, in Kansas City, Kansas, 1336.85 feet in a Southwesterly direction (Measured on the line of said street) from the South line of Osage Avenue; thence East along the South line of a tract of land formerly owned by the Western Dressed Beef Company, 270 feet, more or less, to a point in the West line of right of way of the Union Terminal Railroad; thence in a Southwesterly direction along said line of right of way, to a point where same intersects or coincides with the East line of Railroad Street; thence in a Northeasterly direction along the line of said street 390 feet, more or less, to place of beginning, and containing an area of 0.48 acres.

All in Wyandotte County, Kansas.

Real Estate Purchase #4 beginning at a point in the West line of the Northeast quarter of the Southwest quarter, Section 20, Township 11, Range 25, Wyandotte County, Kansas, 854 feet South of the Northwest corner of same, said point being also the Southwest corner of land of John O'Connor; thence North 414 feet to a point in the South line of right of way of the Union Terminal Railroad Company; thence South 71 degrees 40 minutes East along said line 603.5 feet to a point in the west line of land of Morris O'Connor; thence South along same 161.4 feet; thence South 63 degrees 37′ West 139.5 feet to a point in the South line of land of said John O'Connor; thence West along said South line 447.58 — to place of beginning, and containing 4.1 acres.

All in Wyandotte County, Kansas.

Real Estate Purchase #6 being all of lots 1, 2, 3, 4, 5, 6, 7, Block 14, West Kansas Addition No. 1, to City of Kansas (now Kansas City, Missouri); also commencing at the Northwest corner of said lot, thence running due North to the Missouri River; thence East following the meanderings of said River to a point due North of the N. E. Corner of said lot 5; thence due South to the N. E. corner of said lot 5, thence West to place of beginning; also commencing at the Southwest corner of Lot 11, in said Block 14, thence North along the East line of Santa Fe Street 86.67 feet to N. W. corner of lot 8, in said block 14; thence East along the North line of said lot 8, 98.2 feet; thence Southwest making an interior angle with the last described line of 50 degrees 35′ and running 112.2 feet to the South

line of Lot 11, being the North line of Eighth Street at a
1057 point on said line 26.2 feet East of the East line of Santa Fe Street; thence West along the South line of lot 11 and the North line of Eighth Street 26.2 feet to place of beginning, subject to right of way of the Kansas City Suburban Belt Railroad Company.

All in Jackson County, Missouri.

Real Estate Purchase #9 being all of lots numbered 1-45-46, in Block 2, in Modern Mutual Place, an addition to Kansas City, Missouri, as the same appears of record upon the Recorded Plat thereof, and so much of lots numbered 2 and 44 in Block 2, and so much of lots numbered 6, 7, and 8, in Block 1, in said addition as lie N. & N. W. of a line parallel to and 20 feet South and S. E. of the center line of the most Southerly tract of the K. C. S. B. R. R. Co. or K. C. & Independence Air Line, as the same is now located across said lots, which said center line is described as follows:

Beginning at a point in the West line of Lot 8, in Block 1, of said Addition, 65/100 feet S. of the N. W. corner of said lot; thence in a Northeasterly direction on a line of a curve to the right of 550.8 feet radius, 210 feet more or less to a point in the W. line of lot 44, in Block 2, of said Addition 3.3 feet S. of the N. W. Corner of said lot; thence continuing on said curve to the right having a radius of 550.8 feet 198.8 feet to appoint in the E. line of Lot 1, in Block 2 of said Addition 2 1/10 feet South of the N. E. corner of said lot.

All in Jackson County, Missouri.

Real Estate Purchase #10 being all of lots 31, 47 and 48 Hurck's Sub-division of Guinotte Farm, as the same are marked and designated on the recorded plat thereof, on file in the office of the Recorder of Deeds in and for the County of Jackson, State of Missouri.

All in Jackson County, Missouri.

Real Estate Purchase #11 being Lots 14, 15, 16, 17, and 18 Loomis' Riverside Addition, Lots 25, 27 and 28, Clifton Place Addition, to Kansas City, Kansas; Lots 2, 3, 5, 31 & 32 Block "D", F. J. Baird's Addition to Armourdale, now a part of Kansas City, Kansas.

All in Wyandotte County, Kansas; excepting that part of Lots 14, 15, 16, 17, and 18, of the said Loomis' Riverside Addition to Kansas City, Kansas, located South and West of the right of way of The Kansas City Southern Railway Company, formerly The Union Terminal Railroad Company and being that part of said lots heretofore sold and conveyed to August Uihlein on the 4th day of
1058 April, 1904, by Thomas T. Crittenden, Receiver of the Central Improvement Company, said deed being recorded in the office of the Register of Deeds of Wyandotte County, State of Kansas, in Volume 299 at page 80.

Real Estate Purchase #12 being Lot 4, Block 5 Lykins' Addition, Kansas City, Mo.

All in Jackson County, Missouri.

Real Estate Purchase #20 being Lot 21, Block 9 of Centropolis, Jackson County, Missouri.

Real Estate Purchase #21 being an undivided one half of Lot 124, Block 12, Old Town (now Kansas City) Missouri.

Real Estate Purchase #22 being a tract of land described by metes and bounds as follows: Beginning at the N. E. corner of Lot 16, Block 16, in that part of Kansas City, Missouri, known as "Extension of West Kansas Addition No. 1"; thence West along the North line of said Block 16, 72 feet, to the Northwest corner of Lot 14 in said Block; thence in a Northerly direction, on the prolongation or extension of the West line of said Lot 14, 62.1 feet to a point 22 feet (Measured at right angles) North of the center line of the main track of the K. C. S. B. R. R., as located and constructed upon the ground; thence in an Easterly direction on a line parallel to the center line of said main track, and at the uniform distance of 22 feet from said center line, 184 feet to a point in the Northerly extension or prolongation of a line parallel to and 4 feet East of the East line of Lot 2, Block 15, in West Kansas Addition No. 1, thence South on said line 73.1 feet to a point in the North line of said Block No. 15, 4 feet East of the Northeast corner of said Lot 1, thence 52 feet to the N. W. corner of Lot 1 of said Block; thence South along the East line of Mulberry Street, 13 feet more or less, to a point 6 feet north of the center line of the most northerly switch track of the K. C. Ft. S. & M. Ry.; thence in a westerly direction on a line parallel to the center line of said switch track, and at the uniform distance of 6 feet from the North of said center line 60 feet to a point in the West line of said Street; thence North along said line 18 feet more or less, to place of beginning.

All in Kansas City, Jackson County, Missouri.

Real Estate Purchase #23 being a certain lot or piece of land situated in that part of Kansas City, Missouri, just North of and adjoining what is known as Extension of West Kansas Addition Number One, and bounded and described as follows, to-wit:

1059 Beginning at the Northwest corner of Lot one (1), in Block No. Fifteen (15) of said extension of West Kansas Addition No. One; thence North along the prolongation of the East line of Mulberry Street to the Missouri River; thence Easterly along the Missouri River to a point where the prolongation of the East line of Lot No. Eight (8) in said Block and Addition meets the Missouri River; thence Southerly along said prolongation of the East line of said Lot Eight (8) to the North line of Block No. Fifteen (15); thence Westerly on the North line of said Block Fifteen (15) to the place of beginning.

Also a certain lot or piece of land comprising parts of Lots One (1), Two (2), Three (3), Four (4), and Five (5), in Block No. Fifteen (15) in that part of Kansas City, Missouri, known as "Extension of West Kansas Addition No. One" and bounded and described as follows: Beginning at the Northwest corner of said block; thence East along the North line of same ninety-nine (99) feet more or less to a point Six (6) feet (measured at right angles) North of the center line of the most Northerly switch track of the Kansas City, Fort Scott & Memphis Railroad; thence in a Southwesterly direction on a line parallel to said center line and at the

uniform distance of six (6) feet from same One Hundred (100) feet, more or less, to a point in the East line of Mulberry Street; thence North along said line Thirteen (13) feet, more or less, to the place of beginning, in Jackson County, Missouri.

Real Estate Purchase #24 being a certain lot or piece of land situated North and West of that part of Kansas City, Missouri known as "Extension of West Kansas Addition No. One" and bounded and described as follows: Beginning at a point in the Northward extension of the East line of Hickory Street Eight feet South of the center line of the Consolidated Terminal Railroad (now The Kansas City Southern Railway) as said road is located and constructed upon the ground, and six hundred and thirteen and six-tenths (613.6 feet North of the North line of Ninth Street; thence in a Southwesterly direction on a line parallel to the center line of said Kansas City Southern Railway Company's Railroad and at the uniform distance of Eight (8) feet (at right angles) South of said line One Hundred and Ninty-two and Eight-tenths (192.8) feet to a point in the Northern extension of the East line of Lot number Eight (8) in Block number Sixteen (16) of said Extension of West Kansas Addition No. 1; thence South along said line Fifty-five and nine-tenths (55.9) feet to a point six feet North of the center line of the Kansas City, Ft. Scott & Memphis Railroad Company's most Northerly main switch track; thence in a Southwesterly direction, on a line parallel to the center line of said Kansas City,
1060 Ft. Scott & Memphis switch track, and at the uniform distance of six (6) feet North of said center line, One Hundred and Ninety-two and Eight tenths (192.8) feet to a point in the Northward extension of the East line of Hickory Street, five hundred and twenty-six (526) feet North of the North line of Ninth Street; thence north along said line Eighty-seven and six-tenths (87.6) feet to place of beginning, and containing 0.308 acres, more or less.

All in Jackson County, Missouri.

Real Estate Purchase #27 being

First Parcel,—A triangular piece of ground in the Northwest corner of Block Three (3) Coates & Hopkins' Addition to the City of Kansas (now Kansas City) bounded as follows: Beginning at a point on the West side of said Block Three (3) which is Sixteen (16) feet from the Northwest corner thereof, and running thence Northerly along said West side Sixteen (16) feet to said corner; thence Easterly along the North side of Block three (3) Seventy (70) feet; thence Southwesterly to the place of beginning; containing about 560 square feet or 13/1000 of an acre.

Second parcel,—A part of Block seven (7) in said Coates & Hopkins Addition, which is bounded as follows: Beginning at a point on the East side of said Block seven (7), which is two hundred and Fifty-two and four-tenths (252.4) feet from the Northwest corner of Eighth & Henning Streets; thence Northerly Forty-six (46) feet along said East side to the Northeast corner of said Block seven (7); thence Northwesterly along the Northerly side of Block seven (7) One Hundred Forty-four and Seven-tenths (144.7) feet to the Northwest corner thereof; thence South along the West side of said

Block seven (7) 84 degrees and four minutes included angle Two Hundred Forty-four and Three tenths (244.3) feet; thence Northeasterly 35 degrees 20 minutes included angles One Hundred Eighteen and One Tenth (118.1) feet; thence Northeasterly 187 degrees 15 minutes, included angles Sixty-seven and Five Tenths (67.5) feet; thence Northeasterly 188 degrees, 28 minutes, included angle, Sixty-eight and seven tenths (68.7) feet to the point of beginning, Containing 21,215 square feet, or 487/1000 of an acre.

All in Jackson County, Missouri.

Real Estate Purchase #29 being all that part of Lot 32, Hurck's Sub-division of Guinotte Farm between right of way of the K. C. S. B. R. R., and the Missouri River, including all accretions, if any, to said lot, or any part thereof.

1061 All in Jackson County, Missouri.

Real Estate Purchase #13 being Lot 7 Block 4 Lykin's Addition, Kansas City, Mo.

All in Jackson County, Mo.

Wherefore and in consideration whereof it is hereby further ordered, adjudged and decreed that the defendant, Central Improvement Company, shall, after August 24, 1910, convey to The Kansas City Southern Railway Company all of the real estate and property above described, and that the Receiver of the said Central Improvement Company, join in said deed, if so requested by The Kansas City Southern Railway Company, and that the said receiver, upon execution of said deed, forthwith deliver possession of said properties to said Company.

It is further ordered, adjudged and decreed that *as to* all and singular the other allegations and charges and complaints in the intervening petition of The Kansas City Southern Railway Company, are without equity and that they be and are hereby dismissed.

VII. The Court finds the issues, made by paragraphs 15 to 20 inclusive of the answer of the Guardian Trust Company to the amended intervening petition of The Kansas City Southern Railway Company, against the Guardian Trust Company and in favor of The Kansas City Southern Railway Company, in that and it is so decreed, The Kansas City Southern Railway Company, did not assume, or agree to pay, or become liable for, the indebtedness or any part of it, owing by the Kansas City Suburban Belt Rail Road Company to the defendant, Guardian Trust Company, and that The Kansas City Southern Railway Company is in no wise liable or bound for the payment of the indebtedness of the Kansas City Suburban Belt Railroad Company to the defendant, Guardian Trust Company, the payment of which is decreed in paragraph IV of this decree.

VIII. It is further ordered and decreed that the exceptions filed herein by the Kansas City Suburban Belt Railroad Company and its receiver, and also by The Kansas City Southern Railway Company, the Cambria Steel Company, the Guardian Trust Company, and the Central Improvement Company, be and the same are hereby

overruled, except in the respects herein otherwise ordered and decreed.

IX. It is further ordered and decreed that, after the payment of all proper costs of the receiverships of the Central Improvement Company and the Northern Townsite Company in this cause, the balance of all the money, now in the hands of the receivers,
1062 respectively, of said companies, pending this litigation, shall be by said receivers paid into the registry of this Court, subject to the rights of the Guardian Trust Company, as the pledgee holder of part of the capital stock of said companies, as such rights shall be made to appear, inasmuch as it is not shown to the Court that there are any known officers of said Northern Townsite Company and said Central Improvement Company, to whom these payments can now be ordered to be made.

Upon any application made by the Guardian Trust Company for said moneys, so to be paid into the registry of the court, the same shall be referred to the Special Master herein, who shall forthwith ascertain the facts and report to the court, so that said moneys may be distributed without any unnecessary delay, and for such services the Special Master shall receive no other compensation than that hereinafter provided for.

X. It is further ordered and decreed that, as to the Second Street Improvement Company, this cause shall be and is dismissed in all respects.

XI. It is further ordered, adjudged and decreed that the compensation of E. F. Swinney, as receiver of the Northern Townsite Company is hereby fixed at Fifteen Hundred Dollars ($1500.00), and that the compensation of S. W. Moore, as the counsel for the receiver, is hereby fixed at Fifteen Hundred Dollars ($1500.00), and that the said receiver be and he is hereby discharged and his bond canceled; that the compensation of H. H. Crittenden, receiver of the Central Improvement Company, is hereby fixed at Five Hundred Dollars ($500.00) and that the compensation of S. W. Moore, as the counsel of the receiver, is fixed at Two Thousand Dollars ($2000.00), and that said receiver be and he is hereby discharged and his bond canceled; that, it appearing to the court that all costs incurred by the Cambria Steel Company, prior to November 20, 1901, have been paid by it, it is ordered that no further costs in this proceeding be taxed against said Company, nor shall any costs heretofore paid by said Company be chargeable against any of the other parties to this action; and it is further ordered and decreed that, in addition to the allowances heretofore made to Shannon C. Douglass, Special Master, on account of his services as such Master in this cause, there is hereby allowed to him as further compensation the sum of Fifteen Thousand Dollars ($15,000.00), for and on account of his said services, which shall be taxed as costs in this case, and it appearing to the Court that the former allowances heretofore made to him were paid in the same proportion and by the same parties as herein provided, no further order will be made in re-
1063 spect to equalizing such payments, all said allowances to be taxed as costs herein.

XII. It is further ordered, adjudged and decreed that the costs of this action be paid as follows; one-third (1/3) thereof shall be paid by the Guardian Trust Company, and Two-thirds (2/3) thereof shall be paid by the Kansas City Suburban Belt Railroad Company, and its receiver, and The Kansas City Southern Railway Company.

XIII. It is further ordered and decreed that this Court retains jurisdiction of this cause in order to carry out the purposes and orders herein made in this decree.

(Signed) JNO. F. PHILIPS, *Judge.*

#2468. Decree-Comp.

Afterwards, to-wit, on the 10th day of August, 1910, the Assignment of Errors of the Guardian Trust Company was filed. Said Assignment of Errors is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2468. In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver; Northern Townsite Company; and Fairmount Amusement Company; Defendants; The Kansas City Southern Railway Company, Intervenor.

Ancillary Bill.

Assignment of Errors by Guardian Trust Company.

Now on this 10th day of July, 1910, comes the Guardian Trust Company, defendant in the original bill of complaint in
1064 this cause and defendant in the ancillary bill of complaint of Edward F. Swinney Receiver of the Kansas City Suburban Belt Railroad Company, and The Kansas City Suburban Belt

Railroad Company, and defendant in the various intervening petitions of The Kansas City Southern Railway Company, and considering itself aggrieved by the order and decree entered in this court on the 25th day of June, 1910, whereby this court did enter a final decree in this cause, and did include in said decree a finding that The Kansas City Southern Railway Company was not liable for the indebtedness found in said decree and adjudged to be due to the Guardian Trust Company from The Kansas City Suburban Belt Railroad Company; and whereby the court ordered and decreed that the defendant Central Improvement Company, and its Receiver, should, after August 24, 1910, convey to the said The Kansas City Southern Railway Company the railroad property in said decree described, and did decree that the costs of this action be paid as follows: One-third thereof by the Guardian Trust Company, and two-thirds thereof by The Kansas City Suburban Belt Railroad Company and its Receiver, and The Kansas City Southern Railway Company, does now [*day*] that said decree is erroneous and against the just rights of this defendant, for the following reasons:

First. The court erred in over-ruling the xceptions of the Guardian Trust Company to the report of the Honorable Shannon C. Douglass, Special Master, and in over-ruling each of said exceptions made and taken by this defendant.

Second. The court erred in including in said decree and finding that The Kansas City Southern Railway Company did not assume or agree to pay, or become liable for the indebtedness, or any part of it, owing by The Kansas City Suburban Belt Railroad Company to the Guardian Trust Company.

Third. The court erred in requiring the Central Improvement Company and its Receiver to convey to The Kansas City Southern Railway Company the properties and each of the properties in said decree specified.

Fourth. The court erred in refusing to hold that the claim of The Kansas City Southern Railway Company in respect to the properties of the Central Improvement Company, and each of the properties in said decree described, was barred by the statute of limitations and by laches.

Fifth. The court erred in ordering, adjudging and decreeing that the costs of this action be paid, one-third by the Guardian Trust Company and two-thirds by The Kansas City Suburban Belt Railroad Company and its Receiver, and The Kansas City Southern Railway Company.

1065 Sixth. The court erred in taxing any part of the costs of this proceeding against the defendant Guardian Trust Company.

Seventh. The court erred in adjudging and decreeing that the costs and expenses of the administration of the defendant, Central Improvement Company, and the defendant, Northern Townsite Company, including compensation for the Receivers of said Company, and compensation for the counsel of said Receivers, should be paid out of the assets of said Company, because said expenses, costs

and compensation should be paid by the Cambria Steel Company and the Kansas City Suburban Belt Railroad Company and its Receiver, and The Kansas City Southern Railway Company.

Wherefore, this defendant prays that said decree be reversed and that this court be directed to enter a decree which shall exclude from its findings the finding that The Kansas City Southern Railway Company is not liable for the indebtedness of The Kansas City Suburban Belt Railroad Company to this defendant, and that the decree be reversed as to the lands of the Central Improvement Company in said decree described, and that the said Central Improvement Company and its Receiver be not required to convey the said lands in said decree described to the Kansas City Southern Railway Company, and that all the costs of this proceeding and the costs and expenses of administration of the various companies, defendants in this cause, including compensation for Receivers of the same, and compensation for counsel for said Receivers, be taxed against the Cambria Steel Company, The Kansas City Suburban Belt Railroad Company, and The Kansas City Southern Railway Company, and for such other relief as to justice may pertain.

GUARDIAN TRUST COMPANY,
By EDWARD P. GATES,

Its Solicitors.

Afterwards, to-wit, on the 10th day of August, 1910, the Assignment of Errors of the Central Improvement Company was filed. Said Assignment of Errors is in words and figures as follows:

In the Circuit Court of the United States, for the Western Division of the Western District of Missouri.

No. 2468. In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Ter-
1066 minal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver; Northern Townsite Company and Fairmount Amusement Company, Defendants.

Ancillary Bill.

The Kansas City Southern Railway Company, Intervenor.

Assignment of Errors by Central Improvement Company.

Now on this 10th day of July, 1910, comes the Central Improvement Company, defendant in the original bill of complaint in this cause, and defendant in the ancillary bill of complaint of Edward F. Swinney, Receiver of The Kansas City Suburban Belt Railroad Company, and The Kansas City Suburban Belt Railroad Company, and defendant in the various intervening petitions of The Kansas City Southern Railway Company, and considering itself aggrieved by the order and decree entered in this court on the 25th day of June, 1910, whereby this court did enter a final decree in this cause, and did include in said decree a finding that the Kansas City Southern Railway Company was not liable for the indebtedness found in said decree and adjudged to be due to the Guardian Trust Company from The Kansas City Suburban Belt Railroad Company; and whereby the court entered and decreed that the defendant Central Improvement Company, and its Receiver, should, after August 24, 1910, convey to the said The Kansas City Southern Railway Company the railroad property in said decree described, and did decree that the costs of this action be paid as follows: One-third thereof by the Guardian Trust Company, and two-thirds thereof by The

Kansas City Suburban Belt Railroad Company and its Receiver, and The Kansas City Southern Railway Company, does now say that said decree is erroneous and against the just rights of this defendant, for the following reasons:

First. The court erred in over-ruling the exceptions of the Central Improvement Company to the report of the Honorable Shannon C. Douglass, Special Master, and in overruling each of said exceptions made and taken by this defendant.

1067 Second. The court erred in requiring the Central Improvement Company and its Receiver, to convey to The Kansas City Southern Railway Company the properties and each of the properties in said decree specified.

Third. The court erred in refusing to hold that the claim of the Kansas City Southern Railway Company in respect to the properties of the Central Improvement Company, in said decree described, was barred by the statute of limitations and by laches.

Fourth. The court erred in requiring this defendant, Central Improvement Company, and its Receiver, to pay the costs and expenses of said receivership, including the compensation of the Receiver and counsel for the Receiver, whereas said expense and compensation should have been taxed against and paid by Cambria Steel Company, complainant, The Kansas City Suburban Belt Railroad Company and its Receiver, and The Kansas City Southern Railway Company, Intervenor.

Wherefore, This defendant prays that said decree be reversed as to the lands of the Central Improvement Company, in said decree described, and that this defendant, Central Improvement Company, and its Receiver, be not required to convey the said lands to The Kansas City Southern Railway Company, and that all the costs of this proceeding be taxed against the Cambria Steel Company, The Kansas City Suburban Belt Railroad Company and The Kansas City Southern Railway Company, and for such other relief as to justice may pertain.

CENTRAL IMPROVEMENT COMPANY,
By H. H. CRITTENDEN, *Receiver;*
By EDWARD P. GATES &
GEORGE H. ENGLISH, JR., *Its Solicitors.*

Afterwards, to wit on the 10th day of August, 1910, the Petition of Guardian Trust Company for Appeal and Order allowing appeal were filed and entered of record. Said Petition and Order are in words and figures as follows:

In the Circuit Court of the United States, for the Western Division of the Western District of Missouri.

No. 2468. In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Ter-
1068 minal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver; Northern Townsite Company and Fairmount Amusement Company, Defendants.

Ancillary Bill.

The Kansas City Southern Railway Company, Intervenor.

Petition of Guardian Trust Company for Appeal.

The above-named defendant, Guardian Trust Company, conceiving itself aggrieved by the final order and decree made and entered in the above-entitled cause, on the 25th day of June, 1910, does hereby appeal from said order and decree, to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the assignment of errors, wrich is filed herewith; and said Guardian Trust Company prays that this appeal may be allowed and that citation issue as provided by law; that a transcript of the record, proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Eighth Circuit, and your petitioner further prays that the proper order, touching the security to be required of it to perfect its appeal, be made.

GUARDIAN TRUST COMPANY,
By EDWARD P. GATES, *Its Solicitor.*

The foregoing petition for appeal is allowed and it is ordered that the cost bond to be filed by said appellant be and it is hereby fixed in the sum of Five thousand Dollars ($5,000.00).

Dated this 10th day of August, 1910.

(Signed) SMITH McPHERSON, *Judge.*

Afterwards, to wit, on the 10th day of August, 1910, the Petition for Appeal of the Central Improvement Company and Order allowing appeal were filed and entered as record. Said Petition and Order are in words and figures as follows:

1069 In the Circuit Court of the United States, for the Western Division of the Western District of Missouri.

No. 2468. In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver, Northern Townsite Company and Fairmount Amusement Company, Defendants.

Ancillary Bill.

The Kansas City Southern Railway Company, Intervenor.

Petition of Central Improvement Company for Appeal.

The above-named defendant, Central Improvement Company, conceiving itself aggrieved by the final order and decree made and entered in this cause, the 25th day of June, 1910, requiring the Central Improvement Company and its Receiver, to convey to The Kansas City Southern Railway Company the properties and each of the properties in said decree specified; and refusing to hold that the claim of The Kansas City Southern Railway Company, in respect to the properties of the Central Improvement Company, in said decree described, was barred by the statute of limitations and by laches, and requiring this defendant, Central Improvement Company, and its Receiver, to pay the costs and expenses of said receivership, prays that this appeal may be allowed and that citation issue as provided by law; that a transcript of the record, proceedings and paper upon which said order and decree was made, duly authenticated, may be

sent to the said United States Circuit Court of Appeals for the Eighth Circuit.

And your petitioner further prays that the proper order touching the security to be required of it to perfect its appeal, be made and,

1070 desiring to supersede the execution of the decree, your petitioner here tenders bond in such amount as the court may require for such purpose and prays that, with the allowance of the appeal, a supersedeas be issued.

Dated this 10th day of August, 1910.

CENTRAL IMPROVEMENT COMPANY,
By H. H. CRITTENDEN, *Receiver:*
By EDWARD P. GATES &
GEORGE H. ENGLISH, JR., *His Solicitors.*

The foregoing petition for an appeal is allowed upon the petitioner giving bond, conditioned as the law directs, in the sum of Thirty thousand Dollars, ($30,000.00) which may operate as a supersedeas; and that a true copy of the record, assignment of errors and proceedings had in the case, shall be transmitted to the United States Circuit Court of Appeals, for the Eighth Circuit.

Dated this 10th day of August, 1910.

(Signed) SMITH McPHERSON, *Judge.*

The Bond for Appeal of the Guardian Trust Company, approved and filed herein on the 10th day of August, 1910, as in words and figures as follows:

In the Circuit Court of the United States, for the Western Division of the Western District of Missouri.

No. 2468. In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants; The Kansas City Southern Railway Company, Intervenor.

Ancillary Bill.

1071 *Bond of Guardian Trust Company on Appeal.*

Know All Men by These Presents:

That The Guardian Trust Company, as principal, and United States Fidelity & Guaranty Company of Baltimore, Md., as surety, acknowledge themselves to be jointly indebted unto The Kansas City Southern Railway Company, The Kansas City Suburban Railroad Company and Edward F. Swinney, its Receiver, and Cambria Steel Company, in the full and just sum of Five thousand and no/100 Dollars ($5,000.00) to be paid to them, their successors or assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our respective seals.

Dated at Kansas City, Missouri, the 10th day of August, 1910.

The condition of the above obligtion is that

Whereas, On the 25th day of June, 1910, in the above-entitled cause, a final order and decree was made and entered and the said Guardian Trust Company has obtained an order allowing an appeal from said final order and decree, and has obtained a citation directed to the complainants and defendants in said bill and supplemental bill, other than this defendant, Guardian Trust Company, citing and admonishing them to be and appear in the United States Circuit Court

of Appeals for the Eighth Circuit, sixty (60) days from and after the date of said citation.

Now, if the said Guardian Trust Company shall prosecute its appeal to effect, and answer to all costs if it fail to make its plea good, then the above obligation to be void; otherwise, to remain in full force and virtue.

In Witness Whereof, the said Guardian Trust Company and said United States Fidelity and Guaranty Company have caused these presents to be signed by their proper officers and their corporate seals to be hereunto affixed.

[SEAL.] GUARDIAN TRUST COMPANY,

Attest:
EDWARD C. WRIGHT,
Assistant Secretary.
By JOHN A. PRESCOTT,
Its Vice President.

[SEAL.] UNITED STATES FIDELITY & GUARANTY COMPANY,
By MERRITT M. LUCAS,
JEAN L. CROSS,
Its Attorneys in Fact.

1072 Approved:
SMITH McPHERSON, *Judge.*

The Bond for Appeal of the Central Improvement Company, approved and filed August 10th, 1910, is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2468. In Equity.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants; The Kansas City Southern Railway Company, Intervenor.

Ancillary Bill.

Bond of Central Improvement Company on Appeal.

Know All Men by These Presents:

That we, Central Improvement Company, as principal, and United States Fidelity & Guaranty Company of Baltimore, Md., as surety, are held and firmly bound unto The Kansas City Southern Railway Company, The Kansas City Suburban Belt Railroad Company, and Edward F. Swinney, its Receiver, and Cambria Steel Company, in the full and just sum of Thirty thousand and no/100 Dollars ($30,000) to be paid to them, their successors or assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated at Kansas City, Missouri, this 10th day of August, 1910.

The condition of the above obligation is that

1073 Whereas, on the 25th day of June, 1910, in the above-entitled cause, a final order and decree was made, requiring the Central Improvement Company, and its Receiver, to convey certain properties in said decree described, to The Kansas City Southern Railway Company, and requiring the defendant, Central Improvement Company, and its Receiver, to pay the costs and expenses of the receivership, and the said Central Improvement Company has

obtained an order allowing an appeal from said final order and decree, and has obtained a citation directed to the complainants in said bills, and the defendants other than the Central Improvement Company, citing and admonishing them to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, sixty days from and after the date of said citation;

Now, if the said Central Improvement Company shall prosecute its appeal to effect and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void; otherwise, to remain in full force and virtue.

CENTRAL IMPROVEMENT COMPANY,
By H. H. CRITTENDEN, *Receiver,*
By EDWARD P. GATES,
GEO. H. ENGLISH, JR.,
His Solicitor.
UNITED STATES FIDELITY & GUARANTY COMPANY,
[SEAL.] By MERITT M. LUCAS,
JEAN L. CROSS,
Its Attorneys-in-Fact.

Approved:

SMITH McPHERSON, *Judge.* [SEAL.]

Afterwards, to-wit, on the 10th day of August, 1910, the Præcipe for Appeal of the Guardian Trust Company was filed. Said Præcipe is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2468.

CAMBRIA STEEL COMPANY, Complainant,

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street
1074 Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants,

vs.

CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company and T. T. Crittenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants; The Kansas City Southern Railway Company, Intervenor.

Ancillary Bill.

Præcipe for Record on Appeal.

To the Clerk of said Court:

For use in the appeal of the Guardian Trust Company from the order and decree of this court filed June 25, 1910, entering and rendering a final decree in the above-entitled cause, you will please prepare the transcript for the appellate court and include therein the following parts of the record:

1. The original bill of complaint of Cambria Steel Company, filed September 6, 1900, with exhibits attached.
2. Entry of appearance of the railroad companies and defendants in said bill, filed September 6, 1900.
3. Order granting restraining order, appointing receivers, etc., filed September 6, 1900.
4. Entry of appearance of Guardian Trust Company, filed October 1, 1900.
5. Entry of appearance filed October 1, 1900, for Central Improvement Company, et al.
6. Answer of Guardian Trust Company to original bill of complaint, filed November 5, 1900, with exhibit attached.

7. Answer of Central Improvement Company to original bill of complaint, filed November 5, 1900.

8. Order as to hearing of application for temporary injunction, filed November 7, 1900.

9. Replication of Cambria Steel Company to answer of Guardian Trust Company, filed December 3, 1900.

1075 10. Replication of Cambria Steel Company to answer of Central Improvement Company, et al. filed December 3, 1900.

11. Ancillary bill filed by The Kansas City Suburban Belt Railroad Company and its Receivers vs. Cambria Steel Company, Guardian Trust Company, et als., filed November 20, 1901.

12. Stipulation in cause No. 2616 extending time for filing answers.

13. Separate answer of Guardian Trust Company to ancillary bill filed in cause No. 2616 December 9, 1901.

14. Separate answer of Cambria Steel Company to ancillary bill, filed December 16, 1901, to cause No. 2616.

15. Exceptions by complainants to answer of Guardian Trust Company, filed December 31, 1901.

16. Replication to answer of Guardian Trust Company, filed April 9, 1902, in cause No. 2616.

17. Order sustaining exceptions and referring cause to Honorable Shannon C. Douglass, Special Master, filed April 1, 1902, in cause No. 2616.

18. Resignation of Wash Adams, Receiver Central Improvement Company, filed May 29, 1902, and order of same date accepting same.

19. Order appointing Honorable Thomas T. Crittenden Receiver of Central Improvement Company, filed June 27, 1902.

20. Stipulation making The Kansas City Southern Railway Company a party, filed February 7, 1905.

21. Stipulation extending the time for The Kansas City Southern Railway Company to intervene, filed February 27, 1905.

22. Order granting leave to The Kansas City Southern Railway Company to file intervening petition and referring the issues to Honorable Shannon C. Douglass, as Special Master, filed February 27, 1905.

23. Intervening petition of The Kansas City Southern Railway Company, filed February 27, 1905.

24. Answer of Guardian Trust Company to intervening petition of The Kansas City Southern Railway Company, filed March 7, 1905.

1076 25. Answer of Central Improvement Company to intervening petition of the Kansas City Southern Railway Company filed.

26. Amended and supplemental ancillary bill of Knott and Swinney, Receivers, filed March 22, 1905, omitting exhibits.

27. Order referring issues upon same to Honorable Shannon C. Douglass, filed April 7, 1905.

28. Stipulation that The Kansas City Southern Railway Company may file amended intervening petition to be referred to Honorable Shannon C. Douglass, Special Master, filed May 1, 1905, and order

made thereon, of same date, that issues stand referred to Honorable Shannon C. Douglass to take the testimony and report his findings of fact and conclusions of law.

29. Amended intervening petition of The Kansas City Southern Railway Company, filed May 1, 1905, omitting exhibits.

30. Order enlarging time of Guardian Trust Company to plead to amended intervening petition, filed May 15, 1905.

31. Answer of Guardian Trust Company to amended intervening petition of The Kansas City Southern Railway Company, filed May 20, 1905, and order of reference of same date.

32. Answer of Guardian Trust Company to amended and Supplemental bill of complaint of Knott and Swinney, filed June 1, 1905.

33. Answer of Central Improvement Company, T. T. Crittenden Receiver, to amended intervening petition of The Kansas City Southern Railway Company, filed August 7, 1905.

34. Answer of Central Improvement Company to amended and supplemental bill of complaint of Knott and Swinney, Receivers, filed June 9, 1905.

35. Replication to answers of Guardian Trust Company and Central Improvement Company, filed June 26, 1905.

36. Order granting leave to file second amended ancillary bill, filed July 2, 1906.

37. Second amended and supplemental ancillary bill of complaint, filed July 2, 1906, omitting exhibits.

38. Answers and pleas of Guardian Trust Company, filed July 2, 1906.

39. Stipulation making up the issues, filed July 2, 1906.

1077 40. Answer of Central Improvement Company, filed October 19, 1906.

41. Replication of Swinney, Receiver, to answer of Guardian Trust Company to second amended ancillary bill, filed July 2, 1906.

42. Replication of The Kansas City Southern Railway Company to answer of Guardian Trust Company to amended intervening petition filed July 2, 1906.

43. Answer of Central Improvement Company and T. T. Crittenden Receiver, to second amended bill of Swinney Receiver, filed October 19, 1907.

44. Application of Swinney, et al., for leave to file supplemental bill, filed November 16, 1907, and order of same date granting leave to file.

45. Supplemental bill of complaint against Guardian Trust Company and exhibits attached, filed November 16, 1907.

46. Restraining order filed November 16, 1907.

47. Answer of Guardian Trust Company to rule to show cause, filed December 16, 1907.

48. Order granting temporary injunction against Guardian Trust Company, filed February 22, 1908.

49. Injunction bond filed, February 24, 1908.

50. Motion of Guardian Trust Company to dissolve restraining order, filed February 29, 1908, and order of same date denying said motion.

51. Petition for appeal from injunction order of February 22, 1908, and order allowing appeal.

52. Appeal bond Guardian Trust Company filed March 10, 1908.

53. Letter of S. W. Moore and affidavit of Thomas J. Bales, filed March 14, 1908.

54. Mandate and opinion of Circuit Court of Appeals of the United States for the Eighth Judicial Circuit, on appeal of Guardian Trust Company vs. The Kansas City Southern Railway Company et al., in cause No. 2827, filed June 21, 1909.

55. Order appointing H. H. Crittenden Receiver of Central Improvement Company, filed June 19, 1908.

1078 56. Report of Honorable Shannon C. Douglass, Special Master, filed May 21, 1910.

57. Supplemental report of Special Master, filed June 22, 1910.

58. Exceptions of Guardian Trust Company to the report of Honorable Shannon C. Douglass, Special Master, filed June 17, 1910.

59. Exceptions of Central Improvement Company by H. H. Crittenden, its Receiver, to report of Honorable Shannon C. Douglass, Special Master, filed June 17, 1910.

60. Final decree rendered in this cause on June 25, 1910.

61. Petition of Guardian Trust Company for appeal from said final decree, and order allowing appeal, filed August 10, 1910.

62. Petition for appeal of Central Improvement Company from said final decree, and order allowing appeal, filed August 10, 1910.

63. Assignment of errors of Guardian Trust Company, in connection with petition for appeal, filed August 10, 1910.

64. Assignment of errors by Central Improvement Company, filed in connection with petition for appeal, filed August 10, 1910.

65. Bond on appeal by Guardian Trust Company, and order approving same, filed August 10, 1910.

66. Bond on appeal of Central Improvement Company and order approving same, filed August 10, 1910.

66*a*. Præcipe of Central Improvement Company for record on appeal filed August 10, 1910.

67. Citation in connection with said appeal of Guardian Trust Company, and return of service endorsed thereon.

68. Citation in connection with said appeal of Central Improvement Company and return of service endorsed thereon.

Other portions of the record, i. e. interlocutory orders, directions to and reports by the various receivers, evidence taken by the Special Master, and other papers and documents in the case not being deemed necesary on the hearing of the appeal, may be omitted by you in preparing said transcript.

Respectfully,

EDWARD P. GATES,
Solicitor for Guardian Trust Company.

1079 Afterwards, to-wit, on the 10th day of August, 1910, the Præcipe of the Central Improvement Company was filed. Said Præcipe is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2468.

CAMBRIA STEEL COMPANY, Complainant,
vs.
THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, CENTRAL IMPROVEMENT COMPANY et al., Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company et al. Complainants,
vs.
CAMBRIA STEEL COMPANY, CENTRAL IMPROVEMENT COMPANY et al., Defendants; The Kansas City Southern Railway Company, Intervenor.

Ancillary Bill.

Præcipe for Record on Appeal by Central Improvement Company.

To the Clerk of said Court:

For use in the appeal of the Central Improvement Company from the order and decree of this Court filed June 25th, 1910, entering and rendering a final decree in the above entitled cause, the Central Improvement Company adopts as its own the transcript for the Appellate court prepared in accordance with the præcipe for record on appeal of Guardian Trust Company, which præcipe and record it deems sufficient.

Respectfully,

EDWARD P. GATES,
GEO. H. ENGLISH, JR.,
Solicitors for Central Improvement Company and H. H. Crittenden, Its Receiver.

UNITED STATES OF AMERICA, *sct:*

I, Adelaide Utter, Clerk of the Circuit Court of the United States for the Western Division of the Western District of Missouri, do hereby certify that the above and foregoing is a full, true and complete copy of the record, assignment of errors and all proceedings in cause #2468, Cambria Steel Company, complainant, vs. Kansas City Suburban Belt Railroad Company, et al., defendants, in accordance with the præcipes filed by the Guardian Trust Company and the Central Improvement Company upon their appeal from the decree made and entered herein on the 25th day of June, A. D.
1080 1910, as fully as the same remains on file and of record in my office. Copies of said præcipes are hereto attached.

I further certify that the documents numbered as follows in said

præcipes, to-wit: No. 25, Answer of Central Improvement Company to intervening petition of Kansas City Southern Railway Company; No. 35, replication to answer of Central Improvement Company; No. 43 Answer of Central Improvement Company and T. T. Crittenden, Receiver to 2nd amended bill of Swinney, Receiver, and the opinion of the United States Circuit Court of Appeals (No. 54) have never been filed in this court.

Witness my hand as clerk and the seal of said court. Done at office in Kansas City, Missouri, this 27th day of September, A. D. 1910.

[Seal U. S. Circuit Court, Western Division, Western District, Missouri.]

ADELAIDE UTTER, *Clerk.*

Filed Oct. 6, 1910. John D. Jordan, Clerk.

1081 (*Appearance of Messrs. Gates & English as Counsel for Appellants in Cause No.* 3489.)

United States Circuit Court of Appeals, Eighth Circuit.

No. 3489.

CENTRAL IMPROVEMENT COMPANY et al., Appellants,
vs.
CAMBRIA STEEL COMPANY et al.

The Clerk will enter my appearance as Counsel for the Appellants.

EDWARD P. GATES,
GEO. H. ENGLISH, JR.,
1003 *Scarritt Bldg., Kansas City, Mo.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Oct. 10, 1910.

(*Appearance of Messrs. Gates & English as Counsel for Appellee Guardian Trust Co. in Cause No.* 3489.)

The Clerk will enter my appearance as Counsel for the Appellee, Guardian Trust Co.

EDWARD P. GATES,
GEO. H. ENGLISH,
1003 *Scarritt Bldg., Kansas City, Mo.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Dec. 17, 1910.

(Appearance of Mr. Frank Hagerman as Counsel for Appellee Cambria Steel Co. in Cause No. 3489.)

The Clerk will enter my appearance as Counsel for the Appellee, Cambria Steel Co.

FRANK HAGERMAN.

(Endorsed): Filed in U. S. Circuit Court of Appeals on Dec. 17, 1910.

(Motion of Appellant Central Improvement Co. to Dismiss Appeal in Cause No. 3489.)

Comes now the Central Improvement Company and moves to dismiss the appeal heretofore taken in its name and to strike the cause from the docket of this Court for the following reasons:

1082 The decree herein was rendered on June 25th, 1910. On August 10th, 1910, counsel purporting to represent the Central Improvement Company made application to the Circuit Court at Kansas City, Missouri, for an appeal in its behalf. An order was signed by Judge Smith McPherson on August 10th, 1910, allowing the appeal, and approving a supersedeas bond.

Afterwards and on October 8th, 1910, the Central Improvement Company presented an application to the Circuit Court at Kansas City, Missouri, to vacate the allowance of the said appeal, upon the ground that counsel, asking for the appeal in behalf of the said Central Improvement Company, had no authority to represent it. A hearing was accordingly had and the Court found that the said appeal, allowed on August 10th, 1910, was improperly allowed, in that the counsel, purporting to represent the Central Improvement Company, were not in fact authorized to represent it, or appear for it. The orders, allowing the appeal and approving the supersedeas bond, were set aside and vacated. This order was made on October 8th, 1910, at the same term at which said decree of June 25th, 1910, was rendered, and at the same term at which the order allowing the appeal of August 10th, 1910, was entered. A copy of the order, signed by the Honorable Smith McPherson, setting aside and vacating the orders allowing the appeal and approving the supersedeas bond, is herewith attached, marked Exhibit "A". A certified copy of said order of October 8th, 1910, was filed in this Court in December, 1910.

The Central Improvement Company further states that it did not desire to appeal from the said decree of June 25th, 1910, and that it did not authorize any one to take an appeal for it or in its behalf.

CENTRAL IMPROVEMENT COMPANY,
By T. B. BUCKNER, *Its Solicitor.*

STATE OF MISSOURI,
County of Jackson, ss:

J. A. Edson, of lawful age, being duly sworn, upon his oath states that he is President of the Central Improvement Company and makes this affidavit in its behalf; that he has read the foregoing motion and knows the contents thereof, and that the matters and facts therein stated are true.

1083 J. A. EDSON.

Subscribed and sworn to before me this 14th day of April, 1911. My commission will expire October 15th, 1912.

[SEAL.] CLARENCE R. HALL,
Notary Public in and for said State and County.

EXHIBIT "A".

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 2468.

CAMBRIA STEEL COMPANY, Complainant,
vs.
THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Bill.

EDWARD F. SWINNEY, as Receiver of the Kansas City Suburban Belt Railroad Company, and Kansas City Suburban Belt Railroad Company, Complainants.
vs.
CAMBRIA STEEL COMPANY, GUARDIAN TRUST COMPANY, MISSOURI Elevator & Terminal Company, Central Improvement Company, and T. T. Crittenden, Its Receiver; Northern Townsite Company, and Fairmount Amusement Company, Defendants; The Kansas City Southern Railway Company, Intervenor.

Ancillary Bill.

Order.

The Central Improvement Company has presented an application to vacate the allowance of an appeal made on the application
1084 of the said Central Improvement Company on August 10th, 1910. In support of the application the affidavits of J. A.

Edson, President of the Central Improvement Company and of H. H. Crittenden are offered which affidavits are ordered to be filed and made a part of the record herein. Said Central Improvement Company also offers the minute book of said Company of the said Central Improvement Company and the record thereof, which book is ordered to be filed and made a part of the record herein.

In resistance to said motion is offered the affidavit of H. H. Crittenden with the exhibit therein set out, namely, the letter of June 10th, 1910, from him the said Crittenden to Messrs. Gates & English.

Mr. E. P. Gates and Mr. George H. English specially appear to said motion claiming to be authorized to represent the receiver of the Central Improvement Company under the letter set forth in the affidavit of H. H. Crittenden, for the purpose of objection to the jurisdiction of this Court to pass upon said application and for the purpose of objection to the sufficiency of said application to confer jurisdiction on the court or to authorize the vacating of the order allowing the appeal referred to therein.

The said George H. English in open court professionally states to the court that the authority of said Gates & English to take the said appeal on behalf of said Central Improvement Company and said receiver Crittenden or either of them is as found in the decree of June 25th, 1910, and the said letter of June 10th, 1910, and not otherwise or by other authority. The decree herein was entered and ordered of record June 25th, 1910, the same being a day of the regular April term, 1910, of this court, and the said April term is still in session, the court not having yet adjourned for the said term.

There is no charge of bad faith on the part of said attorneys or solicitors in taking said appeal, and there is and has been no bad faith on the part of any one, but the court finds, and does hold that it has full power and jurisdiction to pass upon the application to vacate the order allowing such appeal of the Central Improvement Company, and the court further finds from the inspection of the petition for appeal, and of the assignment of errors, and of
1085 the supersedeas bond, that the attempt was made to appeal from the decree for and on behalf of the Central Improvement Company, only, and the court further finds the fact to be that neither the said Central Improvement Company nor the said H. H. Crittenden granted authority to any attorney or solicitor or other person to take said appeal and the order of this court by Smith McPherson, Judge, of August 10, 1910, allowing the said appeal of said Central Improvement Company or Receiver or either and in approving said bond and directing that said appeal, and bond should act as a supersedeas, were each and all done through inadvertence and without authority and by reason of a mistake of fact by acting upon such petition for appeal, when in truth and in fact neither the said Central Improvement Company, nor H. H. Crittenden had asked for an appeal and had not conferred authority upon anyone to ask for an appeal.

In view of the foregoing the order of August 10, 1910, allowing an appeal to said Central Improvement Company and the whole thereof is hereby vacated and declared for naught.

To each, all and every of which the said E. P. Gates and George H. English claiming to act under the authority of the documents heretofore referred to except on behalf of the receiver of the Central Improvement Company.

(Signed) SMITH McPHERSON, *Judge.*

(Filed October 8th, 1910.)

[Endorsed:] Filed in U. S. Circuit Court of Appeals on Apr. 18, 1911.

(*Proof of Service of Motion to Dismiss Appeal in Cause No.* 3489.)

To Frank Hagerman, Solicitor for Cambria Steel Company:
Messrs. Gates & English, Solicitors for Guardian Trust Company:

You and each of you are hereby notified that the Central Improvement Company has filed in this cause the attached motion to dismiss and strike from the docket the appeal allowed in the name of the Central Improvement Company.

CENTRAL IMPROVEMENT COMPANY,
By T. B. BUCKNER, *Its Solicitor.*

1086 Service of a copy of this notice and motion acknowledged this 17th day of April, A. D. 1911.

FRANK HAGERMAN,
Solicitor for Cambria Steel Co.
EDWARD P. GATES &
GEO. H. ENGLISH, JR.,
Solicitors for Guardian Trust Co.

[Endorsed:] Filed in U. S. Circuit Court of Appeals on Apr. 19, 1911.

(*Counter Motion of Guardian Trust Co. to Motion of Central Improvement Co. to Dismiss Appeal in Cause No.* 3489.)

Comes now the Guardian Trust Company, one of the Appellees in the above entitled cause, and shows to the Court, that the affidavit of H. H. Crittenden, the Receiver of the Central Improvement Company referred to in the order of the Honorable Smith McPherson, Judge, filed October 8th, 1910, which order is attached to the motion of the Central Improvement Company filed herein, is in words and figures as follows, to-wit:

"H. H. Crittenden, of lawful age, being duly sworn, on his oath states, that on June 10th, 1910, he addressed to Messrs. Gates & English, Kansas City, Missouri, a letter of which the following is a copy:—

KANSAS CITY, Mo., June 10", 1910.

Messrs. Gates & English, Kansas City, Mo., Scarritt Bldg.

GENTLEMEN: In response to your letter of June 8", 1910, I beg to say that I took up with Judge Phillips, in company with your Mr. English, the matters referred to therein and under his instructions at said interview, you were authorized by Judge Phillips in my name, as Receiver of the Central Improvement Company, to file and present to the Court such exceptions to the report of the
1087 Special Master and such other matters in connection therewith as in your judgment will best conserve the interests of the Central Improvement Co.

It is understood that the Receivership is to be put to no expense for attorney's fees in the matter.

Very respectfully,

H. H. CRITTENDEN, *Receiver.*"

No revocation of authority conferred in this letter has ever been made by me.

Duly subscribed and sworn to on the 8th day of October, before a Notary Public."

This Appellee further shows to the Court that it is interested in the appeal of said Central Improvement Company by reason of the following facts, namely:

The said Central Improvement Company is a corporation organized under the laws of the State of Missouri, and having an authorized capital stock of Two Hundred Thou-and ($200,000.00) Dollars, of which capital stock, 1,407 shares have been issued and are outstanding. Of said outstanding stock, 1,120 shares were pledged by the Kansas City Suburban Belt Railroad Company, the former owner thereof, to said Guardian Trust Company, as collateral security for an indebtedness owing by said Belt Company to said Trust Company.

In the final decree in the cause from which said appeal is taken, the validity of the indebtedness from said Belt Company to said Trust Company, is affirmed, and the right of the Trust Company to subject said shares of stock to the satisfaction thereof is likewise affirmed. But as a part of said decree, all the property of said Central Improvement Company described in said decree, was ordered to be conveyed to the Kansas City Southern Railway Company, thus rendering said shares of stock so pledged as aforesaid, worthless to said Trust Company.

The legal title to said 1,407 shares, or substantially all of them which were formerly owned by said Belt Company, was acquired by said Kansas City Southern Railway Company in connection with the foreclosure of the mortgages upon the property of said Belt Company, and all of said shares, or substantially all of them, are now held and voted by said Kansas City Southern Railway Company, or its employees or in its interest, subject however to the pledge of said
1088 1,120 shares as found in the final decree herein.

Said final decree having directed the conveyance of the

property of said Central Improvement Company described in said decree, to said Southern Company, it is impossible for said Trust Company to obtain the consent of said Central Company to except to or appeal from, said final decree. Said Trust Company therefore, believing said decree was erroneous and prejudicial to its interests, sought to have said decree reviewed as respects said Central Improvement Company lands, through the Receiver of said Central Improvement Company.

Said Trust Company, through its solicitors, requested said Receiver to except to the Master's report filed herein, and requested said Receiver to authorize the solicitors of said Trust Company to appear for him in said matter and in such other matters as in their judgment would be deemed best for the interest of said company, and said Receiver did give them the authority so to do, as shown in said affidavit and letter of said Receiver hereinbefore set forth.

Your petitioner further shows to the Court, that it is of the opinion, that said decree, as respects the properties of said Central Improvement Company, is erroneous for the reasons heretofore stated in the brief of your petitioner and of said Central Company heretofore filed in this Court.

Your petitioner therefore prays the Court, that if the Court is of the opinion that said letter of said Receiver was insufficient to constitute authority for taking said appeal, that it direct said Receiver to ratify and confirm all the acts of said solicitors of said Guardian Trust Company in taking the appeal for said Central Improvement Company, to the end that a full hearing of said matters may be had upon the appeal of said Central Improvement Company.

GUARDIAN TRUST COMPANY,
By EDWARD P. GATES &
GEO. H. ENGLISH, JR.,
Its Solicitors.

STATE OF MISSOURI,
County of Jackson, ss:

George H. English, Jr. of lawful age, being duly sworn, states on his oath, that he is solicitor and agent for said Guardian Trust Company, Appellee, and makes this affidavit in its behalf, and
1089 that the matters and things in the foregoing counter motion are true.

GEORGE H. ENGLISH, JR.

Subscribed and sworn to before me, this 22nd day of April, 1911.

[SEAL.] SILAS EMMET SKELLEY,
Notary Public.

My commission expires Feb. 28, 1914.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Apr. 24, 1911.

(*Notice of Counter Motion Filed by Guardian Trust Co. and Acceptance of Service in Cause No.* 3489.)

You, the above named Appellants and Appellees, will take notice, that the Guardian Trust Company, Appellee herein, has filed in the above entitled matter, a counter motion to the motion of the Central Improvement Company to dismiss the appeal, a copy of which is herewith furnished you.

GUARDIAN TRUST COMPANY.
By EDWARD P. GATES &
GEO. H. ENGLISH, JR.,
Its Solicitors.

Service of the above notice and receipt of a copy of the motion referred to therein is hereby accepted, this 21st day of April, 1911.

CENTRAL IMPROVEMENT COMPANY.
By T. B. BUCKNER, *Its Solicitors.*
FRANK HAGERMAN,
Solicitors for the Parties Represented by Them.
S. W. MOORE,
Solicitors for the Parties Represented by Them.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Apr. 24, 1911.

1090 *Suggestion of Diminution of Record and Motion of Cambria Steel Co. for Writ of Certiorari.*)

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 3489.

CENTRAL IMPROVEMENT COMPANY et al., Appellants,
v.
CAMBRIA STEEL COMPANY et al., Appellees.

No. 3490.

GUARDIAN TRUST COMPANY, Appellant,
v.
CAMBRIA STEEL COMPANY et al., Appellees.

Suggestion of Diminution of Record.

Now comes the Cambria Steel Company, an appellee, and respectfully shows:

1. Upon the hearing before the master, as shown by his transcript of the evidence returned with his report contained in the record

herein, the following, found on pages 8315 and 8316 of volume 16, appears as part of the proceedings in the cause:

"Monday, January 30th, 1905,—10 A. M. On Monday, the 30th day of January, 1905, at 10:00 o'clock A. M., the master re-
1091 sumed the hearing of this cause, at the offices of the Kansas City Southern Railway Company, Thayer Building, northwest corner 9th and Broadway, and the following proceedings were had, to-wit:

'The MASTER: I will announce, gentlemen, that I make an order fixing the time for the taking of testimony in this cause, commencing each day at 10 o'clock A. M., and running until 1 o'clock P. M., and commencing again at 3 o'clock P. M. and running until 6 o'clock P. M.'

"Whereupon, and at the request of Mr. S. W. Moore, on account of his enforced absence from the city, the master adjourned the further hearing in this cause until Thursday, the 2nd day of February, 1905, at 10 o'clock A. M., then to be resumed at the same place.

THURSDAY, February 2nd, 1905, 10 A. M.

On Thursday, the 2nd day of February, 1905, at 10 o'clock A. M., at the same place, the master resumed the hearing of this cause, and the following further proceedings were had, to-wit:

'Mr. HAGERMAN: Before you proceed with this matter, I want to make this statement. So far as the Kansas City Suburban Belt Railroad Company, or the Receivers of the Kansas City Suburban Belt Railroad Company are concerned, in this accounting, I have no longer any connection with it; but, something has been said in the course of conversation, by Mr. Rosenberger, in regard to serving notices, which made me think it would probably be better for me to come here at this hearing, so that Your Honor and these gentlemen will have no misunderstanding in regard to the Cambria case. As I understand it, this accounting is between the Kansas City Suburban Belt Railroad Company and the Trust Company. The notices served, have all been entitled in the Cambria case; and, there is a stipulation on file in the case, which practically leaves the Cambria Company out of it until this accounting is all ended. I apprehend—the stipulation, in effect, so provides, that if upon the accounting it is shown or found there is a balance due the Suburban Belt Company or its Receivers, then the question is open,—it is open for us then to try the question whether that balance should not be subjected to the creditor's bill of the Cambria Company. Another question which will then arise, is, suppose a lot of this collateral on hand ought to be released, that is, released or freed from the particular pledge under which it is held; then, the question will arise whether it is not subject to the creditor's bill,—or, whether it can be held under the mortgage, or under the pledge. But, so far as this particular
1092 accounting is concerned, those questions between the Cambria Company and those parties cannot arise until after the testimony is taken. I simply wanted to come here and state my position, so that there would be no misunderstanding as to my not appearing in the future.

None of the counsel made any objection or reply to the statement. Whereupon, the master stated—'that is my understanding of the matter.'"

2. The said proceedings above set out are material parts of the record herein upon the question whether the court below was right in adjudging that this appellee pay no further costs, yet they do not appear in the transcript filed herein. The solicitor for the other parties hereto, except the Guardian Trust Company, prior to this term, signed a stipulation that the record should be amended in this respect. Said stipulation was submitted to counsel for the Guardian Trust Company, who promised to look into the matter, but upon April 28, 1911, they notified appellee that they would not so stipulate. Wherefore, this suggestion of diminution of record is made accompanied by the certificate of the clerk of the court, below, and a writ of *certiorari* asked to perfect the record in this respect.

FRANK HAGERMAN,
Solicitor for Cambria Steel Company, Appellee.

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, ss:

Adelaide Utter, Clerk of the Circuit Court of the United States in and for said division and district, hereby certifies that the foregoing matter quoted from pages 8315 and 8316 of volume 16 of the evidence returned by the special master with his report in these cases in the court below, is correct as same appears of record in my office.

[SEAL] ADELAIDE UTTER, *Clerk.*

1093 Received copy this May 1st, 1911.

S. W. MOORE,
Solicitor for parties represented by him.

EDWARD P. GATES,
GEO. H. ENGLISH, JR.
Solicitors for Guardian Trust Company.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on May 4, 1911.

1094 In the United States Circuit Court of Appeals, Eighth Circuit.

Number 3489.

CENTRAL IMPROVEMENT COMPANY et al., Appellants,
vs.
CAMBRIA STEEL COMPANY et al., Appellees.

Number 3490.

GUARDIAN TRUST COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al., Appellees.

Suggestions of Guardian Trust Company in Opposition to Application for Writ of Certiorari of Cambria Steel Company, Appellee.

Now comes Guardian Trust Company, a party to the above entitled causes, and respectfully shows to the court, that the writ of certiorari asked by the Cambria Steel Company herein should not be granted for the following reasons, to-wit:

1095 I.

None of the matters and things set forth in said portion of the record embraced in said application are material to this hearing or necessary for the hearing on appeal.

II.

Said portion of the record is incomplete, in that it fails to set forth the entire transaction therein referred to. Said transaction was as follows, namely:

MONDAY, January 30th, 1905—10 a. m.

On Monday, the 30th day of January, 1905, at 10 o'clock a. m., the master resumed the hearing of this cause, at the office of the Kansas City Southern Railway Company, Thayer Building, northwest corner Ninth and Broadway, and the following proceedings were had, to-wit:

The MASTER: I will announce, gentlemen, that I make an order fixing the time for the taking of testimony in this cause, commencing each day at 10 o'clock a. m. and running until 1 o'clock p. m., and commencing again at 3 o'clock p. m., and running until 6 o'clock p. m.

Whereupon, and at the request of Mr. S. W. Moore, on account of his enforced absence from the city, the master adjourned the further hearing of this cause until Thursday, the 2nd day of February, 1905, at 10 o'clock a. m., then to be resumed at the same place.

1096 "THURSDAY, February 2nd, 1905—10 a. m.

On Thursday, the 2nd day of February, 1905 at 10 o'clock a. m. at the same place, the master resumed the hearing of this cause, and the following further proceedings were had, to-wit:

Mr. HAGERMAN: Before you proceed with this matter, I want to make this statement. So far as the Kansas City Suburban Belt Railroad Company, or the receivers of the Kansas City Suburban Belt Railroad Company are concerned, in this accounting, I have no longer any connection with it; but, something has been said in the course of conversation, by Mr. Rosenberger, in regard to serving notices, which made me think it would probably be better for me to come here at this hearing, so that Your Honor and these gentlemen will have no misunderstanding in regard to the Cambria case. As I understand it, this accounting is between the Kansas City Suburban Belt Railroad Company and the Trust Company. The notices served have all been entitled in the Cambria case; and, there is a stipulation on file in the case, which practically leaves the Cambria Company out of it until this accounting is all ended. I apprehend—the stipulation, in effect, so provides, that if upon the accounting it is shown or found there is a balance due the Suburban Belt Company or its receivers, then the question is open—it is open for us to then try the question whether that balance should not be subjected to the creditor's bill of the Cambria Company. Another question which will then arise, is, suppose a lot of this collateral on hand

1097 ought to be released, that is, released, or freed from the particular pledge under which it is held; then the question will arise whether it is not subject to the creditor's bill, or, whether it can be held under the mortgage, or under the pledge. But so far as this particular accounting is concerned, those questions between the Cambria Company and those parties can not arise until after the testimony is taken. I simply wanted to come here and state my position, so that there would be no misunderstanding as to my not appearing in the future.

None of the counsel made any objection or reply to the statement. Whereupon, the master stated, "that is my understanding of the matter."

Mr. ROSENBERGER: I understand that you still desire that all notices of motions be served on you

Mr. HAGERMAN: I think you had better do that. I have no objection to signing any notices you may have and any acceptance of notices that affect the general merits of the case.

Mr. ROSENBERGER: I want to know whether you want to be served with all notices?

Mr. HAGERMAN: Yes, I think that would be the better way. You will have no trouble—they will all be accepted. But sometimes, in order to serve the Cambria Company, I might want to be present. It will be no more trouble in sending out the notices. Mine will only be a carbon copy of the one to Mr. Moore."

The following stipulation, which is the only one bearing on the subject mentioned by Mr. Hagerman, is on file in said cause:

1098 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

Bill.

In Equity.

CAMBRIA STEEL COMPANY, Complainant.

vs.

THE KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, UNION Terminal Railroad Company, Kansas City & Independence Air Line, Guardian Trust Company, Missouri Elevator and Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company, Defendants.

Cross Bill.

STUART R. KNOTT and EDWARD F. SWINNEY, as Receivers of the Kansas City Suburban Belt Railroad Company, Complainants,

vs.

GUARDIAN TRUST COMPANY and FRANCIS M. BLACK, Its Receiver; Missouri Elevator and Terminal Company and Wash Adams, Its Receiver; Central Improvement Company and Wash Adams, Its Receiver; Second Street Improvement Company, Fairmount Amusement Sompany, and Northern Townsite Company, Defendants.

Stipulation.

It is hereby stipulated and agreed by and between Stuart R. Knott and Edward F. Swinney, receivers of the Kansas City Suburban Belt Railroad Company, complainants in the cross bill in the above
1099 entitled cause, and the defendants, the Guardian Trust Company and Francis M. Black, its receiver, Second Street Improvement Company and Cambria Steel Company, as follows:

First. That the said complainants shall withdraw or dismiss their cross bill heretofore filed herein, and shall file an amended cross bill, in the nature of an ancillary bill in this cause, making the Kansas City Suburban Belt Railroad Company a co-plaintiff with them in said amended ancillary cross bill, and also making the Cambria Steel Company, the complainant in the original bill herein, a defendant in said amended ancillary cross bill, and that said amended ancillary cross bill shall be filed on or before the 15th day of November, 1901, and that the defendants, the Guardian Trust Company and its receiver and the Second Street Improvement Company and the Cambria Steel Company, shall have leave to plead or answer to said amended ancillary cross bill, on or before the first Monday in December, 1901.

Second. That the accounting between the Kansas City Suburban Belt Railroad Company and its receivers and the Guardian Trust Company and its receiver, sought by the said amended ancillary

cross bill, shall be expended by all of the parties hereto, and whatever balance, if any, that may be found due to the said Guardian Trust Company or its receiver, from the said Kansas City Suburban Belt Railroad Company or its receivers shall be entered up in this cause as a judgment in favor of the said Trust Company and its receiver and against the Suburban Belt Railroad Company and its receivers without the necessity of presenting any claim therefor by way of cross bill; or other affirmative pleading; and whatever balance, if any that may be found due to the said Suburban Belt Railroad Company, or its receivers, from said Guardian Trust
1100 Company or its receivers, shall be entered up in this cause as a judgment in favor of the said Kansas City Suburban Belt Railroad Company and its receivers, and against the Guardian Trust Company and its receiver.

Dated this — day of November, 1901.

STUART R. KNOTT AND
EDWARD F. SWINNEY,
Receivers of the Kansas City Suburban Belt Railroad Co.,
By THOMAS R. MORROW,
S. W. MOORE,
Their Solicitors.
GUARDIAN TRUST COMPANY AND
FRANCIS M. BLACK,
Its Receiver.
F. M. BLACK AND
TRIMBLE & BRALEY,
Its Solicitors.
SECOND STREET IMPROVEMENT COMPANY,
By TRIMBLE & BRALEY,
Its Solicitors.
CAMBRIA STEEL COMPANY,
By —— ——, *Its Solicitors.*

I consent and agree to the foregoing stipulation with the understanding that it shall in no wise prejudice the right, if any, which the Cambria Steel Company has to subject any debt found to be due from the Guardian Trust Company, or to subject any property or collateral or the proceeds thereof, heretofore or now in the
1101 hands of the Guardian Trust Company or its receiver, or its or his assigns, and all the testimony introduced by any party herein shall be with the understanding that the Cambria Steel Company can, if it so desires, use the same upon final hearing of its bill in the case above entitled.

FRANK HAGERMAN,
Solicitor for Cambria Steel Co.

III.

Wherefore, your petitioner prays the court that the application of the said Cambria Steel Company for a writ of certiorari be not

granted, or that if the same be granted, that the same be granted only upon condition that the entire portion of the record hereinbefore set forth be certified by the clerk of the court.

(Signed) EDWARD P. GATES &
GEO. H. ENGLISH, JR.,
Solicitors for Guardian Trust Company.

UNITED STATES OF AMERICA,
Western Division of the Western
District of Missouri:

I, Adelaide Utter, clerk of the Circuit Court of the United States in and for said division and district, do hereby certify that the foregoing matter quoted from pages 8315, 8316, 8317 and pages 8322, 8323 and 8324 of Volume 16 of the evidence returned by the Special Master with his report in these causes in the court below, is correct as the same appears of record in my office.

[SEAL.[(Signed) ADELAIDE UTTER, *Clerk.*

1102 STATE OF MISSOURI,
County of Jackson, ss:

George H. English, Jr., of lawful age, being duly sworn, upon his oath states that he is agent and attorney for Guardian Trust Company, and makes this affidavit in its itself, and that the matters and things set forth in the foregoing instrument are true as therein stated.

(Signed) GEO H. ENGLISH, JR.

Subscribed and sworn to before me this 4th day of May, 1911.

(Signed) SILAS EMMETT SKELLEY, [SEAL.]
Notary Public.

My term expires the 28th day of Feb., 1911.

Received copy this May 4th, 1911.

(Signed) S. W. MOORE,
Solicitor for Parties Represented by Him.

(Signed) FRANK HAGERMAN,
Solicitor for Cambria Steel Co.

(Signed) T. B. BUCKNER,
Solicitor for Central Improvement Co.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on May 6, 1911.

1103 (*Appearance of Mr. Samuel Untermyer for Certain Appellees, in Cause No.* 3489.)

No. 3489.

CENTRAL IMPROVEMENT COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al.

The Clerk will enter my appearance as Counsel for the Appellees (except Cambria Steel Co.).

SAM UNTERMYER.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on May 26, 1911.

(*Motion to Dismiss Submitted in Cause No.* 3489, *to Be Considered with Cause on Merits.*

May Term, 1911.

FRIDAY, May 26, 1911.

In this cause the motion of appellees to dismiss the appeal herein having been called to the attention of the Court, it is now here ordered by the Court that said motion to dismiss be taken as submitted to be argued and considered with the cause on the merits.

(*Order that Portions of Record of Circuit Court Printed in Suggestions of Guardian Trust Co., Filed May* 6, 1911, *Be Taken as Part of Record in Circuit Court of Appeals.*)

May Term, 1911.

FRIDAY, May 26, 1911.

No. 3489.

CENTRAL IMPROVEMENT COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al.

and

No. 3490.

GUARDIAN TRUST COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al.

The above entitled causes came on to be heard upon the suggestion of a diminution of record and motion of the Cambria Steel Company for a writ of certiorari.

On consideration whereof, and in pursuance of the agreement of counsel in open Court, it is now here ordered by this Court that the portion of the record of the said Circuit Court, as set out and
1104 printed in the suggestions of the Guardian Trust Company in opposition to the application for a writ of certiorari filed herein, shall be taken and considered by the Court as a part of the transcript of the record in this cause.

(*Order of Argument of Question of Taxation of Costs Against Cambria Steel Co.*)

May Term, 1911.

FRIDAY, May 26, 1911.

In the above entitled causes the question as to the liability of the Cambria Steel Company for costs was argued by Mr. Frank Hagerman in behalf of the Cambria Steel Company by permission of the Court, in advance of the argument on the merits.

(*Order of Argument on Merits.*)

May Term, 1911.

FRIDAY, May 26, 1911.

The above entitled causes having been called for hearing on the merits, argument was commenced by Mr. George H. English, Jr. for the appellants, and the hour for adjournment having arrived further argument is postponed until tomorrow.

(*Order of Submission on Merits.*)

May Term, 1911.

SATURDAY, May 27, 1911.

The above entitled causes having been called for further hearing, argument was continued by Mr. George H. English, Jr. for appellants, by Mr. Samuel Untermyer and Mr. Samuel W. Moore for appellees and concluded by Mr. Edward P. Gates for appellants.

Thereupon, these causes were submitted to the Court on the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(*Appearance of Messrs. Gates & English as Counsel for Appellant in Cause No.* 3490.)

No. 3490.

1105 GUARDIAN TRUST COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY *et al.*

The Clerk will enter my appearance as Counsel for the Appellant.

EDWARD P. GATES,
GEO. H. ENGLISH, JR.,
1003 *Scarritt B'ld'g. Kansas City, Mo.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Oct. 10, 1910.

(*Appearance of Mr. S. W. Moore as Counsel for Appellees K. C. Sub. Belt Ry. Co. et al. in Cause No.* 3490.)

The Clerk will enter my appearance as Counsel for the Appellees, K. C. Sub. Belt Ry. Co. et al.

S. W. MOORE.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Dec. 13, 1910.

(*Appearance of Mr. Frank Hagerman as Counsel for Appellee Cambria Steel Co. in Cause No.* 3490.)

The Clerk will enter my appearance as Counsel for the Appellee, Cambria Steel Co.

FRANK HAGERMAN.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Dec. 17, 1910.

(*Appearance of Mr. Samuel Untermyer as Counsel for Certain Appellees in Cause No.* 3490.)

The Clerk will enter my appearance as Counsel for Appellees (except Cambria Steel Company).

SAM. UNTERMYER.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on May 26, 1911.

1106 (*Petition of Edward A. Shedd et al. for Leave to File Additional Briefs.*)

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 3490.

GUARDIAN TRUST COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al., Appellees.

No. 3489.

CENTRAL IMPROVEMENT COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al., Appellees.

Petition for Leave, etc.

And now come Edward A. and Charles B. Shedd and Robert H. Law and show to the court that they are residents of the City of Chicago, Illinois; that they are stockholders in the Guardian Trust Company, said Shedd and Shedd having $66,700 par value and said Law $15,000 par value of said stock, the total outstanding stock of said Trust Company being about $2,200,000, and they petition for leave to file additional briefs herein in support of the appeal of the Guardian Trust Company.

1107 Said petition is based upon the following grounds:

1. The decree of the court below, entered in June, 1910, awarded the said Trust Company a judgment against the Kansas City Suburban Belt Railroad Company of $639,658.86, which with interest and the costs involved now amounts to over $700,000.

It appears from the record that said Belt Company is a defunct company, the assets of which were acquired by the Kansas City Southern Railway Company over ten years ago under a reorganization or consolidation plan, the essential provisions of which (including the depositors' agreement annexed thereto) are set out in the master's report herein (Pr. Rec., 942-955).

The lower court found in its decree that the said Southern Company was not liable for the Belt Company debts.

The first assignment of error herein is the only one bearing upon this issue, viz.:

"1st. That the court erred in including in said decree the finding that the Southern Company did not assume or agree to pay or become liable for the indebtedness owing by the Belt Company to the Trust Company."

The briefs filed on behalf of the Trust Company do not fully argue said first assignment of error:

In that said briefs present only the question of the right or propriety of the Circuit Court making a finding upon the question of

the liability of the said Southern Company; whereas it is not argued in the alternative that said finding or ruling is in fact erroneous and wrong on the merits.

1108 2. That said ruling is wrong, and that the said Southern Company is so liable upon each of two separate and independent grounds, viz.:

1st. By virtue of the fact that said Southern Company is a consolidation of said Belt Company, as shown by the plan of reorganization and the provisions therein for the exchange of stock;

2d. By virtue of an express promise in said plan to pay the floating debt of the reorganized companies; in that it is announced in said plan inviting the deposits of stocks and bonds of the old companies that one of the "results to be attained" by the plan would be

"(*b*) The payment of the floating debt and the existing car trust company obligations;"

thus showing an election on the part of the reorganizers to recognize the floating debt of the old companies in reorganizing them into the new one.

3. That there will be occasioned by the allowance of this application no substantial surprise to the counsel for said Southern Company, nor will any new burden be placed upon them because:

Elaborate and thoroughly prepared briefs bearing upon this question were prepared in 1905 and 1907 by a former counsel of the Trust Company, Harry S. Mecartney, Esq., of Chicago, while he had charge of the present case in the court below, the first having been filed before the master in June, 1905, and the second, a complete revised brief, having been filed before him in June, 1907.

That there was also prepared at the expense of the Trust Company an opinion on said reorganization plan by C. O. Tichenor,

1109 Esq., of Kansas City, Mo., in November, 1905.

That the said counsel for the Southern Company, Samuel W. Moore, Esq., filed a printed brief on said issue before the master in the fall of 1906, and also in the fall of 1907, a second printed brief in answer to the second or revised brief of Mr. Mecartney.

That it is proposed to file herein only the said opinion of Mr. Tichenor and the said second or revised brief of said counsel, Mr. Mccartney, with a short abstract of the master's rulings on said issue.

4. If, therefore, as the case at present stands this court should hold that since the issue of the liability of said Southern Company was expressly raised in the answer of the Guardian Trust Company to the intervening petition of said Southern Company; since it was an issue so germane and so vital that, if decided in favor of the Trust Company, it would of itself alone have disposed of the entire case of the Southern; and since evidence was introduced on said issue by both parties, etc., etc., the master had a right to make a finding in respect thereto, and that the lower court had, therefore, a right to make a finding in respect thereto—as the counsel for the Southern Company contends herein—it will then of necessity follow, if the

merits of said ruling be not gone into, that the Trust Company will lose its right to a decree against the Southern Company for over $700,000.

It appears from the briefs as well as from the record, that the Guardian Trust Company commenced three suits against the
1110 Southern in the Jackson County (State) Court at Kansas City to recover of the Southern as successor of the Belt the notes originally issued by the Belt. These are still pending. If the finding of no liability remains in this record the Southern will of course plead res judicata to these pending claims.

It is true that there is a claim on the part of the Trust Company to some collateral which the decree of the Circuit Court denies to it; and by which if it reverses—and only in case it reverses—such decree it will be apt to realize a portion of this claim—stated on the oral argument to be $300,000 to $400,000; but even as to such collateral and in such case said Trust Company is liable to be put to great delay, expense and complications in collecting or realizing upon the same.

Wherefore, petitioners submit affidavits and suggestions in support hereof, and pray for leave to file the opinion, brief and abstract of the master's ruling presented herewith, as well as a complete copy from the record in this case of the said reorganization plan.

Respectfully submitted,

NEWELL H. CLAPP,
ENOCH J. PRICE,
Counsel for Edward A. and Charles B. Shedd and Robert H. Law.

1111 *Affidavit of Charles B. Shedd.*

STATE OF ILLINOIS,
County of Cook, ss:

Charles B. Shedd, being duly sworn, deposes and says that he and his brother, Edward A. Shedd, have been for more than seven years last past stockholders in the Guardian Trust Company of Kansas City, Missouri, and holding therein in common a total of 667 shares, or $66,700 par value of the stock of said company, the total par issue of which is about $2,200,000. That Robert H. Law is the owner of 150 shares of said stock.

Affiant further says that the present suit, represented in the appeal of the Guardian Trust Company, involves a claim against the Kansas City Southern Railway Company, including interest and costs of over $700,000, or nearly one-third of the capital stock, and being equal to or exceeding the value of all of the assets of said company other than said claim.

Affiant further says that if the said decree of the Circuit Court in this case is sustained it will make a difference to the applicants as stockholders in the Guardian Trust Company of about $25,000.

Affiants further say and show to the court that, as they are advised by counsel, the said claim against the Kansas City Southern

Company is a good and valid claim and is clearly sustainable in law and equity. That the decree of the court below following the report
1112 of the special master has awarded the Guardian Trust Company judgment for all its claims (less a few small conceded off-sets) amounting to $639,658.86, against the Kansas City Suburban Belt Railway Company, but the assets of which company were absorbed about ten years ago by the Kansas City Southern Company under its reorganization plan. Hence, the said judgment, outside of the collateral securing the claims, is worthless.

Affiant further states that from the beginning of said cause until about December 6, 1904, or thereabouts, the Guardian Trust Company was represented in the litigation in the court below in this case by J. McD. Trimble, Esq., who was then succeeded by one Harry S. Mecartney, Esq., a counselor at law of Chicago, Illinois, who continued in charge of said litigation with Jules C. Rosenberg, Esq., of Kansas City as his local assistant counsel. Said Mecartney was succeeded on or about March 27, 1908, by Messrs. Gates and English, the present counsel.

That in the course of his said employment said Mecartney obtained an opinion of C. O. Tichenor, Esq., of Kansas City, upon the merits of the question of the liability of the Southern Company for said Belt Company debt, printed copies of which were furnished the directors (of which affiant was one) and the executive committee of said Trust Company in the fall of 1905, and presents herewith a printed copy of said opinion, which sustains the said claim of liabilty.

That said Mecartney also prepared a brief upon said issue and a later revised brief thereon.

That affiant is informed and believes that copies of said opinion of Mr. Tichenor and of said briefs are in possession of said
1113 Guardian Trust Company's counsel, who have presented the present appeals to this court, but they have declined to either present a brief of their own or to use said opinion or brief upon said issue.

Affiant further says that he only learned on or about May 14th or 15th, 1911, of the situation in respect to said appeal of said Trust Company in the Court of Appeals, and that the attention of the said counsel, Messrs. Gates and English, had been called to the same by said Mecartney and suggestion made that the briefs be filed upon said liability issue. That affiant immediately thereafter, and on May 20th, ult., retained counsel on behalf of himself and brother and said Law to look into said matter and present briefs and arguments thereon; but was advised that it was impossible to prepare the proper papers and application before the oral argument in said cause, which was set for four days later, the 24th of May.

Affiant further says that this litigation was instituted by and in the name of the Kansas City Suburban Belt Railroad Company at a time when practically all of its stocks and bonds had been deposited in pursuance of the reorganization plan which involved said company and its constituent companies, along with the Kansas City, Pittsburgh & Gulf Company; and that at the time thereof, as the

record shows herein, the said Southern Company and the reorganization committee,—which was practically identical in interest and in power with the said Southern Company,—had control of said Belt Company and all of its assets, and instigated this litigation.

1114 That shortly after the said suit had been commenced, John W. Gates and others who were minority stockholders in the Guardian Trust Company and of dominating influence with said Kansas City Southern and reorganization committee,—said Gates and his counsel, Max Pam, being members of said committee,—commenced a stockholders' suit in the name of one Bierce against said Trust Company, and a receiver for said company was appointed in said Bierce case, which affiant is informed was mentioned in the oral arguments in this case. Said receiver was discharged in 1902.

That after said receiver had been appointed the Guardian Trust Company ceased doing business as an active concern, and has not done business since, except to liquidate its assets.

That after a long factional contest and in October, 1905, one John A. Prescott,—who had represented said Gates and others as to their stock interests in the Guardian Trust Company,—got control of said Trust Company by virtue of a liquidating contract, and that said Prescott has been in control of said company since, and liquidating its assets under the formal direction of an executive committee.

Affiant further says that the stockholders of said Trust Company are widely scattered, there being at last accounts received by him about 400 in number; and it would be impossible to assemble a large number of them to join in the application now made without great effort and expense, especially since most of them have become discouraged on account of the long and oppressive

1115 Belt litigation and the court conditions under which it has been carried on; and that since, as he is advised, this application must be made quite early and as promptly as possible, there is not the time requisite to enlist them in any new movement to protect their interests herein by joining in this application.

That said Messrs. Gates and English (who are the regular counsel for said Trust Company), with said Prescott and Mr. E. C. Wright, his personal counsel and business associate,—all located at Kansas City—constitute four of the five members of the executive committee of the Guardian Trust Company. That the fifth member of said executive committee, Mr. A. E. Stilwell (who is a resident of New York City), is and has been for many years engrossed as the chief promoter and manager of the Kansas City, Mexican & Orient Railway and has been able to give but little time to the affairs of said Trust Company, and affiant believes is not advised of the precarious situation in respect to said appeal. That, therefore, any further application by affiant to the officers of said Guardian Trust Company to cause said briefs to be filed would be useless, even were there time allowed therefor.

CHARLES B. SHEDD.

Subscribed and sworn to before me this 12th day of June, 1911.

N. R. WAKEFIELD, JR.,
Notary Public.

1116 STATE OF ILLINOIS,
County of Cook, ss:

Harry S. Mecartney, being duly sworn according to law, doth depose and say that he is and has been for nearly thirty years last past a practicing lawyer, with headquarters in Chicago, Illinois.

That on December 6, 1904, affiant was retained in the litigation pending in the United States Circuit Court at Kansas City, between the Kansas City Suburban Belt Railroad Company as complainant and Guardian Trust Company, defendant, and the Kansas City Southern Railway Company, intervenor therein, affiant succeeding the Honorable J. McD. Trimble as counsel for said Guardian Trust Company.

That affiant continued in charge of said litigation until March 27, 1908, when he was succeeded therein by Messrs. Gates & English, who represent said Guardian Trust Company in the present and pending appeal in the United States Circuit Court of Appeals of the Eighth Circuit.

Affiant further states that in the summer and early fall of 1905 he prepared and printed a brief and argument on the question of the liability of said Southern Company for the floating debt of the Belt Company and other companies which had been merged by the reorganization agreement of 1899 into the Kansas City Southern Railway Company. That he obtained for the benefit and at the expense of said Guardian Trust Company an opinion from Honorable C. O. Tichenor, a leading lawyer of Kansas City and Missouri, the effect of which was to sustain said claim
1117 of liability upon two independent grounds, namely (1), that said Southern Company was a consolidation of said Belt Company and other companies, and also (2), that the plan of reorganization contained an express election or promise to pay such debts; which conclusions were also the contentions asserted in affiant's said brief.

That affiant in due course had said opinion printed and copies mailed to each of the directors of the Guardian Trust Company early in November, 1905.

Affiant further says that said cause referred to above, was argued before the special master, Shannon C. Douglas, in July, 1906, and that said Southern Company through its counsel, S. W. Moore, Esq., of Kansas City, presented a long printed brief upon said issue of consolidation and liability to pay the Belt Company's debts, exceeding 100 pages.

That after said arguments had been closed and while the cause was pending before said Master Douglas in June, 1907, affiant prepared an additional and revised brief on said issue, labeled "Supplemental Argument on Intervention Issues and on Cross Bill to be Filed," in which the conclusions were again reached that said

Southern Company was liable for the debts of said Belt Company, as outlined in the prior brief of affiant and in said Tichenor's opinion. Affiant had intended to file a cross-bill in said cause upon said issue.

That after this brief had been filed before said master in the spring of 1907, said S. W. Moore, Esq., presented a printed brief in reply thereto exceeding some 50 pages, to which affiant made no further reply.

1118 Affiant further states that subsequent to his leaving the case in March, 1908, he has had nothing whatever to do with this litigation, and did not keep track of the same; but that about May 1st last he learned in consultation with said Trimble that the present counsel had not argued the merits of said question of liability upon the present appeal, and later obtained from said Trimble a copy of the brief of the Guardian Trust Company, appellant in said cause.

That he later examined the record at Kansas City and had various copies made of some extracts thereof, and finally reported to Messrs. Shedd and Law, petitioners herein, on or about May 16, 1911, the situation in respect to said appeal, and also the jeopardy in which, according to affiant's judgment, the said cause had been placed by the manner of its presentation; and that on May 18, 1911, he had a further consultation with them, immediately after which they retained counsel for the purpose of presenting further briefs to said Court of Appeals.

Affiant further states that at their request and instance he attended the oral argument lately had in St. Paul in said case and took full notes thereof, and had the same written up and presented to the counsel herein for said Shedd and Law. That he has attempted to the extent of his ability to assist said counsel in understanding said record and in preparing said motion.

Affiant further states that on or about May 4, 1911, he fully explained to Messrs. Gates & English what he considered the danger in the way said appeal had been presented, and about

1119 that time furnished them with additional printed copies of the said opinion of Mr. Tichenor and of the said briefs prepared by him in 1905 and 1907, as hereinabove stated. That he also suggested that said briefs be filed in time for the coming argument, unless said counsel chose to file briefs of their own upon said issue. That the cause has been presented without any attempt on the part of said counsel to present such briefs of their own or to file the said briefs and opinion which had been prepared at great labor at the expense of the Guardian Trust Company.

Further affiant saith not.

HARRY S. MECARTNEY.

Subscribed and sworn to before me this 12th day of June, A. D. 1911.

N. R. WAKEFIELD, JR.,
Notary Public.

1120 *Suggestions in Support of Above Petition.*

This record presents a case where, as it is believed, some $700,000 has been put in jeopardy by the manner of the presentation of the present appeal lately heard on oral agreement.

The stockholders applying for leave have done nothing to bring about this state of affairs and failed in no duty which would have obviated it.

It is, therefore, a question of a clear loss to them alone of quite a snug fortune.

The application has two alternative bases, viz.:

I. That its equity appears alone upon the face of the issues of the pending appeal proper and of the briefs lately filed.

II. That if this be not sufficient in itself—and to aid the court only in case of doubt—the issue now pending is a branch or adjunct of a long litigation abnormally oppressive to the Trust Company, and is apt to result in an unjust ending of the same; and hence indulgence of the application is doubly warranted by the briefest survey of the entire record.

As this court has learned from the briefs filed and the late oral arguments, the original bill was filed in September, 1900, by the Cambria Company as a creditor of the Belt Company, against the latter and the Guardian Trust Company and other companies, praying for a receiver for the Belt Company, who, as it
1121 was prayed, should file a bill for an accounting on behalf of the Belt against the Guardian.

Receivers were promptly appointed and they filed a bill for an accounting, which has been called herein an "ancillary bill," and which became of course the main accounting bill.

The master and the court below have found after a ten years' litigation that there was no right to such accounting, and that the notes and claims held by the Guardian Trust Company against the Belt were all valid and due as per their terms. (Three conceded off-sets aggregating some twenty-odd thousand dollars were allowed.)

It also appears that in February, 1905, the Kansas City Southern Railway Company filed an intervening petition in the lower court, in which it claimed that various stocks and bonds and other personal and intanglible property theretofore pledged by the Belt Company to the Guardian Trust Company as collateral to its debt and then held by the latter had been acquired by the Southern as purchaser under a foreclosure sale of the assets of said Belt Company. It also made a claim to the lands held by the Central Improvement Company, as shown in paragraph 6 of its printed petition filed therein.

In the year 1905 the Guardian Trust Company filed its printed answer to said intervening petition, in which, after denying the right of said intervenor to said collateral, it set forth in paragraphs Nos. 14 to 20 thereof that the Kansas City Southern Railway

was a consolidation of the Suburban Belt and the Kansas
1122 City, Pittsburg & Gulf and various other constituent railroad companies, and that thereby under the statutes of Missouri it was liable to pay the debt of the Belt Company.

It was also set forth that in the reorganization plan there was an express undertaking to pay said debts, as in said plan inviting the deposit of stocks and bonds it was expressly stated that one of the "results" to be "attained" by the said plan—i. e., one of its objects—was:

"(*b*) The payment of the floating debt and existing car trust obligations." (P. Rec., 944.)

In the decree entered in the court below, following the special master's report, the following finding is made:

"VII. The court finds the issues, made by paragraphs 15 (14) to 20, inclusive, of the answer of the Guardian Trust Company to the amended intervening petition of The Kansas City Southern Railway Company, against the Guardian Trust Company, and in favor of The Kansas City Southern Railway Company, in that and it is so decreed, The Kansas City Southern Railway Company, did not assume, or agree to pay, or become liable for, the indebtedness, or any part of it, owing by the Kansas City Suburban Belt Railroad Company to the defendant, Guardian Trust Company, and that The Kansas City Southern Railway Company is in no wise liable or bound for the payment of the indebtedness of the Kansas City Suburban Belt Railroad Company to the defendant, Guardian Trust Company, the payment of which is decreed in paragraph IV of this decree." (Printed Rec., 1061.)

The Guardian Trust Company in the appeal herein has
1123 made but three assignments of error, of which the first is the only one relating to said issue:

"1st. That the court erred in including in said decree the finding that the Southern Company did not assume or agree to pay or become liable for the indebtedness by the Belt Company to the Trust Company." (Appellant's Brief.)

Counsel for appellants have not argued the merits of said claims set forth in paragraphs 14 to 20.

If the court should hold,—as we certainly are afraid it may hold,—that the court below had jurisdiction to pass upon this issue, it can and will be claimed by the Southern Company that there has been a final adjudication upon this issue of ultimate fact. So that when the pending cases against the Southern Company shall be brought on in the state courts of Jackson County, Missouri, the Southern will be enabled to defeat this large claim of over $700,000. (In fact, the Southern's counsel frankly say that this is their intention.) Thereby the Guardian Trust Company's stockholders are apt to lose said amount of money—unless the finding of the lower court is attacked herein upon its merits.

There is needed no new evidence nor any additional portion of the record below, as the master's report sets forth all the essentials of

the reorganization plan and the prior depositors' agreement, and he expressly so states. (Print. Rec., 944.)

To save any question, however, as to an ultimate disposition of this liability issue in toto, we have concluded to present
1124 herewith a certified copy of the printed reorganization plan and the prior depositors' agreement annexed to the same as shown in the record, and ask leave to have it filed.

The assignment of error—the first—is sufficient, for our purposes here, as we believe. It is averred that the court erred "in including in its decree" the finding of non-liability of the Southern. This is in effect an averment that the court erred in decreeing that there was no liability.

Besides, this court under Rule 11 can at its option take notice of a plain error not assigned.

But to save any question upon this technical and formal point, we petition—in the alternative that the court should deem the assignment too narrow—to assign the following:

"IV. The said finding of non-liability on the part of said Kansas City Southern Railway Company to pay the debts of the said Belt Company was and is erroneous."

I.

The cases where stockholders of a corporation are allowed to intervene in behalf of the company and either conduct or control the administration of its affairs on the ground of waste or mismanagement, etc., etc., are well known to this court.

The present application does not go this far. It does not even ask the court to control this litigation—but is simply an attempt to save the case and the resultant loss. It is in substance a request to be enabled to aid the court in administering justice—the justice involved in the present appeal.

1125 It has for its equity that embodied in the following:

1. Applicants are stockholders in the appealing company.

2. A large financial interest of said company, making, in fact, the major quantum of its assets, some $760,000, is put in jeopardy by the manner in which the appeal has been presented, or at least argued. (It involves $25,000 of applicants' money alone.)

3. Applicants, learning of this fact or situation, make seasonable application to aid the company and the court—and, hence, the cause of justice—by presenting simply further argument upon the record. It will take the court but a few hours to read the briefs presented, and probably save an erroneous award of a sum of money huge in itself.

4. The faithful and prudent administration of corporate affairs and the protection of stockholders' interests thereby are of universal interest and concern. And

5. The protection of creditors of a large public enterprise such as a railroad—and especially where a reorganization plan contains a broad express provision for the payment of its obligations—is also a matter of universal concern.

Hence applicants suggest that the court should allow the additional argument upon the face of the appeal alone, and that portion of the record most strictly involved thereby.

1126

II.

As a second consideration or as a broader basis for the application, and particularly as emphasizing the eminent propriety in granting it, applicants desire to briefly point out the abnormal character of this litigation instigated and prosecuted by the Belt-Southern interests. If the decree of the Circuit Court is affirmed, it will all have resulted in success to them; and this success probably the sheer result of the oppressive dimensions of the case itself and its tendency to baffle the efforts of the ablest counsel in comprehending all its vital questions and effectually presenting arguments thereon. Much—in fact, all—of the subject-matter referred to on this head was referred to in the briefs filed and in the oral arguments, complete notes of which lie before the writer hereof.

36,000 pages of evidence!

The longest record ever made!

But this is not all.

This "longest record ever made" was made upon a hopelessly bad bill—upon a legally meaningless theory or complaint!

Can your Honors calmly conceive of such a thing?

Or that there existed court conditions at Kansas City or anywhere else in this country which permitted it?

1. In the briefs filed and in the oral arguments lately made it was calmly stated to the court that the Cambria bill and the Ancilliary bill and also the intervening petition all charged that the Guardian Trust Company had "dominated" the Belt and its constituent companies, and also the subsidiary companies allied in interest to it; that the master had found as a fact that the Trust Company had "not dominated" the said company.

1127

No word was said by counsel on either side to the effect that there was no real intelligent charge of domination in the bills or petition, i. e., any domination such as could be exercised in inter-corporate affairs or relationships.

The chief and most explicit charge of domination or rather the nearest approach to one is set out in the ancillary bill. (Print. Rec., p. 236, 244.)

The judges will wonder when told that it was not claimed in the ancillary bill in any of these "domination" pleadings, either (1) that the Trust Company at any time ever held a majority of stock in the Belt, or even a respectable minority thereof, or (2) that any ring or set of men caused the Trust Company to dominate the Belt to their financial interest, or (3) caused the Trust Company to cause the Belt to enter into unfair or fraudulent "promoting" contracts with them, or (4) that they, by reason of having a much larger interest in one corporation than the other, caused such unfair contracts to be made in consequence of which they would receive an undue financial benefit, etc. (These are the only four classes of

so-called domination cases which we have heard of.) But that the entire charge of "domination" and resultant fraud and unfairness is based solely upon the averment that during the entire
1128 period of eleven years covered by the accounting, the stockholders of each corporation—presumably adult and not under duress—happened to "elect" largely—and not wholly—identical directors (P. R., 244); that therefore and thereby the entire transactions between the two companies, all open and unconcealed, all spread at large and in duplicate on the books of each company (they "tallied to a cent"; P. R., 745, "(*j*)")—were constructively "fraudulent," no matter whether approved by the officers of each company, balances settled for by note, no matter whether older than the statute of limitations, etc., etc.

Of course, the court will see that it would be just as easy and just as logical to say that thereby the Belt Company "dominated" the Trust Company, and there would be just as much excuse for a bill by the latter and just as much excuse for a $23,000 reporters' bill and a $25,000 master fee or for total costs of nearly $100,000,—Judge Gates' estimate made on the oral argument. The strange thing about the master's report is that he finds the fatal insufficiency of the averments of the bill, but devotes some several hundred printed pages to finding from the evidence that there was "no domination"—and the bill is based on nothing else!

He mentions (P. R., 742) the four classes of "domination" cases mentioned above. He then "distinguishes" this case therefrom, by setting out (pages 743-745) some thirteen "Controlling Facts" "which appear on the face of the bill, or are practically undisputed in the proofs" numbered "(*a*)" to "(*m*)", most all, if not each of which, would have been a complete defense if a good or prima facie cause of action had been stated in the first instance!
1129 (Of what use such an elaborate report could be can not be imagined—although the labor involved in its preparation probably justified the unusually large fee allowed.)

In other words, the bill is at war with a well-known condition long common to the entire country. And if it were good, almost every large corporation in the country would be held liable to "account" to every other corporation with whom it had done business and whose directors were largely common to both and no matter how many, how old or how open or often settled the transactions had been. Such a ruling if generally enforced would, as it is easily perceived, overwhelm and paralyze the courts and throw them into a state of anarchy.

The "Stipulation" to Account.

The excuse for allowing the collossal record to be made—independently of the question whether the bill could sustain any decree rendered in pursuant of any such "accounting"—has been the stipulation so often and triumphantly referred to by counsel for the Belt and Southern. (Stip. shown in Print. Rec., 570, also 1034, and in Appellee's brief, p. 2.)

We can do no better than refer to Mr. Mecartney's printed argument on the subject filed before the master, copies of which have been in the possession of the Trust Company and Messrs. Gates and English as well, and here merely quote a few extracts from his analysis of this stipulation.

As a preliminary, we observe that any agreement between parties to take the time and use the functionaries of the public
1130 courts to re-account for 10,000 to 12,000 items of business (the master's estimate, Printed Rec., 662), all of which had been settled and shown on the books of the parties years before, and this upon a legally meaningless pleading, ought certainly not bind the courts, and hence not the parties.

The following are the extracts referred to:

"(1) Since the defendant expressly reserved the right to plead to the bill, it was clear that there was not meant to be a consent to a general accounting.

"(2) 'The accounting' to be expedited was, hence, an accounting subject to all pleas in bar or defenses to the right to an account.

"(3) The 'accounting' prayed for or 'sought' in the bill showed the scope of and merely identified the case itself. The accounting case was to be expedited.

"(4) The Trust Company did not waive any defenses to the bill as a whole or any part thereof; and where the right to plead or object to any accounting is expressly reserved, no other construction than the one stated is possible.

"(5) The bill had not been filed at the time the stipulation was made, and it is not to be supposed that a defendant would consent to go into evidence upon any transaction that might be attached, or to waive all legal defenses thereto. Hence,

"(6) As the accounting, after pleas and answers should have been filed, was to be expedited, the parties must have intended that
1131 the 'accounting sought,' subject to the pleas or answers to be filed, was to be expedited.

"(7) Even if the matter were otherwise in doubt, and even if defendant had not expressly reserved the right to plead—to object—the answer subsequently filed containing pleas in bar and denying complainant's right to an accounting would control, and on two grounds, viz.:

(*a*) As revealing the construction which the parties themselves had placed upon said stipulation.

(*b*) As superseding the stipulation. The case was to be tried upon pleadings to be filed, and not upon the stipulation.

(*c*) The fact that complainant later filed exceptions to the answer containing no objection that it was broader than the stipulation or was in violation of it, etc., etc., is also strong and controlling evidence as to how the parties construed the stipulation.

"To the above may be added:

"(8) The bill to be filed was later amended, and the answer to that again denied the right of complainant to any accounting, and set up various pleas in bar thereto. And the case has been tried upon the pleadings as filed.

"(9) The court would incline to adopt a construction against accounting for such stale transactions, especially where no secret fraud was alleged; and

"(10) Would probably decline on its own account to be used for such an investigation.

"(11) There is no intelligent statement in the bill of a right of or a basis for account. The bill is not capable of having any such stipulation applied to it,—otherwise than as an agreement to speed the cause.

1132 "There is no basis for 'an account' until some legal right or claim can be scraped up somehow and somewhere on the face of the bill."

In opposing the issuance of Judge McPherson's injunction (reversed here in Guardian Trust Co. v. Kas. Cy. Southern Ry. Co., 171 Fed. 43), and in the answer to the rule to show cause, Mr. Mecartney, former counsel for the Trust Company, set up the fatal insufficiency of the ancillary bill and the intervening petition (Secs. 13 and 14; P. R., 642), and argued the same in a short printed brief.

It seems somewhat strange that Messrs. Gates and English did not, in the argument on the former appeal, insist upon the insufficiency of the basal pleadings—the original support of the supplemental bill for injunction.

In fact, the last paragraph but one of this court's opinion fully justifies the point that the court should consider the basal pleadings, and the belief that it would have done so there had their apparent lack of merit been urged upon its attention.

We have quoted this brief analysis to show the court here the significance of this record and a purpose that has evidently lain back of this abnormal and oppressive suit.

For we cannot believe that the able and astute counsel for the Belt and Southern have not long since discerned the fallacy of their complaint.

It is hard for a fresh reader of these bills to believe that a counsel of Mr. Hagerman's standing and ability could either per-

1133 sonally or in connection with Mr. Max Pam have filed a bill with no more legal or intelligent a charge, than a mere cry of "domination and constructive fraud" and to tender such a basis to Judge Phillips for throwing a number of corporations into receiver's hands and joining all together in one suit.

On this record showing, therefore, we say that the entire case upon the face of the proceedings is an abnormal wrong upon the Trust Company; and that its very scope and dimensions alone are apt to have caused the present counsel for the Trust Company to have overlooked the great danger in the present appeal as presented, and possibly to be unconscious of the plain merits of the Trust Company's case and claim against the Southern.

Therefore, we say the counsel or party causing such a record and such a wrong have no basis of complaint against an attempt to save the situation and the cause of justice by the simple act of filing additional arguments.

And we of course assume that Messrs. Gates and English will

not oppose it. For the merits of the question of the Southern's liability need only be considered in case the judges are of opinion that such issue was properly made the subject of a finding by the court below.

2. But a very marked and significant addition to the record showing just referred to is revealed in the record of the two dependent suits filed by the Southern's counsel, Mr. Moore, to enjoin
1134 the state court suits.

And with these this court is familiar.

The first is reported in 146 Fed. 337 (Guardian T. Co. v. Kas. Cy. Southern Ry. Co.).

Now, in the case brought in 1900 to foreclose the Belt mortgage, the Guardian had been made a party by reason of its having been a co-trustee with the Provident Life in the mortgage. In addition to its formal answer as trustee, it asked leave to file "an amended and supplemental answer," in which it set up that the foreclosure was simply a part of a reorganization scheme and of a probable intent on the part of the reorganizers to use the prospective decree to embarrass the Trust Company and other Belt creditors in asserting their claims against the prospective purchaser—the Southern. The application for leave to file was denied with the following stipulation inserted in the decree to protect and insure the company's clear right to sue the Southern and without question, viz.:

"This decree is entered on the express condition to which the complainant has assented, that it shall be without prejudice to and shall not bar the right of the Guardian Trust Company, or its receiver, to plead and insist in any litigation now pending, or hereafter brought, that the Kansas City Southern Railway Company, by virtue of the manner in which it was organized, or for any other reason, is legally or equitably liable for and bound to pay the unsecured debts of the Kansas City Suburban Belt Railroad Company," etc.

Now, Mr. Moore, in July, 1905, filed a supplemental bill based upon the Southern's purchase of Belt assets upon fore-
1135 closure to enjoin the prosecution of the Guardian's state court cases brought to recover of the Southern upon the Belt notes which it held.

In the face of this plainly worded stipulation the injunction was deliberately issued by Judge Phillips and the same deliberately accepted by Mr. Moore for the Southern!

It appears from page 16 of the briefs filed by Mr. Mecartney in this court upon the appeal from said order, that said stipulation had been quoted at large in the answer or printed brief which had been filed before Judge Phillips, but the same was not even referred to in his opinion in said cause.

Also, that in said brief in this court said counsel of course simply printed the stipulation without argument.

This court held the injunction without merit, (1) upon the face of the record, and also (2) by reason of the stipulation, which it held controlled in any event, and this, of course, without argument

or analysis. It evidently was one of those instances where a thing was too plain to admit of analysis or argument.

3. What next was done to keep the issue and all of them in the United States Court under the direction or control of Judge Phillips and before Master Douglass or involved—or buried beneath—the awful pile of evidence, or, as Mr. Mecartney calls it, "dust"?

It seems that when the state court cases were nearly reached for trial after all manner of dilatory pleas and motions had
1136 been made in the state court and the case had been finally set for trial on a specific date, Mr. Moore filed a supplemental bill by the Belt and Southern jointly (claimed by him to be independent companies) to again enjoin the state court suits.

It was sought not only to enjoin the two suits in which the Belt notes held by the Guardian were involved, but a third suit based upon the notes of the Pittsburg and Gulf Company which notes were not involved and not even mentioned in the accounting case in the Federal Court was sought to be stayed. Judge McPherson enjoined all three suits!

It is no wonder that this court held that the injunctionary order lacked not only a legal basis but also involved an abuse of discretion on the part of the hearing judge. (See G. T. Co. v. K. Cy. South. Ry. Co., 171 Fed. 43.)

It therefore apparently, if not conclusively, appears from the record alone that an abnormal wrong has been committed here—invited and the results deliberately accepted by counsel for the Belt-Southern interests.

The Trust Company was represented until Dec. 1904, by Messrs. Trimble and Braley. They were then succeeded by Mr. Harry S. Mecartney of Chicago with Mr. Jules C. Rosenberger of Kansas City as local assistant counsel. Messrs. Gates and English succeeded him in March, 1908.

They now present the case here on the present appeal
1137 and risk the entire case against the Southern upon a mere technical point of pleading whose merit is in the gravest doubt to say the least. And they decline to submit the careful and thorough opinion of the able Mr. Tichenor, a leading giant of the profession in Missouri, as well as the carefully revised and finished brief of Mr. Mecartney prepared in the service and at the expense of the Trust Company. They do not argue even in the alternative that the Southern clearly is liable for Belt debts. They not only lose the opportunity to end the old and oppressive case, but needlessly risk the entire case and the $700,000 upon two or three sentences in this court's opinion in the second injunction case!

Can this be calmly tolerated?

(To explain: The court—in the case in 171 Feb.—evidently speaking of the pleadings upon which the injunctionary order had been based, remarked that the suit in the national court did not "involve" the personal liability of the Southern. This alone is the "sheet anchor," as Mr. English remarked, of the Guardian by which it seeks to escape the plea of res judicata to be offered by the Southern in the coming state court trials.)

Will the court not permit the case to be saved? Incidentally it may be better for Messrs. Gates and English that the case be saved. For if there be not actionable negligence involved in the presentation of the present appeal, there is something closely approaching it.

This precarious situation the court will observe (See affidavit of Shedd) was only known to applicant stockholders some ten
1138 days or less before the case was set for argument here.

It is apparent from the volume of the record here that due diligence has been used to prepare this application. In fact, without Mr. Mecartney's aid—volunteered without compensation—it would scarcely have been possible to present it thus early.

It will also be observed that the present counsel had their danger pointed out to them some three weeks before the argument here by Mr. Mecartney; but they do not seem to have appreciated the situation and the danger.

To fully present the liability issue we have prepared a schedule analysis of the master's lengthy conclusions or report on said issue, and annexed the same to the briefs presented.

It is significant that the clause in the reorganization plan upon which is based one of the two independent grounds of liability sustained in Mr. Tichenor's opinion as well as in Mr. Mecartney's brief (Point IX, pages 59 to 68) while set out in the quotations of the master from the plan (Print. Rec., 944) is not even referred to by him in his opinion, and is wholly ignored therein.

It is therefore hoped and prayed that this application for leave to file may be granted.

It is therefore clear that this entire question of liability can be presented by the consideration of one document, the essentials of which are recited in the master's report, and disposed of by making a ruling on a point purely of law.

While as shown on pages 18-20 of the "Analysis of the
1139 Master's Rulings" presented herewith, there are two grounds of liability alleged other than the two above suggested, it seems clear to us that they are untenable, for reasons stated in said analysis. Secondly, they relate to or are based upon questions of fact, as to which exceptions have not been preserved.

To anticipate all possible technical objections to this application, we call attention in advance to the exceptions filed by the Guardian to the master's report. (Printed Record 1036-9.)

After stating generally that the Trust Company "excepts to the report," etc., and that "by reason of the laches of the Southern Company," etc., the intervening petitions "should be dismissed in all their parts," etc., it excepts,

"Second: The master has in such report stated (on p. 461 thereof) as follows:

'That the Southern Company is not in any way liable for the floating indebtedness of the Belt Company.'"

This was the finding upon which Paragraph VII of the decree, quoted in our petition above, was based, and relates to the same subject matter.

It is true that the exception goes on to say:

"Whereas, said finding was unnecessary and should have been omitted," etc.

The "whereases" or suggestions as to what the master should have found are properly no part of the exception.

1140 So that we say:

1. The point here urged is plainly covered by the exceptions.

2. As the master in his report recites the essentials or the "basis" of the reorganization plan, his error—as we allege it herein to have been—was a pure error of law.

And as to such error, as is well known law, no exceptions are necessary.

2 Daniel Chy. Pl. & Pr., Sec. 1310.
17 Enc. Pl. & Pr., 1048.
Celluloid Mfg. Co. v. Cellonite Mfg. Co., 40 Fed. 476.
Hurd v. Goodrich, 59 Ill. 450.
Van Tobel v. Ostrander, 158 Ill. 499.
Hayes v. Hammond, 162 Ill. 133.
Von Platen v. Winterbotham, 203 Ill. 202.

It is, of course, scarcely necessary to suggest that if the court should desire, in addition to the briefs presented here, an oral argument upon the issue, the petitioners would gladly respond, and present an oral argument thereon, either separately or in conjunction with Messrs. Gates & English, as the court might direct.

We have endeavored to place this issue before the court within the narrowest possible limits.

Point I of the petition is based primarily on the narrowest issues of the appeal, all of record, with which the court has been made familiar.

Point II is likewise based upon the record and only such outside facts as are not subject to dispute; and the latter are mentioned only in order to explain the situation and to excuse the lack

1141 of earlier action on the part of the petitioning stockholders.

Respectfully submitted,

NEWELL H. CLAPP.
ENOCH J. PRICE.
For Petitioners Shedd & Law.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on June 16, 1911.

1142 (*Motion of Edward A. Shedd et al. for Order upon Kansas City Southern Ry. Co. et al. to Show Cause, etc.*)

And now come Edward A. and Charles B. Shedd and Robert H. Law, by Newell H. Clapp and Enoch J. Price, their counsel, and move the court to grant a rule on appellees, The Kansas City Southern Railway Company and Cambria Steel Company, as well as upon appellant, Guardian Trust Company, to show cause why they should not be allowed to file additional briefs herein on behalf of the ap-

pellant, Guardian Trust Company, as is prayed for in their petition this day presented.

NEWELL H. CLAPP,
ENOCH J. PRICE,
Counsel for Edward A. and Charles B. Shedd and Robert H. Law.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on June 16, 1911.

(*Order to Show Cause Why Motion to File Additional Briefs Should Not Be Granted, etc.*)

May Term, 1911.

FRIDAY, June 16, 1911.

Edward A. Shedd, Charles B. Shedd and Robert H. Law having this day filed their petition in writing for leave to file additional arguments on behalf of the appellant Guardian Trust Company in the above entitled cause and their written motion to the same effect, it is hereby

Ordered that the appellees, Kansas City Southern Railway Company and Cambria Steel Company, and appellant Guardian Trust Company show cause before this Court at its chambers in the City of St. Paul on the 21st day of June A. D. 1911 at ten o'clock in the forenoon of that day why the prayer of said petitioners and their said motion should not be granted and said petitioners be given leave to file and have considered the additional brief, arguments and other documents in said petition referred to.

Let a copy of this order and of said petition and motion be served upon the solicitors for appellant Guardian Trust Company and for appellees Kansas City Southern Railway Company and Cambria Steel Company on or before the 17th day of June A. D. 1911.

Dated June 16th, 1911.

(Signed) WALTER H. SANBORN,
Circuit Judge.

1143 (*Proof of Service of Notice of Hearing on Petition of Shedd et al. for Leave to File Additional Briefs.*)

Notice.

To Frank Hagerman, Esq., Counsel for Cambria Steel Company;
To Samuel W. Moore and Samuel Untermyer, Esquires, Counsel for Kansas City Southern Railway Company et al., Appellees; and
To George H. English and Edward P. Gates, Esquires, Counsel for Guardian Trust Company:

You and each of you are hereby notified that on Friday the 16th day of June A. D. 1911, the said Court of Appeals in and for the

Eighth Circuit entered a rule in the above entitled cause upon the Cambria Steel Company, the Kansas City Southern Railway Company and the Guardian Trust Company, to show cause on or before the 21st day of June A. D. 1911, at ten o'clock A. M. why Edward A. and Charles B. Shedd and Robert H. Law should not have leave to file additional briefs in said cause upon the part of the appellant, Guardian Trust Company, as prayed for in their petition presented to the court on said day; with a copy of which rule and petition and affidavits and suggestions in support thereof, as well as with a copy of the said briefs proposed to be filed, you are herewith served.

Dated, June 16, 1911.

NEWELL H. CLAPP,
406 *National German American*
Bank Bldg., St. Paul, Minn.
ENOCH J. PRICE,
No. 9 South La Salle St., Chicago, Illinois,
Counsel for said Petitioners Shedd and Law.

1144 (MEMO. OF CLERK—Here follows a copy of the Motion of Edward A. Shedd, et al. for an Order upon the Kansas City Southern Railway Company, et al. to show cause, etc., filed June 16, 1911, and a copy of the order of said Circuit Court of Appeals of June 16, 1911, to show Cause why the Motion of Shedd, et al. to file Additional Briefs should not be granted, which said motion and order are omitted for the reason that copies thereof have heretofore been included in this transcript.)

Proof of Service.

STATE OF MISSOURI,
County of Jackson, ss:

On this 17th day of June A. D. 1911, personally appeared before the undersigned David A. Murphy a Notary Public in and for said county and state, Charles M. Bush, Esq., who being by me first duly sworn on his oath deposeth and saith:

That on the 17th day of June A. D. 1911, at the city of Kansas City in the state of Missouri, he served a duplicate copy of the petition of Edward A. and Charles B. Shedd and Robert H. Law, motion, notice of entry of rule to show cause, and rule to show cause, copies of each of which are hereto annexed as well as a copy of the additional briefs proposed to be filed which are mentioned in said notice, upon the following named persons and in the manner following, that is to say:

Upon Frank Hagerman, counsel for the above named appellee Cambria Steel Co. by handing a copy of said petition, motion, notice of entry of rule to show cause and rule to show cause and additional briefs to said Frank Hagerman in Kansas City, Jackson County, Missouri:

Upon Samuel W. Moore, counsel for appellees Kansas City Southern Railway Company, et al. by handing a copy of said petition,

motion, notice of entry of rule to show cause, additional
1145 briefs and rule to show cause to said Samuel W. Moore in Kansas City, Jackson County, Missouri;

And upon George H. English and Edward P. Gates of counsel for appellant Guardian Trust Company by delivering a copy of said petition, motion, notice of entry of rule to show cause, additional briefs and rule to show cause to S. E. Skelley, he being in charge of the office of said English and Gates at 1003 Scarritt Building, Kansas City, Missouri; they being absent from Kansas City, Jackson County, Missouri.

Further deponent saith not.

[SEAL.] CHAS. M. BUSH.

Subscribed and sworn to before me this 17th day of June A. D. 1911.

DAVID A. MURPHY,
Notary Public, Jackson County, Missouri.

My commission expires June 5th, 1915.

(MEMO. OF CLERK.—Attached to this Proof of Service of Notice of Hearing on Petition of Shedd, et al. for Leave to File Additional Briefs is a copy of the Petition of Shedd, et al. for Leave to File Additional Briefs, Filed June 16, 1911, which is omitted here for the reason that a copy of same has heretofore been included in this transcript.)

(Endorsed:) Filed in U. S. Circuit Court of Appeals on June 20, 1911.

(*Return of Guardian Trust Co. upon Rule to Show Cause, etc.*)

Comes now Guardian Trust Company, Appellant above named, and for its return and answer to the rule and order heretofore made upon the 16th day of June, 1911 by the Honorable Walter H. Sanborn, Judge of this Court, says:

I.

That by reason of the former decision of this Court, and by reason of the state of the pleadings and record in the cause from which this appeal is taken, the question of the personal liability of the Kansas City Southern Railway Company for the debt of the Belt Company,
is not in issue and can not be determined upon this ap-
1146 peal. Since said issue is the only subject discussed in said briefs proposed to be filed by said petitioners, this appellant is of the opinion, that neither said briefs, nor any argument upon said issue, would be a proper matter to be submitted to this Court.

II.

Said petitioners are not parties to the record of this cause.

EDWARD P. GATES &
GEO. H. ENGLISH, JR.,
Solicitors for Guardian Trust Company.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on June 21, 1911.

(Order of Submission of Petition of Shedd et al. for Leave to File Additional Briefs in Cause No. 3490.)

May Term, 1911.

WEDNESDAY, June 21, 1911.

No. 3490.

GUARDIAN TRUST COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al.

This cause came on to be heard upon the petition of Edward A. Shedd, et al., for leave to file additional briefs in this cause, with affidavits and suggestions in support thereof, and upon the return by the Guardian Trust Company to the rule to show cause heretofore issued and served upon it.

Thereupon, the said petition of Edward A. Shedd, et al., for leave to file additional briefs in this cause, was argued by Mr. Newel H. Clapp in behalf of petitioners in support of said petition, and by Mr. Edward P. Gates and Mr. George H. English, Jr., in behalf of the Guardian Trust Company, and by Mr. Samuel W. Moore, in behalf of the Kansas City Southern Railway Company, in opposition thereto.

Whereupon, the said petition of Shedd, et al., was submitted to the Court and by the Court taken under advisement.

1147 (*Order That Cases Stand for Further Hearing upon Additional Briefs of Parties to be Filed.*)

May Term, 1911.

WEDNESDAY, June 21, 1911.

No. 3489.

CENTRAL IMPROVEMENT COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al.

and

No. 3490.

GUARDIAN TRUST COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al.

In the above entitled cases upon the motion of the Guardian Trust Company for leave to file additional briefs, it is now here ordered by the Court that these cases be set down for further hearing before this Court, upon additional briefs of the parties to be filed herein, on or before the first day of December, 1911.

(*Motion of Guardian Trust Co. for Leave to File Additional Briefs, etc.*)

Comes now the Guardian Trust Company, and shows to the Court, that heretofore, to-wit, on the 21st day of June, 1911, oral application was made by this appellant to the Judges of this Court in Chambers, for leave to file additional briefs in the above entitled causes, particularly upon two points, namely:

1. Whether or not this Court could, upon the record, consider the question of the correctness of the findings of the Master and the Circuit Court, in respect to the liability of the Kansas City Southern Railway Company for the debts of the Belt; and

2. Upon the merits of said issue, if the Court should be of the opinion that the merits of said issue is a matter properly cognizable by this Court.

That by the agreement of the parties hereto, made in Chambers in the presence of said Judges of this Court on said day, such
1148 application or the filing of said briefs should not be deemed to conclude or affect this Appellant in respect to its contention that the ruling of this Court in these causes could not be re-adjudicated upon the State Court causes mentioned and described in the record herein, and further, that this application and the filing of said briefs should have no effect upon said State Court causes,

save and except that appellant agreed to consent that said Court Causes might be passed from term to term during the pendency of this matter, and until this Court should have reached a decision thereon.

Said oral application was by said Judges granted upon the consent of the parties and under the agreements aforesaid, with the understanding that this Appellant should, within ten days, file formal written application for said leave, setting forth the above facts.

Now therefore, for the reasons and upon the agreements above mentioned, this Appellant, Guardian Trust Company, prays leave of Court to prepare and submit to the Court, additional briefs in these causes, on or before the 1st day of November, 1911, and to prepare and submit to this Court, reply briefs to any briefs which may be filed herein by the Appellees, on or before the 1st day of December, 1911.

GUARDIAN TRUST COMPANY,
By EDWARD P. GATES &
GEO. H. ENGLISH, JR.,
Its Solicitors.

Copy of above application received this June 30, 1911.
FRANK HAGERMAN.

Copy of the above application received this June 30, 1911. Appellee by this acceptance of service does not admit the alleged agreement set forth in the application.

S. W. MOORE,
For the Kansas City So. Ry. Co.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on July 1, 1911.

1149 In the United States Circuit Court of Appeals, Eighth Circuit.

No. 3490.

GUARDIAN TRUST COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al., Appellees.

No. 3489.

CENTRAL IMPROVEMENT COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al., Appellees.

Petition of Edward A. and Charles B. Shedd and Robert H. Law for Leave to File Suggestions as to Final Judgment Herein.

And now come Edward A. and Charles B. Shedd and Robert H. Law and show to the court that they are stockholders in the Guar-

dian Trust Company, said Shedd and Shedd having $66,700 par value and said Law having $15,000 par value of said stock, the total outstanding stock of the trust company being about $2,200,000, the stockholders being over 300 in number and widely scattered. Said company has been in liquidation for over eight years last past.

1150 They hereby petition for leave to file:

1. Additional assignments of error herein on behalf of the Trust Company, as follows:

"IV. The said finding of non-liability on the part of said Kansas City Southern Railway Company to pay the debts of the said Belt Company was and is erroneous."

2. Certified copy of the reorganization plan and depositors' agreement of the Kansas City Southern Railway Company; and,

3. Suggestions in support of this petition to the effect that, in case this court finds said Southern Company liable to the Trust Company for the claims which the latter has established against the Belt Company, this court embody in its judgment herein a direction for a final judgment in the Circuit Court against said Southern Company.

Their petition is based upon the following grounds:

1. The appeal of the Guardian Trust Company from said decree contained—Par. "VII" thereof—a finding that the Southern Company was not liable for Belt Company debts.

At the instance of these petitioning stockholders and upon their representation that the claim of the Trust Company against the Southern Company was apt to be lost by failure of its counsel, Messrs. Gates and English, to argue the merits of this finding, this court granted the latter counsel leave to file additional briefs upon such issue.

Nevertheless, while they have filed such briefs, said counsel

1151 for the Trust Company—notwithstanding this court's announcement that such issue was properly in the cause—have declined to ask this court for a final judgment in case the Guardian's claim shall be sustained. This course can only result in prolonging a litigation already abnormally long and oppressive, with no benefit to any one so far as can be perceived.

2. This matter involves a claim now amounting to well above $725,000, independently of the Guardian's claim to the Central Improvement Company collateral; and such collateral may also be saved solely by having a favorable adjudication upon such liability issue. It represents a loss or gain to these stockholders alone of above $25,000.

3. This record—by far the longest ever made in the history of the known world—was made at the real instance of and supported only by the means of the Southern Company—and furthermore, has been made upon a thoroughly bad bill of complaint.

(See master's report, P. R. 742, where thirteen "controlling facts" are found "to appear on the face of the bill or are practically undisputed in the proofs.")

The Trust Company has been held out of its large debt by being forced into court and kept in court by a colossal yet useless "ac-

counting" with the defunct Belt Company, the predecessor of the Southern. And this great wrong has been largely perpetuated by means of several injunctions issued against the prosecution of the state court cases (common law cases based upon such claim
1152 of liability), and both of which were held by this court to be absolutely without merit.

146 Fed. 337.
171 Fed. 43.

It would be painfully wrong to the stockholders of the Trust Company, to the court as an instrument of justice, and to the cause of justice itself, that the object of the Southern Company or its counsel should be further served by the determination of the Trust Company's counsel not to ask for a final judgment herein so as to end what has been practically found to have been scarcely less than a farce.

A photo of this huge record may aid in taking in the significance of the situation and one taken several years ago is annexed to this pamphlet.

4. There can be no good object in having this court find merely that the decree of the court below was erroneous on this issue, and still having it withhold a final judgment in the cause, after eleven and a half years of useless litigation.

The court granted leave to the counsel to reopen their case upon the very ground that they had allowed themselves to be foreclosed on this liability issue, and in effect that if the finding in the decree should not be attacked it would be res judicata of the issue, and this large claim would thus be lost to the stockholders. The counsel seem now to persist in their attitude that such issue is not in the case. They decline to file the additional assignment of errors, and merely invite the court to "notice a plain error" in their behalf—the correction of which they even refuse to formally ask for,
1153 to say nothing of their not accepting the wide-open opportunity to end the oppressive case.

5. While the master has recited the essential provisions of the complete reorganization plan, it is thought best to have it presented in its entirety. As this issue has been ordered to be argued it is probably the place of the Southern's counsel to bring up any omitted parts which he thinks material. Nevertheless to save any quibbling upon the question we think the plan complete should be filed.

(Messrs. Gates and English have printed a complete copy of this plan as an appendix to their Reply lately filed but have declined to file the original certified copy.

In support of this application petitioners present brief affidavits of Harry S. Mecartney, and Enoch J. Price, Esqs., and also printed copies of their former petition filed in June, 1911, which resulted in the reopening of the case for the purposes of argument upon this vital issue.

6. Petitioners suggest that the application here made is only in aid of the court's doing ultimate and complete justice in the case,

and as to what should be the form of the final order herein. Hence it is believed that the same are properly presented at any time before the final order has been entered; and that the court would not decline sincere and appropriate suggestions to that end. Nevertheless they present herewith such affidavits to show that this application and brief have been reasonably early and seasonably made under the circumstances.

Wherefore, petitioners pray that leave be given them to file
1154 (1) additional assignment of error as above; (2), a certified copy of the reorganization plan and the agreement prefixed thereto, and (3) the suggestions hereto annexed; and that in case this court finds that the Southern Company is liable for the Belt Company debts, a final judgment may be entered herein directing the lower court, upon the application of the Trust Company, to enter a decree against the Southern Company for the total amount of the decree formerly entered against the Belt Company, with interest and costs.

And petitioners will ever pray, etc.

EDWARD A. SHEDD,
CHARLES B. SHEDD,
ROBERT H. LAW,
By NEWEL H. CLAPP AND
ENOCH J. PRICE,
Their Counsel.

STATE OF ILLINOIS,
County of Cook, ss:

HARRY S. MECARTNEY, being duly sworn, deposes and says that he was formerly counsel for the Guardian Trust Company, as appears from the records herein. That during last November he learned that counsel for the Trust Company were hesitating about insisting in this cause that this court, in case it should sustain the claims of the Trust Company against the Southern Company, direct a judgment in the lower court, in substance as set forth in the petition prefixed hereto. That thereupon at considerable labor, covering a total of several weeks of time, he corresponded with D. J. Haff, Esq., of Kansas City, Missouri—retained last fall as special counsel
1155 to aid Messrs. Gates and English in the matter of this appeal and as affiant understood the leading counsel in the case and made several briefs for his consideration with a view to persuading him of the feasibility and propriety of having such judgment or final direction for a judgment entered herein.

That early in December affiant learned that such counsel had finally concluded to make no such formal request until the oral argument in the case or until this court might indicate of its own accord that it might give such relief to the Trust Company. That affiant about the middle of December last learned that there was to be no oral argument in the case. He thereupon reported the same to Messrs. Clapp and Price, attorneys for the petitioners herein; and said Clapp thereupon and about December 15th last, wrote Messrs. Gates and English to send him the certified copy of the reorganiza-

tion plan and agreement of the Southern Company (which said Clapp had sent them for the purpose of having the same filed herein); but such copy was not received by him until about December 26th last. Affiant received the same from said Clapp on December 27th last. That since said time he has been in consultation with E. J. Price, Esq., one of said counsel, with a view to aiding him in preparing suggestions in support of the petition herewith filed; but affiant has been for four weeks since said date almost continuously in court attending upon two long jury trials, and has only within the last three weeks been able to aid such counsel in the preparation of the same.

HARRY S. MECARTNEY.

1156 Subscribed and sworn to before me this 17th day of February, A. D. 1912.

[Notarial Seal, Cook Co., Ills.]

EVERETT M. SWAIN,
Notary Public.

STATE OF ILLINOIS,
County of Cook, ss:

Enoch J. Price, being duly sworn according to law, doth depose and say: That he is one of the two counsel for the petitioners Messrs. Shedd and Law in this cause who are stockholders in the Guardian Trust Company as set forth in the above petition; that several days before the first of January, 1912, when he was apprised of the final determination of the counsel in this case not to file the certified copy of the reorganization plan which had been furnished them for that purpose or to make an application for a final judgment against the Southern Company in this cause he conferred with Harry S. Mecartney, Esq., former counsel for the Trust Company, with a view to having him aid in preparing this petition and suggestions in support thereof.

That on account of the fact that the record herein is immense in proportions and that said Mecartney was entirely familiar with it and all the complex issues in the case and had also assisted in preparing the former petition of the stockholders herein, and on account of the fact that said Mecartney was perfectly willing to do all in his power to further the cause of the Trust Company herein affiant deemed it both wise and economical to rely largely upon the
1157 aid of said Mecartney in preparing such application and brief. That by reason thereof such work of preparation was delayed several weeks on account of the inexorable court engagements of said Mecartney. That it was further delayed for about one week's time by the fact that Mr. A. E. Macartney, Esq., the partner of Mr. Clapp, died suddenly about the 6th inst. and his said colleague Mr. Clapp was unable to consider and revise the papers on account thereof and the same were only received back from said Clapp upon the 15th instant.

Affiant says that had he and his said colleague alone prepared

these papers independently of and without the aid of Mr. Mecartney they could have been prepared and presented to this court but little sooner than they have actually been.

ENOCH J. PRICE.

Subscribed and sworn to before me this 16th day of February, A. D. 1912.

[Notarial Seal, Cook Co., Ills.]

B. H. MONTGOMERY,
Notary Public.

1158 *Suggestions in Support of Foregoing Application.*

The undersigned counsel on behalf of the above named stockholders of the Guardian Trust Company again feel constrained to make application to this court touching the disposition of the appeal of said company in this case.

For failure of counsel for the Trust Company to argue the real merits of the main controversy between it and the Southern Company, viz: the liability of the Southern for Belt debts, these stockholders filed a petition last June for leave to file additional briefs. Their only claim in such behalf had been that such issue—raised by the Trust Company itself in its answer to the intervening petition—was not properly in the case and that the special finding of master and lower court of non-liability on the part of the Southern was unnecessary to a decision of the case and for this reason alone, erroneous.

While agreeing that the decision upon the merits was wrong, we disagreed with the counsel that it was not germane to the issues; and fearing a judgment here against the Trust Company which would be pleaded as res judicata in the state court suits, we filed a petition for leave to assign additional errors upon such issue, and to submit the briefs therein prepared by Mr. Mecartney, former counsel for the Trust Company, and one prepared by C. O. Tichenor, Esq., of Kansas City.

1159 A rule was issued upon counsel for both the Southern and Trust Companies to show cause why leave should not be granted.

Upon the hearing of the rule, Messrs. Gates and English—as well as Mr. Moore—opposed the same and announced their confidence in their position, and that they preferred to reserve the issue of the Southern's liability for trial in the three state court cases.

This court—through Mr. Justice Sanborn—then announced that the justices had unanimously reached the tentative conclusion that that issue had been necessarily involved in the case below and therefore had been properly—though not necessarily correctly—passed upon by master and court. That although it was rare for the court to make such an announcement prior to filing its written opinion, nevertheless in the peculiar circumstances the justices "felt it their

duty" to make it, "because if we withheld it from you" (Messrs. Gates and English) "it may be that we would deprive you of some opportunities that you may desire to take advantage of."

Immediately upon such announcement Messrs. Gates and English made application for leave to argue the merits of the liability issue. Said Judge Gates on behalf of the Guardian Trust Company, "We should be glad if we could present a brief upon that point."

Thereupon the counsel for Shedd and Law did not press their appeal for leave to file their own briefs, but stated that in view of such application they had no desire to inject their own briefs
1160 into the case; and that "all we are asking is that all that can be said upon the proposition and all the authorities that there are to sustain the position of the Trust Company may be presented to the court. We would just as lief it should be presented under the signature of Gates and English as anybody else."

Messrs. Gates and English then courteously said they would willingly submit their draft of brief to the undersigned counsel for petitioners for suggestions.

It was agreed that briefs would be exchanged by counsel for the Trust and Southern Companies November 1st, and any replies by December 1st last.

The court thereupon entered an order that the cause be re-taken upon briefs to be filed by December 1st last.

The briefs were exchanged and a reply submitted by Messrs. Gates and English, and an additional reply by D. J. Haff, Esquire, of Kansas City.

Messrs. Gates and English did, as per their agreement, submit to the undersigned counsel their first or typewritten draft of brief upon such additional issue of liability of the Southern and the latter made certain suggestions which were in part adopted by them.

We also sent them the original documents presented with our application last June, to which was attached the certified copy of the plan upon the assumption that they would desire to file the same and ask for a final judgment herein. On November 19th one of
1161 the undersigned counsel received a letter from them that they were yet undecided as to whether they would use the certified copy of the reorganization plan and desired to retain it a little longer. Learning about December 15th that they did not intend to use the same, we wrote requesting its return, and it was returned to us several days before the first of the year.

In the former application of these petitioners leave was asked (p. 19) to formally assign additional error as follows:

"IV. The said finding of non-liability on the part of said Kansas City Southern Railway Company to pay the debts of the said Belt Company was and is erroneous."

Leave was also asked to file a certified copy of the reorganization plan.

In the "Supplemental Brief" of Messrs. Untermyer and Moore upon this liability issue it was assumed that Messrs. Gates and English would argue for leave to file additional and specific assignments

of error upon such issue in substance like the one presented with the petition of Shedd and Law. (Suppltl. Brief, p. 5.)

In the "Reply" of Messrs. Gates and English, pp. 1 and 2, it is said that they had not made such application and in substance that they meant to rely upon the court to "consider the question"—of liability, etc.—"in the present state of the record, without additional assignment of error"—as it was claimed the court had power to do, and correctly, as we agree.

A complete copy of the reorganization plan was printed as an appendix to the reply.

1162 It was then perceived that apparently Messrs. Gates and English did not mean to entirely yield to the new situation and that they were merely going to invite this court to notice upon their behalf, a $700,000 error, and also refrain from asking for a final judgment for the money—or a final direction for one; although this court had before it the one document from which the issue of liability sprung, and had entire jurisdiction of the issue.

In other words, the court's proffer of mercy or amnesty to the Trust Company is being thrown back into its face, with the suggestion that all that counsel care to accept from the court upon its own invitation is an order setting aside the objectionable finding and without the resultant judgment in their favor!

The court is formally invited to give its opinion upon an issue which evidently counsel still claim is not properly in the case; but they desire the finding of the lower court set aside in order that they "may not be embarrassed"—as they asserted upon the oral argument—by the claim of Mr. Moore that it is res judicata.

This presents to us a situation which is unique in the history of court practice and almost impossible of explanation.

The only suggestions that occur to us as rational are, first, that possibly the ruling of this court and the ultimate disposal of the case here would involve a confession of error upon the part of Messrs. Gates and English as to their having omitted in the first instance an attack upon the merit of this finding—which they are not yet ready to make.

1163 Second, the only other explanation possible is suggested by the fact that upon resisting the application of these petitioners last June, Messrs. Gates and English (as per stenographic report) announced to your Honors that before electing to omit any challenge of Judge Phillips' finding upon this liability issue they had submitted the question to the executive committee of the Trust Company and had obtained its approval of their plan of briefing the case. They also stated that after they had received notice of the application of these petitioners for leave to file additional briefs upon this liability issue, they had re-submitted the matter to that portion of such executive committee resident in Kansas City (Mr. Prescott, the liquidator of the Trust Company, and two others), and they had ordered that the application be resisted.

Although this fact might well serve to transfer the responsibility of the case from Messrs. Gates and English to the executive committee, or such portion of it as had given directions to them as to the

argument of the case, and might thus well excuse their neglect to argue the real merits of the case, it does not explain their present declination to ask this court to end the matter, nor their insistence upon having the issue drag its course through the state court and possibly through the State Supreme Court—three years behind its call—and this at the cost of imperiling the issue in this cause by inviting the court to force upon them a final ruling or decree in their favor, for which they decline to ask!

For our part, we can see no benefit in such a course to anybody, except such as would ordinarily flow from keeping the Trust
1164 Company in further and prolonged liquidation.

In view of the facts shown in the affidavits presented in our former petition and the references to the record in the latter, we do submit that the stockholders of this Trust Company should not have this final issue held open longer. That if the Southern Company—whose resources have sustained its counsel in making this colossal record upon a bill found by the master to be bad upon its face for a half dozen reasons, and also further barred by a half dozen conceded and undeniable or "undisputed" facts—is liable for this big Belt debt, it is time for it to be finally adjudged so to be in a case where that specific issue has been brought into the case by the Trust Company itself and rests upon the construction of but one document.

It seems needless to add that if we had had any intimation at the hearing in chambers at St. Paul last June that Messrs. Gates and English had not meant to apply for leave to file the additional assignments of error and to ask for the fullest judgment they could get herein, or to temporize with the situation and with the court's leniency, we would not have so promptly waived insistence upon our application for leave to do so.

And as it was through our efforts that the issue has been saved it would seem that it is not inappropriate for us to insist that it be now disposed of.

We gather that the chief objections of Messrs. Gates & English to making formal assignments of error on this issue and presenting an application for a final judgment herein are two
1165 (which we try to anticipate in advance):

1st. That because no cross-bill was filed by the Trust Company based upon this issue, or because no affirmative relief was prayed by it in respect thereto, therefore such issue is not res judicata on this record and hence any adjudication of this issue in favor of the Trust Company would merely be "persuasive" evidence in the State Court Cases and not conclusive.

2nd. That if this court should hold that for lack of proper exceptions it could not review this finding, such action of the Trust Company in formally assigning error might tend to preclude it from claiming in the State Court Cases that the present finding of the master and court is not res judicata.

The idea that an issue set up merely in defense can never be held to be adjudicated even when a special finding thereon has been made, will certainly strike this court as novel indeed. And if this

court should overrule this finding and award a judgment in favor of the Trust Company against the Southern, it certainly will satisfy the stockholders of the Trust Company and it ought to satisfy their counsel. It is what they have been fighting for—and we know of nothing else.

As to the second point, it would seem that counsel made their election as to this point last June. The counsel had submitted their case upon the risk that the liability issue was not in the case.

The court graciously warned them that it thought it was. They then elected to proceed upon the basis that it was.

1166 They certainly are not doing so by asking the court to elect whether it will treat each issue as in or out of the case.

This temporizing with the situation is not fair to the court or the Trust Company and its stockholders.

While it would be perfectly just for this court to rebuke them with directing a judgment in favor of the Trust Company, stockholders of the latter accurately advised of the situation naturally feel that there should be some one to make the formal request or to stand as sponsor for the judgment if granted.

We assume, too, that counsel are well advised of the uniform rule that where jurisdiction is invoked of a court and denied by the court, the action has no force whatever as res judicata of the subject matter.

The annexed brief is here submitted to meet all possible objections to the course proposed and to prove:

1. That the issue of the Southern's liability being in the case, it is of course competent for the court upon reversing to direct a decree against the Southern upon a formal amendment of the answer of the Trust Company to its intervening petition praying for such decree.

2. There is no rule of "laches" barring the Trust Company from such relief.

3. No further pleadings or amendments of the Southern Company should be allowed in such case.

4. The finding herein as to the liability of the Southern will be res judicata of such issue; and hence there is no reason why an end should not be made of the entire issue and final relief awarded herein.

* * * * * * *

1167 (Here follows a brief in support of the foregoing Petition for leave to file Suggestions as to Final Decree.)

(Endorsed:) Filed in U. S. Circuit Court of Appeals on February 19, 1912.

1168 (*Order for Notice to Counsel and Fixing Time for Filing Briefs, etc., on Petition of Shedd et al.*)

December Term, 1911.

MONDAY, February 19, 1912.

On reading the petition of Edward A. Shedd, and others presented this day,

It is hereby ordered, that copies of this petition and accompanying papers be served upon other counsel in the case as soon as convenient, that any other counsel in the case may, if they so desire, answer the petition and present affidavits concerning the same in writing or in print at any time within fifteen (15) days, and that the petitioners may reply in the same manner within ten (10) days thereafter when the matter will be submitted to the Court.

St. Louis, Missouri, February 19, 1912.

(Signed) WALTER H. SANBORN,
Circuit Judge.

(*Proof of Service of Order of February* 19, 1912, *as to Filing of* ***Briefs, etc.***)

Affidavit of Mailing.

STATE OF ILLINOIS,
County of Cook, ***ss:***

B. H. Montgomery being duly sworn deposes and says that he is an office associate with Enoch J. Price, and at the instance of said Enoch J. Price mailed to Samuel Untermyer, 37 Wall St., New York, attorney for the Kansas City Southern Railway Company, on February 21, 1912, postage prepaid, a copy of the Petition of Edward A. and Charles B. Shedd and Robert H. Law for leave to file Suggestions, which petition was filed at the office of the clerk of said Court of Appeals at St. Louis on February 19, 1912.

B. H. MONTGOMERY.

Subscribed and sworn to before me this 23rd day of February A. D. 1912.

[SEAL.] EVERETT M. SWAIN,
Notary Public.

Notice.

To Frank Hagerman, Esq., Counsel for Cambria Steel Company:
To Samuel W. Moore and Samuel Untermeyer, Esquires, Counsel for Kansas City Southern Railway Company et al., Appellees; and
To D. J. Haff, George H. English and Edward P. Gates, Esquires, Counsel for Guardian Trust Company:

1169 You and each of you are hereby notified that on Monday, the 19th day of February A. D. 1912, the said Circuit Court

of Appeals in and for the Eighth Circuit, sitting at St. Louis, entered a rule in the above entitled cause upon the petition of Edward A. Shedd and others that day presented, with a copy of which rule you are herewith served.

There is also served on you herewith a copy of said petition referred to in said rule. You are also served with a copy of the petition of said Shedd and others which was filed in said cause at St. Paul on June 16, 1911, and upon which a hearing was heretofore had; copies of said last mentioned document having been presented to said court along with the first mentioned petition.

Dated, February 20, 1912.

NEWEL H. CLAPP,
406 *German American Bank Bldg., St. Paul, Minnesota.*
ENOCH J. PRICE,
No. 9 South La Salle Street, Chicago, Illinois,
Counsel for said Petitioners Shedd and Law.

Proof of Service.

STATE OF MISSOURI,
County of Jackson, ss:

Charles M. Bush being duly sworn deposes and says that he is by occupation an attorney at law resident in and practicing law at Kansas City, in Jackson County, Missouri.

Affiant further states that on the 21st day of February A. D. 1912, he served true copies of the above and foregoing notice and of the annexed rule or order of court entered in said cause on February 19, 1912, and also true copies of the two printed petitions hereto annexed, upon the following counsel in said cause, viz.:

On Frank Hagerman, Esq., by leaving true copies of said documents with him personally in said county;

On Samuel W. Moore, Esq., by leaving true copies of said documents with F. H. Moore, Assistant General Solicitor of Kansas City Southern Railway Co., Assistant to Samuel W. Moore and in charge of his office, said Moore being absent from Kansas City, Mo.;

1170 On D. J. Haff, Esq., by leaving true copies of said documents with W. C. Michaels, Office partner of D. J. Haff and in charge of his office, said Haff being absent from Kansas City, Mo.;

On George H. English and Edward P. Gates, Esquires, by leaving true copies of said documents with said Edward P. Gates personally in said county.

And further affiant saith not.

CHAS. M. BUSH.

Subscribed and sworn to before me this 21st day of February A. D. 1912.

[SEAL.] MABEL C. TRUSSLER,
Notary Public.

My commission expires August 11, 1915.

(MEMO. OF CLERK.—Attached to the foregoing Proof of Service is a copy of the order of said Circuit Court of Appeals of February

19, 1912, for notice to counsel and fixing time for filing briefs, etc., and also a copy of the petition of Shedd, et al., for leave to file Suggestions as to Final Decree, filed Fbruary 19, 1912, and also a copy of the petition of Shedd, et al., for leave to file additional Briefs, filed June 16, 1911, which said copies so attached are omitted here for the reason that copies of same have heretofore been included in this transcript.)

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Feb. 22, 1912.

Order of Submission of Petition of Shedd et al., for Leave to File Suggestions as to Decree.)

December Term, 1911.

SATURDAY, March 16, 1912.

An order having been entered on the 19th day of February, 1912, in the above entitled causes, granting counsel for appellants and appellees fifteen days within which to answer the Petition of Edward A. Shedd, et al., for leave to file suggestions as to the final decree herein, and permitting the filing of briefs thereon within the same period, and allowing petitioners to reply within ten days thereafter, and it now being made to appear to this Court that neither an answer nor briefs have been filed, It is now here ordered that said petition of Edward A. Shedd, et al., for leave to file suggestions as to the final decree, be, and the same is hereby, submitted to Judges Sanborn, Marshall and Wm. H. Munger before whom the original appeals were argued and submitted.

March 16, 1912.

1171 (*Opinion, Filed October* 22, 1912.)

United States Circuit Court of Appeals, Eighth Circuit, September Term, A. D. 1912.

No. 3489.

CENTRAL IMPROVEMENT COMPANY et al., Appellants,
vs.
CAMBRIA STEEL COMPANY et al., Appellees.

No. 3490.

GUARDIAN TRUST COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al., Appellees.

Appeals from the Circuit Court of the United States for the Western District of Missouri.

Mr. George H. English, Jr., and Mr. Edward P. Gates (Mr. D. J. Haff and Mr. E. C. Meservey on brief), for appellants.

Mr. Frank Hagerman, for Cambria Steel Company.

Mr. Samuel Untermyer and Mr. Samuel W. Moore, for Kansas City Southern Railway Company.

Before Sanborn, Circuit Judge, and Marshall and Wm. H. Munger, District Judges.

WM. H. MUNGER, *District Judge*, delivered the opinion of the court.

While the parties to these controversies are numerous, the questions involved upon the appeal require consideration only of acts of the following named companies, to-wit: The Cambria Steel Company, which, for convenience, will herein be designated Cambria Company; Kansas City, Pittsburg & Gulf Railroad Company, herein called Gulf Company; Port Arthur Channel & Dock Com-
1172 pany, herein called the Dock Company; Kansas City Suburban Belt Railroad Company, herein called the Belt Company; Kansas City Southern Railway Company, herein called the Southern Company; Guardian Trust Company, herein called the Trust Company; The Provident Life & Trust Company, herein called Provident Company.

The Gulf Company was a railroad extending from Kansas City to Port Arthur on the Gulf of Mexico; the Dock Company was a local company having terminal facilities at Port Arthur; the Belt Company was a belt line railroad having terminal facilities at Kansas City, Missouri. Each of these companies had outstanding bonds secured by mortgages upon its properties. The Cambria Company was a judgment creditor of the Belt Company. The Trust Company

owned a large amount of the stock and bonds of both the Gulf Company and the Belt Company and was also a creditor of the Belt Company. The Gulf Company, having defaulted in the payment of interest upon its mortgage, a suit for foreclosure was instituted, and a committee of bondholders was selected to originate and propose a reorganization plan. This committee proposed a plan of reorganization by which the properties of the Gulf Company, the Dock Company and the Belt Company should be acquired and organized into or operated as a single new company. This committee formulated a plan of reorganization, by the terms of which it was proposed that a new company be organized to acquire the properties of the three mentioned companies. Their plan was published and submitted to the bond and stockholders of each of the companies, the committee declaring that it had formulated and adopted said plan as the basis of the reorganization of the railroad system, having for its ultimate purpose the unification of the main line and terminals into one ownership and under one management; that such object was sought to be accomplished by having the Gulf Company, when reorganized, acquire the capital stock of the other two companies, namely, the Dock Company and the Belt Company, and, having thus acquired the control and possession, to thereafter adjust the bonded indebtedness standing against the properties of the Belt Company and Dock Company by retiring the existing bonds, and issuing therefor new bonds, the basis of the plan being that the property of the existing Gulf Company should be sold in the foreclosure proceeding, purchased by the committee, and a successor company organized, to which the property so purchased should be conveyed, together with the stock and bonds of the Dock Company and the Belt Company. If sufficient of the stock and bonds of those companies should be deposited with the committee, in exchange for bonds and stock of the new company to be organized, then those properties to be acquired. By that plan it was said the following results would be obtained: the new company to be organized would

1173 own the property of the Gulf Company and also the bonds and capital stock of the Belt and Dock Companies, and thereby all three properties would be under one corporate ownership, management and control. Said stock and bonds so purchased of the Belt and Dock Companies to be pledged under the mortgage to be given by the company to be organized for the payment of (1) floating debts and existing car trust obligations; (2) adequate provision for working capital for future acquirements. It was also stated that it was contemplated that said reorganized or new company should issue $30,000,000 fifty-year three per cent gold bonds, $18,000,000 of the bonds to be used for the conversion of the bonds of the Gulf Company, $1,330,000 for the conversion of the old or existing bonds of the Belt Company, $817,500 new bonds for the old or existing bonds of the Dock Company, $3,000,000 of the new bonds to be sold for the necessary cash requirements of the new company, $3,802,500 to be reserved for the future requirements of the new company, $3,050,000 of new bonds to be used in acquir-

ing existing outstanding bonds of some other companies that were subsidiary companies of the Belt Company.

It was proposed in the plan that the holders of securities of the Gulf Company were to receive for their bonds seventy-five per cent in new bonds and fifty per cent in new preferred stock; the stockholders of the Gulf Company, upon paying $10.00 per share, were to receive one share of new common stock for each share of the old stock.

The bondholders of the Belt Company, for their old bonds, were to receive 133 per cent of new bonds and 25 per cent in new preferred stock; the stockholders of the Belt Company were to receive for each share one-quarter of a share of new preferred stock and three-quarters of a share of new common stock.

The bondholders of the Dock Company were to receive for their old bonds fifty per cent in new bonds, fifty per cent in new preferred stock, and fifty per cent in new common stock; the stockholders of the Dock Company, for each share of their stock, were to receive three-quarters of one share of new common stock.

The stock and securities of the respective companies were largely deposited according to the committee's plan. A decree was entered in the foreclosure against the Gulf Company on February 5, 1900, sale had and the property thereunder acquired by the Southern Company on March 19, 1900, the date on which it was organized and incorporated.

The Southern Company issued a new mortgage and bonds, also its stock, according to the terms of the reorganization plan, and such bonds and stock were exchanged for the bonds and stock of the old companies, the holders of which had deposited their bonds and stock in accordance with the proposed plan. The Trust Company
1174 accepted the plan and deposited its stock and bonds which it held of the Belt Company and received in new bonds and stock its proportionate amount under the reorganization agreement.

Although the Southern Company had acquired practically all of the bonds and stock of the Belt Company in exchange for its new bonds and stock, in accordance with the reorganization plan and agreement, and acquired possession and control of the property of the Belt Company, the Provident Company, Trustee in the Belt mortgage, filed its bill of foreclosure and asked for the appointment of receivers. The Master's finding in this regard was as follows: "On September 6, 1900, nearly six months after the incorporation of the Southern Company, the receivers were appointed for the Belt Company, at the instance of the Southern, and through the Provident Company, as Trustee, which filed the foreclosure bill; the foreclosure decree being made on November 6th, 1901, and the sale on December 31, 1901, to the Southern Company." The Trust Company was a party to that foreclosure suit and before the decree was entered asked leave to file an amended supplemental answer, stating in effect that the reorganization plan had been promulgated in the interests of creditors of the Belt Company as well as bondholders and stockholders, and that it had been intended to pay the Trust Company's debt, the reorganization committee having often promised to pay it

until about the time of the institution of the foreclosure suit, and that the purpose of such suit was to vest in the Southern Company title to all the Belt Company's property, free from the payment of that company's floating debt, which was a fraudulent purpose. It asked that the Southern Company be made a party to the cause, &c. The court denied the leave to file such answer but provided, however, as a condition of the denial that complainant (Provident Company) should, within five days thereafter, file a stipulation that the decree should be without prejudice to the claim of the Trust Company. The last paragraph of the foreclosure decree was as follows:

"This decree is entered on the express condition to which the complainant has assented, that it shall be without prejudice to and shall not bar the right of the Guardian Trust Company, or its receiver, to plead and insist in any litigation now pending or hereafter brought, that the Kansas City Southern Railway Company by virtue of the manner in which it was organized, or for any other reason, is legally or equitably liable for and bound to pay the unsecured debts of the Kansas City Suburban Belt Railroad Company, either in full or to pay them to the extent of the value of any property heretofore acquired by it from the Kansas City Suburban Belt Railroad Company, or that may hereafter be acquired by it from said company by virtue of these foreclosure proceedings, and without prejudice to the right of said Guardian Trust Company or its receiver, to plead and insist, in any pending litigation or litigation hereafter brought, that the members of the reorganization committee of the Kansas City,
1175 Pittsburg & Gulf Railroad Company assumed to pay and are liable to pay the unsecured debts of the Kansas City Suburban Belt Railroad Company existing at the time the alleged reorganization was undertaken."

On September 6, 1900, the Cambria Company filed a creditor's bill against the Belt Company, Trust Company and other companies, the object and purposes of which was to recover certain securities belonging to the Belt Company, which had been deposited with the Trust Company as security for the Belt Company's indebtedness to the Trust Company, claiming in its bill that the Belt Company was not in fact indebted to the Trust Company, and made an application for the appointment of a receiver, and on that day receivers were appointed for the Belt Company upon the joint application of the Cambria Company and the Provident Company complainant in the foreclosure suit against the Belt Company.

In the suit brought by the Cambria Company issues were joined, the receivers appointed for the Belt Company filed a cross-bill against the Trust Company, denying indebtedness upon the part of the Belt Company to the Trust Company, but claiming that the Trust Company was in fact a debtor of the Belt Company. The case was, in November, 1900, referred to Hon. Shannon C. Douglass, as Special Master, to take the testimony &c. The hearing proceeded before the Master and after much testimony had been taken an order was made by the court in February, 1905, pursuant to a stipulation of parties, admitting the Southern Company as a party and giving it leave to file a petition of intervention, and the Southern Company filed its

petition of intervention on the 27th day of that month, claiming that the various securities held by the Trust Company to secure its indebtedness against the Belt Company were covered by the mortgage which was foreclosed against the Belt Company, and sought to recover such property by its bill of intervention.

The hearing before the Master extended over several years, upwards of 34,000 pages of testimony *was* taken, and the Master, on the 21st of May, 1910, filed his report, which comprises 381 pages of the printed record. The evidence has not been brought to this court; hence all questions of fact as found by the Master are conclusive upon the parties on this appeal.

The Master found that the evidence did not support the claim of the Cambria Company and recommended that its bill be dismissed for want of equity. The Master found upon the accounting that there was due from the Belt Company to the Trust Company the sum of $639,658.86.

The Master found fully the facts as to the reorganization plan, the acquiring by the Southern Company of the stock and bonds of the Gulf Company, Dock Company and Belt Company, the issuing of its new stock and bonds to the holders of the bonds and stock
1176 of those companies, in exchange for the bonds and stock of the respective companies held by them, as we have heretofore stated.

The Master found, as a matter of law, that the Southern Company was not liable for the debts of the Belt Company.

The Trust Company filed exceptions to the report of the Master, among other things to the finding that the Southern Company was not liable for the floating indebtedness of the Belt Company, giving as reasons therefor that that was not an issue in the case, and no finding thereon should have been made by the Master.

Various exceptions were also filed by the Central Improvement Company, one of the defendants in the action.

Subsequently, a hearing was had by the court upon the report of the Master and the exceptions thereto, the exceptions were overruled and the report of the special master was in all things approved and confirmed, and a decree entered in accordance with the findings and recommendations of the Master, from which the Trust Company and the Central Improvement Company have prosecuted their appeal.

The decree also provided that, it appearing that all costs incurred by the Cambria Company prior to November 20, 1901, had been paid by it, no further costs should be taxed against the Cambria Company, nor should any costs which had been paid by the Cambria Company be chargeable against any other parties to the action. The remaining costs were taxed by the court one-third against the Trust Company and two-thirds against the Belt Company, to be paid by the Belt Company and Southern Company.

The assignments of error relied upon in this court are:

1st. That the court erred in including in said decree the finding that the Southern Company did not assume or agree to pay or become liable for the indebtedness owing by the Belt Company to the Trust Company.

2nd. That the court erred in requiring the Central Improvement Company and its receivers to convey to the Southern Company the properties specified in the decree.

3rd. That the court erred in adjudging that one-third of the costs of this action be paid by the Trust Company.

The principal question, and the one which involves the merits of the controversy, rests upon the correctness of the finding of non-liability upon the part of the Southern Company for the debt found due from the Belt Company to the Trust Company, for, as stated by counsel for the Southern Company in their brief:

"The decision of the question of the Southern Company's liability for the debts of the Belt Company was necessary to a dis-
1177 position of the case. The defense pleaded by the Trust Company to the effect that the Southern Company had assumed or become liable for the indebtedness of the Belt Company was, if true, a perfect answer to the intervening petition. It said in substance to the Southern Company—'Even though you may have the legal or equitable title to the collateral securities or to the properties represented by them, yet they were pledged by the Belt Company to secure its indebtedness, you assumed and agreed to pay that indebtedness, and a court of equity will not award you possession of the securities until you discharge your own obligation. Any relief to you must be conditioned upon your payment of the Belt Company's indebtedness.'"

This contention that if the Southern Company had become liable for the indebtedness of the Belt Company to the Trust Company that was a perfect defense to the intervening petition of the Southern Company is sound and unanswerable, and after a careful review of the record in this case this court holds, and it decides, that the issue whether or not the Southern Company was indebted to the Trust Company for the debt of the Belt Company to the Trust Company was a material and decisive issue between the Trust Company and the Southern Company in this case which it was the duty of the master and the court below to consider and decide. The remarks of this court in Guardian Trust Co. v. Kansas City Southern Ry. Co., 171 Fed. 43, 96 C. C. A. 285, that "The liability of the Southern Company to pay the debts which the Trust Company alleges in the actions at law it has promised to pay is not an issue and cannot be determined in this suit in equity", upon which counsel rely, must be construed, as must all opinions of the courts, in the light of the facts and the issue then in hand. The issue before the court in that case was whether the causes of action in the state court were so identical with the cause of action theretofore pending in the court below that an injunction should be issued to stay the prosecutions of the actions in the state court. This court held that the suit in the Circuit Court was in equity, that it related to the title and ownership and the right to a conveyance of certain specific property, while the actions at law brought by the Trust Company against the Southern Company in the state court were purely in personam to recover the alleged debts of the Southern Company, that in the suit in equity the same relief was not sought as in the actions at law and that the

prosecutions of the actions at law in the state court constituted no interference with the suit in the court below. There was nothing in the decision in that case in conflict with the conclusion which has now been reached.

The master and the court below decided that the Southern Company was not indebted to the Trust Company for the indebtedness of the Belt Company to the latter. The Trust Company requests this court to review that decision upon the report of the
1178 master and contends that as a matter of law the Southern Company is so indebted upon the facts which the master finds. The Southern Company objects to this review on the ground that the only exception to the master's conclusion here and the only assignment of error in the affirmance thereof by the court below was placed upon the ground that that issue was not judicable in this suit. But an appeal in a suit in equity invokes a trial de novo in the appellate court and entitles the appellant to a just decree. Dowagiac Mfg. Co. v. Lochren, 143 Fed. 211; Blease v. Garlington, 92 U. S. 1, 8, and under Rule 11 of this court a plain error not assigned may be, and ought to be, considered where the failure to consider it would result in a great injustice. United States v. Bernays, 158 Fed. 792; New York Life Ins. Co. v. Rankin, 162 Fed. 103, 108; United States v. Tennessee etc. R. R. Co., 176 U. S. 242, 256. And in view of the facts that the issue here has been long and persistently contested below, that exception was taken and assignment of error made regarding it, though upon an erroneous ground, that both parties have prepared exhaustive briefs upon the question which the Trust Company asks us to review, that neither party can be taken by surprise and that a failure to review the legal conclusion below would result in an unjust final adjudication of the issue under consideration, we are constrained to consider and decide it.

It is claimed that the Southern Company is liable for the debt of the Belt Company to the Trust Company because it knowingly acquired the property of the Belt Company in the execution of a scheme to exclude the Trust Company's unsecured claim against the Belt Company for $639,658.86 from the benefit of the Belt Company's property and to apply that property by an exchange of stock and bonds and a mere formal and not actual foreclosure sale to the benefit of the stockholders of the Belt Company.

In Louisville Trust Co. v. Louisville &c. Ry., 174 U. S. 674, which was an action brought by a creditor to set aside a sale under a foreclosure as being in fraud of its rights, for the reason that such foreclosure was had in the interests of the stockholders as well as the bondholders, Mr. Justice Brewer, rendering the opinion of the court, said:

"The questions in this case are novel and important. They arise on the foreclosure of certain railroad mortgages, and suggest to what extent the same rules and considerations obtain in them as in the foreclosure of ordinary mortgages upon real estate. It goes without saying that the proceeding in the foreclosure of an ordinary mortgage on real estate is simple and speedy. No one need be considered except the mortgagor and mortgagee, and if they concur in the dis-

position of the foreclosure it is sufficient, and the court may properly enter a decree in accordance therewith. * * *

1179 "But this court long since recognized the fact that in the present condition of things (and all judicial proceedings must be adjusted to the facts as they are) other inquiries arise in railroad foreclosure proceedings accompanied by a receivership than the mere matter of the amount of the debt of the mortgagor to the mortgagee. We have held in a series of cases that the peculiar character and conditions of railroad property not only justify but compel a court entertaining foreclosure proceedings to give to certain limited unsecured claims a priority over the debts secured by the mortgage. It is needless to refer to the many cases in which this doctrine has been affirmed. It may be, and has often been said, that this ruling implies somewhat of a departure from the apparent priority of right secured by a contract obligation duly made and duly recorded, and yet this court, recognizing that a railroad is not simply private property, but also an instrument of public service, has ruled that the character of its business, and the public obligations which it assumes, justify a limited displacement of contract and recorded liens in behalf of temporary and unsecured creditors. * * *

"We notice, again, that railroad mortgages, or trust deeds, are ordinarily so large in amount that on foreclosure thereof only the mortgagees, or their representatives, can be considered as probable purchasers. * * *

"We must, therefore, recognize the fact, for it is a fact of common knowledge, that, whatever the legal rights of the parties may be, ordinarily foreclosures of railroad mortgages mean not the destruction of all interest of the mortgagor and a transfer to the mortgagee alone of the full title, but that such proceedings are carried on in the interests of all parties who have any rights in the mortgaged property, whether as mortgagee, creditor or mortgagor. * * * Assuming that foreclosure proceedings may be carried on to some extent at least in the interests and for the benefit of both mortgagee and mortgagor, (that is, bondholder and stockholder,) we observe that no such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation. In other words, if the bondholder wishes to foreclose and exclude inferior lienholders or general unsecured creditors and stockholders he may do so, but a foreclosure which attempts to preserve any interest or right of the mortgagor in the property after the sale must necessarily secure and preserve the prior rights of general creditors thereof. This is based upon the familiar rule that the stockholder's interest in the property is subordinate to the rights of creditors; first of secured and then of unsecured creditors. And any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation."

1180 A "transfer of property by a debtor with a reservation of an interest therein to himself" is always voidable by his creditors as against a debtor and all claiming under him with notice of his act, and a transfer by stockholders of a corporation of its property with a preservation of an interest in themselves is equally voidable against all who take the property with notice of their act. In Montgomery-Web Co. v. Dienelt, 133 Pa. St. 585, 596, 19 Atl. 430, a new corporation was formed and part of its stock was issued to the stockholders and a part of it was issued to the creditors of an old corporation for their holdings, and all the property of the old corporation was transferred to the new corporation. A single creditor of the old corporation assailed the transaction. The Supreme Court of Pennsylvania said:

"Under such circumstances they (the stockholders) were bound to take notice of the nature of the transaction and to know that equity would still regard the property as a trust for the payment of existing debts, and would follow it on behalf of the creditors until it should get into the hands of innocent purchasers for value. Such purchasers they were not. The old stockholders were not purchasers for value at all and the new stockholders were not innocent, for they knew, or were bound to take notice of the taint in their co-adventurers' title. We are of the opinion that as to the stockholders in the Aronia Company, this was a transfer of property by a debtor with the retention of an interest in himself within the settled rule of law that makes such transfers void as against creditors, and that, as to the Aronia creditors who became new stockholders in the Montgomery Company, they took with such notice as prevents them from claiming now as innocent holders for value against the appellants as execution creditors of the old corporation. It is not worth while to cite authorities for these principles, they are settled and familiar."

In Chicago, Rock Island & Pacific Ry. Co. v. Howard 74 U. S. 392, 409, the leading case upon this subject, where a foreclosure sale of the property of a corporation was made pursuant to an arrangement whereby 84 per cent of the purchase price was to go to its bondholders and 16 per cent to its stockholders, the Supreme Court said: "Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation and recognizes the rights of creditors to pursue it into whatsoever possession it may be transferred, unless it has passed into the hands of a bona fide purchaser; and the rule is well settled that stockholders are not entitled to any share of the capital stock, nor to any dividend of the properties until the debts of the corporation are paid." The facts and the ruling in that case are thus stated in the syllabus:

"A sale under foreclosure of mortgage of an insolvent railroad company, expedited and made advantageous by an arrangement between the mortgagees and the stockholders, under which
1181 arrangement the mortgagees, according to their order, got more or less of their debt (100 to 30 per cent), and the stockholders of the company the residue of the proceeds—a fraction (16 per cent.) of the par of their stock—held fraudulent as against

general creditors not secured by the mortgage, and this although the road was mortgaged far above its value, and on sale in open market did not bring near enough to pay even the mortgage debts; so that in fact, if there had been an ordinary foreclosure, and one independent of all arrangement between the mortgagees and the stockholders, the whole proceeds of sale would have belonged to the mortgagees."

In Central of Georgia Ry. Co. v. Paul, 93 Fed. 878, 884, the Circuit Court of Appeals of the Fifth Circuit said:

"There is no substantial dispute that the appellee, Mary F. Paul, was and is a creditor of the Central Railroad & Banking Company of Georgia, and the question is whether the Central of Georgia Railway Company is liable for her demand. The case shows that the sale of the railway properties under the foreclosure at the suit of the Central Trust Company, the sale of the collateral securing the floating debt claims, and the sale of the 'overflow property,' all were in pursuance of a reorganization plan, which was carried out, and resulted in the transfer of all the property and assets of the Central Railroad & Banking Company of Georgia to the Central of Georgia Railway Company; and the active participating reorganizers were not only the creditors of the Central Railroad & Banking Company of Georgia, secured by mortgage and otherwise, but included as well the stockholders of said company; so that, for the purposes of the present case, it is an indisputable fact that, notwithstanding all the sales of property and other transactions in liquidation, the stockholders of the Central Railroad & Banking Company of Georgia retained their interest and rights, and by virtue thereof are now either stockholders of the new organization, Central of Georgia Railway Company, or are otherwise provided for, and that the new company has acquired, and now holds, all the former property and assets of the old company. It would seem from this state of facts that the appellee has the right to look to the new company for the payment of her claim."

Indeed, it is settled law, that "A reorganization of an insolvent railroad company by which both its mortgage bondholders and its stockholders, in exchange for their bonds and stocks, are given an interest in the new company which purchases the property of the old company at a foreclosure sale made pursuant to such plan of reorganization, and by consent of the old company and its stockholders is fraudulent in law as to unsecured creditors of the old company whose claims are left unpaid and renders the new company liable for the claims of such creditors." Northern Pacific Ry. Co. v. Boyd, 177 Fed. 804; Luedecke v. Des Moines Cabinet
1182 Co., 140 Ia. 223, 118 N. W. 456; Hurd v. New York & Commercial Steam Laundry Co., 60 N. E. 327.

The case under consideration falls directly under this rule of law. A scheme was devised and proposed for the benefit of the stockholders and bondholders of the Belt Company, the Gulf Company, and the Dock Company, as the reorganization agreement reads: "For the reorganization of the Kansas City, Pittsburg & Gulf R. R. Co., and its property, and also, if necessary, for the reorganiza-

tion of the Kansas City Suburban Belt Railroad Co. and the Port Arthur Channel & Dock Company and their properties, and for the consolidation of said corporations, if such consolidation can be lawfully made, and is found to be practicable either with or without foreclosure of either or all of said properties, or by means of the acquisition of the stock or other securities of either or all of said corporations, or in any other manner that may be deemed by said committee to be most practicable and feasible." That scheme was accepted, approved and executed by the stockholders and bondholders of the Belt Company and by the Southern Company for their benefit to the exclusion of the Trust Company's unsecured claim from all benefit from the property of its debtor, the Belt Company. A new company, the Southern Company, was organized, the stockholders and bondholders of the old company, the Belt Company, in exchange for their stock and bonds were offered and took an interest in the new company, the stockholders took for their $4,700,000.00 of stock in the old company about $1,857,000.00 of the preferred stock and about $3,562,500.00 of the common stock of the Southern Company, in all about $5,419,500.00 in stock at its par value, and the bondholders took about $1,330,000.00 of the preferred stock and $250,000.00 of the bonds of the Southern Company, in all about $1,580,000.00 at their par value, for their $1,000,000.00 of bonds of the old Belt Company and after the new company had obtained in this way more than 89 per cent of the bonds and more than 97 per cent of the stock of the old company it purchased the property of the old company at a formal, but not an actual, foreclosure sale, made pursuant to this plan of reorganization at the instigation of the Southern Company as holder of 89 per cent of the bonds of the Belt Company and with its consent as holder of more than 97 per cent of the stock of the Belt Company. And what was the actual effect of the entire performance? The property of the Belt Company was transferred to a new company and its stockholders preserved for themselves an interest in that property. Before the transaction they had common stock of the Belt Company of the par value of $4,700,000.00 and the Belt Company owned its property, after the transaction the stockholders had preferred stock of the Southern Company of the par value of about $1,857,000.00 and common stock of that company of the par value of about $3,562,500.00 and the Southern Company owned the property of the Belt Company. But a sale or transfer by
1183 stockholders of the property of their corporation in which they preserve an interest, whether that sale or transfer be by deed, by mortgage, by judgment, by foreclosure sale, or by any other means, is fraudulent and voidable against the unsecured creditors of their old corporation and a purchaser who takes and converts such property to its own use with knowledge of the facts, becomes legally liable to pay the unsecured debts of the old corporation, at least to the extent of the value of the property so taken and converted. The value of the property of the Belt Company so taken and converted by the Southern Company was many times the amount of the Belt Company's debt to the Trust Company. The

conclusion is irresistible and the judgment of this court is that the Southern Company which, pursuant to this scheme and in its execution, purchased the Belt Company's property at the formal foreclosure sale with full knowledge of the scheme and of the fact that by its execution the stockholders of the Belt Company were appropriating to themselves the benefits of the property of the Belt Company which in law and in equity belonged to the unsecured creditors of that company, became legally liable to pay and is indebted to the Trust Company to the amount of the debt of the Belt Company to the Trust Company in the sum of $639,658.86 and interest from June 22, 1910, on $473,723.59 at the rate of 6 per cent per annum, on $46,565.76 at the rate of 7 per cent per annum and on $119,369.51 at the rate of 8 per cent per annum.

The contention of the Southern Company th t the Trust Company is estopped from enforcing and collecting t is claim based on the unsecured debt of the Belt Company to it, because, for the bonds and stock of the Belt Company, which is owned, it received bonds and stock of the Southern Company under the plan of reorganization, is untenable. The collection of this claim is not an avoidance, it is an enforcement and execution of the scheme of reorganization and of the trust in favor of the creditors of the Belt Company, which that scheme created. The published plan of reorganization was plenary notice under the law to the Southern Company, and to all who became interested under that plan, that purchasers of property of the companies foreclosed pursuant to it, took that property in trust for the unsecured creditors of those companies. That plan expressly set apart $475,000.00 to be applied to the payment of the floating debts of those companies, vested in the committee of reorganization discretionary power to pay such of those floating debts as it saw fit to discharge and that it actually expended $1,164,172.56 in paying such debts. The committee had full authority to pay this claim of the Trust Company. The Trust Company may well have supposed that its claim, as well as the claims of other creditors of these foreclosed companies, which were paid to the amount of over a million dollars, would be paid by the committee. The Trust Company never represented that it
1184 would not, but persistently asserted that it would enforce its demand, and the collection of it from the Southern Company is neither barred by estoppel nor inconsistent with the previous position and action of the Trust Company.

Another objection to the enforcement of this claim is that the Trust Company was guilty of laches. There is nothing in the record to indicate that the Southern Company did not intend to pay the debts of the Belt Company until the foreclosure proceeding was brought by the Provident Company. As stated, the Trust Company interposed its claim in that action and the decree provided that its rights respecting the enforcement of such claim should remain unaffected. When the Southern Company filed its petition of intervention in the case brought by the Cambria Company, the Trust Company promptly asserted in defense thereto the liability of the Southern Company. The Trust Company also brought an action

in the state court against the Southern Company for a part of its claim, for the reasons which it had before asserted. The Southern Company filed its supplemental bill and obtained an injunction against the prosecution of the action in the state court, which was reversed by this court. Guardian Trust Co. v. Kansas City Southern Ry. Co., 146 Fed. 337. The Trust Company then brought a second action in the state court for another portion of its claim. The Southern Company moved the state court to stay the actions, which motion was denied. It then filed another bill for an injunction against the Trust Company to prevent the prosecution of these actions, and the circuit court granted a preliminary injunction, which was reversed by this court. Guardian Trust Co v. Kansas City Southern Ry. Co., 171 Fed. 43. Under these circumstances, the plea of laches is unfounded.

Again, the issue of the liability of the Southern Company to the Trust Company for the debt of the Belt Company to it came into this case as an equitable defense to the intervening petition of the Southern Company of February 27, 1905, wherein it sought to appropriate to itself property of the Central Improvement Company, 1120/1407ths of the shares of the stock of which company had been pledged to the Trust Company by the Belt Company to secure $203,900.00 of the debt of the latter company to the former. The Southern Company endeavored to appropriate this property of the Central Company under the after-acquired clauses of the old foreclosed mortgages of the Belt Company, the Air Line Company and the Gulf Company. The Trust Company answered (1) that the Southern Company owed it this debt, that he who seeks equity must do equity, that the Southern Company was entitled to no relief until it paid this debt, and (2) that by virtue of the pledged stock of the Central Company to secure the payment of the debt of the Belt Company its equitable right to the property of that company was superior to that of the Southern Company. The Trust Company was
1185 guilty of no fatal laches here because it held the majority of the stock of the Central Company and that company held the title to the property which the Southern Company sought to take, so that the Trust Company had a perfect legal right by virtue of its stock to appropriate the property to the payment of its debt and it needed no affirmative relief, and a court of chancery will, and it is its duty to, condition its grant of relief to a complainant with the enforcement of any just claim of the defendant which the latter ought in equity and good conscience to pay, although on account of the statute of limitations, or for some other reason, the defendant might not be able affirmatively to enforce it. Farmers' Loan & Trust Co. v. Denver, L. & G. R. Co., 126 Fed. 46, 51, 60 C. C. A. 588, 593; Pomeroy's Eq. Jur. Secs. 386, 393, note 4; Brent v. Bank of Washington, 10 Pet. 596; De Walsh v. Braman, 160 Ill. 415, 43 N. E. 597, 600; Farmers' Bank v. Eglehart, 6 Gill., 50, 57; Fievel v. Zuber, 67 Tex. 279, 280, 3 S. W. 273; Booth v. Hoskins, 75 Cal. 271, 275, 276, 17 Pac. 225; De Cazara v. Orena, 80 Cal. 132, 134, 22 Pac. 74; Hall v. Arnott, 80 Cal. 348, 354, 22 Pac. 200; Grant v. Burr, 54 Cal. 298, 301; McKeen v. James (Tex. Civ. App.) 23 S.

W. 460, 464; Rodriguez v. Haynes, 76 Tex. 225, 232, 13 S. W. 296; Hartranft's Estate, 153 Pa. 530, 533, 26 Atl. 104; 19 Am. & Eng. Enc. of Law (2d Ed.) pp. 177, 178; Dimick v. Grand Island Banking Co., 37 Neb. 394, 399, 55 N. W. 1066; Gage v. Riverside Trust Co., (C. C.) 86 Fed. 984, 998; Whitmore v. Savings Union, 50 Cal. 145, 150; Spect v. Spect, 88 Cal. 437, 444, 26 Pac. 203, 13 L. R. A. 137.

It is insisted upon the part of the Southern Company that the reference to a Master was by consent of parties, and hence, that the findings of the Master are not subject to review. We do not think the record supports the statement that the Master was appointed by consent of parties. As before stated, the Cambria Company filed its bill September 6, 1900, and the record shows that, on the 7th of November, defendant having answered, the case was referred by the court upon its own motion to Shannon C. Douglass. On February 27, 1905, a stipulation was filed by the parties to the effect that the Southern Railway Company might become a party to the action either by joint complaint or by bill of intervention, as it might elect, and file its bill, asserting its claim, on or before February 25, 1905; that the adverse party should have ten days thereafter in which to plead and that the testimony theretofore taken should be applicable as evidence in support of and in resistance of the Southern Company's claim; "that such orders of court as may be necessary for the purpose may be entered carrying into effect this stipulation." In accordance with this stipulation, the court made an order, permitting the Southern Company to file its bill of intervention, and gave the adverse party ten days in which to plead to the same, referring the issues to Shannon C. Douglass to take the testimony
1186 thereon and report, &c. This stipulation was not a stipulation consenting to the appointment of a Master but was simply one which authorized the court to make the necessary orders relative to permitting the Southern Company to intervene, and fixing the time within which the parties should plead thereto and an order that the testimony theretofore taken should be treated and considered as testimony relative to the issues made by the Southern Company's bill of intervention. The reference to the Master was by the court upon its own motion. The court would naturally refer that issue to the Master who had theretofore been appointed by the court on its own motion to hear the case. Subsequently, on the 1st of May, 1905, the parties stipulated that the Southern Company might amend its intervening petition, setting up, in addition to the matters contained in its intervening petition on file, a claim against the Trust Company for an alleged breach of trust, and consented in the stipulation that such new issue should be referred to Shannon C. Douglass, the Special Master, and the court, pursuant to the stipulation, made an order permitting the Southern Company to file its amended intervening petition in that respect, and referred it to Shannon C. Douglass. It is this last stipulation and this order of the court upon which the Southern Company bases its argument that the reference of the case to the Master was by consent of parties. As before stated, the main issues, and the issues involved on this appeal, had

been referred to the Master by the court upon its own motion. The stipulation that the new issue made by the amended intervening petition should be referred to the Master was a stipulation with reference to that issue, that issue was decided by the Master in favor of the Trust Company, and is not before us for review. So the case is not one where the issues involved have been heard by a master appointed by consent of the parties. Even though the original appointment of the Master had been by consent of parties, a reference under those circumstances would not preclude the court from correcting manifest errors of law made by the Master. Rule 11 of this court. United States v. Tennessee & Coosa R. R. Co., 176 U. S. 242-256; Clyatt v. United States, 197 U. S. 207, 222; United States v. Bernays, 158 Fed. 792; New York Life Ins. Co. v. Rankin, 162 Fed. 103, 108.

The Central Improvement Company has made application to dismiss its appeal. It is not very material to the disposition of this case and to the adjudication of all the rights of the parties to this suit whether the application is granted or denied because the Trust Company had such an equitable interest in the property of the Central Company by virtue of the pledge to it of 1120 out of the 1407 shares of the stock of that company issued that the Trust Company's appeal completely challenges the decree of the court with reference to that property and furnishes ample warrant for its review and reversal. The Central Company has no prop-
1187 erty of substantial value except that specified in the decree. It is a mere holding company either for the Trust Company or for the Southern Company and the determination of their respective equities necessarily determines the rights of the Central Company and the ownership of the beneficial interest in its property, and the motion to dismiss its appeal is denied.

The result is that the Southern Company is entitled to no relief in this suit unless it first pays to the Trust Company the amount of the Belt Company's debt to it and the costs of this suit because it became indebted to the Trust Company in the amount of that debt by its acquisition of the property of the Belt Company under the reorganization scheme with full knowledge that the stockholders of the Belt Company thereby preserved for themselves an interest in that property to the exclusion of the Trust Company, a creditor of that corporation.

Moreover, if the Southern Company were not equitably estopped from recovering the property of the Central Company by its indebtedness to the Trust Company, nevertheless, equity would require it to pay to that company the value of the latter's 1120 pledged shares of the stock of the Central Company before it would permit it to take the property of the latter company and thus to destroy the value of its stock through its claim as a purchaser at foreclosure sales under the after-acquired clauses of the old mortgages of the Gulf Company, the Air Line Company and the Belt Company. The property in controversy is the remnant of numerous pieces of real estate to which the Central Company took title and for the purchase prices of which it issued its stock at par to the Gulf Company, the

Belt Company and the Air Line Company respectively, which companies paid the par value of that stock either to it or to the vendors from whom the property was bought. The result was that the Central Company, a corporation, owned and held the property in trust to pay the stockholders the par value of its stock which was the purchase price of the property. In this state of the case the Belt Company, which acquired 1120 of the 1407 shares of the stock thus issued by the Central Company, pledged this stock in the year 1899 to the Trust Company to secure the payment of $203,900.00 of its debt to that company and the title and rights of the parties stood thus unquestioned from 1899 until 1905, when the Southern Company filed its intervening petition in this case. It asserted that the Central Company held this property in trust for the mortgagor companies and that the after-acquired clauses of their mortgages carried it to itself, the purchaser at the foreclosure sales thereunder. Conceding that the property was appurtenant to the railroad and that the terms of the after-acquired clauses were broad enough to include it, how can this claim of the Southern Company be sustained. The after-acquired clause of a mortgage attaches to the interest acquired by the mortgagor only and it is always subject and inferior to junior liens, incumbrances and equities under which the property comes to the mortgagor. Farmers' Loan & Trust Co. v. Denver L. & G. R. Co., 126 Fed. 46, 49, 60 C. C. A. 588, 591; United States v. New Orleans R. R. Co., 12 Wall. 362; Central Trust Co. v. Kneeland, 138 U. S. 414, 423. In a simple case the justice and the application of this rule is plain. A railroad company makes a mortgage of its property with an after-acquired clause. It subsequently purchases a piece of property and gives its note and mortgage for the purchase price and the vendor sells or pledges the note to a third person to secure his debt. The mortgagee of the railroad may not deprive the pledgee of the note of the property which secures it under the after-acquired clause of his mortgage until he pays the junior note and mortgage and this because he has given nothing for this property while the junior mortgagee and his pledgee have parted with value for their security upon it. In the case in hand, the Central Company acquired the property here in dispute for its liability to pay to its stockholders the par value of its stock and it held the property in trust to secure the payment to its stock-holders of that liability. The mortgagees under the railroad mortgages and the Southern Company, the purchaser thereunder, knew these facts. They parted with no value on account of this property and a court of conscience may not permit them to deprive the stockholders of the Central Company, who have really paid for it, of the trust property which the Central Company holds to reimburse them unless the court first requires them to pay to the holders of the stock its actual value.

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The fact that the mortgagor companies originally took and held the stock of the Central Company before the Belt Company pledged it to the Trust Company, has not been overlooked. That fact, however, only clearly fixes the legal rights and equities of the parties, fixes the title to the land in the Central Company and estops the

mortgagor companies and all claiming under them from denying that the stock which they took and sold or pledged constituted the primary liability of the Central Company and the primary equity in the property it holds as against the mortgagees of the railroad companies and the purchaser thereunder. Watson v. Bonfils, 116 Fed. 157, 163, 166, 167, 53 C. C. A. 535, 541, 544, 545.

The stock of the Central Company was not the property of that company. It was a liability of that company. Conceding that the after-acquired clauses of the mortgages conveyed the Central Company's interest in this land subject to its primary trust to pay this liability they did not convey its liability, or the stock which represented it. Humphreys v. McKissock, 140 U. S. 304, 314. The equity of the stockholders as against the Southern Company which took whatever it has with full notice of all the facts in this case, is the same that it would have been if the liability of the Central Company, now represented by its stock for the purchase price of
1189 the property, had been represented by its promissory notes and a mortgage upon this land to secure them and they had been pledged by their owners to secure their debt to the Trust Company. The Trust Company, which holds 1120 shares of the stock of the Central Company to secure a debt to it of more than $200,000.00, has an equitable interest in the land of the Central Company superior to that of the Southern Company and the latter is entitled to no relief with reference to this property until it pays to the Trust Company the value of that stock.

The controlling equities of this case require that the decree below should be so modified, among other things, that it will adjudge that the Southern Company is indebted to the Trust Company in the amount which the Belt Company owes it, that is to say, in the sum of $639,658.86 and interest thereon from the date of the original decree, and that no relief be granted to the Southern Company unless that debt is paid.

Three of the stockholders of the Trust Company, at whose instance the question of the liability of the Southern Company was pressed to a decision in this court by the Trust Company, and its counsel, have filed a petition for leave to present the suggestion, that, in case this court finds, as it has found, that the Southern Company owes this debt, a decree should be rendered against it in this suit to the effect that the Trust Company recover this amount from the Southern Company and have execution therefor. There is no prayer for this specific relief in any of the pleadings of the Trust Company, but it is relief to which, under the law and upon the facts now found, the Trust Company is clearly entitled from this, or some other court, and in its answer to one of the numerous bills filed in this case it prayed for such other and further relief as should seem meet and just in the premises. The facts that the Southern Company voluntarily intervened in this suit in 1905 and sought to take from the Trust Company the security for its claim furnished by the stock of the Central Company and by a large amount of other stocks, bonds and property, to which the Southern Company was not entitled, that this attempt of the Southern Com-

pany called into this suit the Trust Company's claim that the Southern Company owed it the amount of the debt of the Belt Company, that the Trust Company tendered that issue in actions at law which it brought as long ago as 1905 and 1906, against the Southern Company in a state court to recover from it this very indebtedness, that the Southern Company delayed and prevented the trial of that issue in those actions at law by means of two successive injunctions which it obtained from the court below, on the ground that this issue was pending in this suit, injunctions which on appeal this court promptly dissolved, Guardian Trust Co. v. Kansas City Southern Ry. Co., 146 Fed. 337, 76 C. C. A. 615; Guardian Trust Co. v. Kansas City Southern Ry. Co., 171 Fed. 43, 96 C. C. A. 285, that
1190 this suit has been thoroughly litigated by all parties interested in it for more than six years, that tens of thousands of pages of evidence have been taken in this litigation and that further litigation in the state court over this issue, although it becomes res adjudicata by this decision, may by appeal or otherwise result in further delay, cause this suggestion of these stockholders to challenge serious consideration. It seems that if by the amendment of any of the pleadings of the Trust Company, or by the filing by it of a cross-bill, or a supplemental bill, or without them, such a decree as suggested may be lawfully rendered, justice and equity would require that that course should be pursued. The three stockholders are accordingly permitted to file their suggestion and leave is granted to the Trust Company, the Southern Company, and to any other party to this suit, to make such motions and present such arguments and authorities, either orally or in writing, to this court at St. Louis on January 10, 1913, regarding this suggestion, as to them shall seem meet. The issue presented by this suggestion is reserved for later consideration. But whatever may be the result of that consideration, the decree below must be reversed and this case must be remanded to the court below with instructions to render a decree which shall contain the first five paragraphs of the decree below, shall adjudge that the equitable claim of the Trust Company, by virtue of the pledge to it of 1120 shares of the stock of the Central Company, in the property of that company described in the sixth paragraph of that decree, is superior to the claim and equity of the Southern Company therein, that the Southern Company is indebted to the Trust Company in the amount of the indebtedness of the Belt Company to that company, that is to say, in the sum of $639,658.86 and interest from the date of the original decree below, on $473,723.59 at 6 per cent per annum, on $46,565.76 at 7 per cent per annum and on $119,369.51 at 8 per cent per annum, that the Southern Company must pay this debt as a condition of obtaining any relief in this suit, that the ninth, tenth, eleventh and thirteenth paragraphs of the original decree be again adjudged and that the Trust Company recover its entire costs of the Southern Company and the Cambria Company, and that the share of such costs as between themselves, but not as against the Trust Company, that shall be paid by the Cambria Company and the Southern Company shall be determined by the court below as to it may seem just and equitable.

Filed October 22, 1912.

1191 *(Order Suspending Entry of Decree, etc., and Denying Motion of Central Improvement Co. for Leave to Dismiss Its Appeal.)*

September Term, 1912.

TUESDAY, October 22, 1912.

In the above entitled causes this Court having this day filed its opinion directing a reversal of the decree below with a remand of the cases for further proceedings, it is now here ordered that the entry of a decree in this Court, be, and the same is hereby, suspended and withheld until the "Suggestions" by Edward A. Shedd, et al., Petitioners, as to the form of the final decree to be entered in the Court below, shall be heard and determined as hereinafter provided, or until the further order of this Court, and full jurisdiction of these causes is hereby retained for all purposes.

It is further ordered and adjudged that leave be, and the same is hereby, granted to Edward A. Shedd, et al., Petitioners, to forthwith file their "Suggestions" as to the form of the final decree to be entered in the Court below, and that said "Suggestions" be set down for a hearing before this Court at St. Louis, Missouri, on the 10th day of January, 1913.

Leave is hereby granted to the Kansas City Southern Railway Company, to the Guardian Trust Company, or to any other party to this suit, to file such motions and to present such authorities, either orally or in writing, on or before the above named date of hearing, regarding the said "Suggestions" as to them may be deemed advisable.

It is further ordered and adjudged that the motion of the Central Improvement Company for leave to dismiss its appeal herein, be, and the same is hereby, denied.

October 22, 1912.

1192 *(Motion of Edward A. Shedd et al. for Leave to File Suggestions as to Further Directions to be Embraced in Decree of Reversal.)*

And now come Edward A. and Charles B. Shedd and Robert H. Law, and present to the court their petition entitled, "Petition of Edward A. Shedd and Others for Leave to File Suggestions as to Further Directions in Reversal Order of Judgment to be entered herein", and move the Court for leave to file the same, and to have the subject-matter thereof considered along with other questions in said cause now reserved for hearing upon the arguments to be had and made on January 10, 1913, or at such other time and in such manner as the Court may order.

NEWEL H. CLAPP,
ENOCH J. PRICE,
HARRY S. MECARTNEY,
Counsel for Edward A. and Charles B. Shedd and Robert H. Law.

Dated December 21, 1912.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Dec. 21, 1912.

(Proof of Service of Motion of Shedd et al. for Leave to File Further Suggestions to be Embraced in Decree.)

Notice.

To Messrs. Samuel Untermyer and Samuel W. Moore, Counsel for Kansas City S. Ry. Co. and Central Imp. Co.:
To Frank Hagerman, Esq., Counsel for Cambria Steel Co.:
To Messrs. Gates & English and D. J. Haff, Counsel for Guardian Trust Co.:

You are hereby notified that the undersigned, as counsel for Edward A. Shedd, et al., have this day presented to the U. S. Circuit Court of Appeals for the Eighth Circuit, Honorable Walter H. Sanborn, Judge Presiding, the petition of said Shedd, et al., as to the taxing of attorneys' fees and other costs in said case, and a notice of motion for leave to file the same, with a copy of which petition and motion you are herewith served; and that said Court,
1193 by said Presiding Justice, announced that the undersigned should serve copies of said petition and motion upon the various counsel in the case, together with a notice that the arguments on January 10th next in said cause would include an argument upon the merits of said petition and that all parties would have leave to file any suggestions or answer to said petition as they might deem advisable.

Dated St. Louis, December 21, 1912.

NEWELL H. CLAPP,
ENOCH J. PRICE,
HARRY S. MECARTNEY,
Counsel for Shedd et al.

Rec'd copy of above notice, motion and Petition Dec. 23rd 1912.
GATES & ENGLISH.
D. J. HAFF, AND
EDWIN C. MESERVEY
S. W. MOORE.
FRANK HAGERMAN.

(MEMO. OF CLERK.—Attached to the foregoing notice is a copy of the motion of Shedd, et al., for leave to file Suggestions as to further Directions to be embraced in the Decree of Reversal, which is omitted here for the reason that a copy thereof precedes the foregoing notice.

Attached to the said Notice is also a copy of the Petition of Shedd, et al., for leave to file further Suggestions as to the Decree, which is omitted here for the reason that said petition was filed on January 20, 1913, and follows this Proof of Service.)

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Dec. 26, 1912.

1194 In the United States Circuit Court of Appeals for the Eighth Circuit.

No. 3490.

GUARDIAN TRUST COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al., Appellees.

No. 3489.

CENTRAL IMPROVEMENT COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al., Appellees.

Petition of Edward A. Shedd and Others for Leave to File Suggestions as to Further Directions in Reversal Order of Judgment to Be Entered Herein.

And now come Edward A. Shedd, Charles B. Shedd and Robert H. Law, and show to the court:

That they are stockholders in the Guardian Trust Company, holding respectively the amounts of stock shown in the following schedule, viz.:

Name.	Shares.	Par value.
Edward A. Shedd and Charles B. Shedd	766	$76,600
Robert H. Law	150	15,000

1195 That the total outstanding stock of said trust company is about $2,000,000, the stockholders being over 300 in number and widely scattered.

That said company has been in liquidation of its assets for nearly twelve years last past.

That the majority of the stock of said company has been held in voting trust (of which the West End Trust Company of Philadelphia is, or was until lately, the depositary), which stock is voted at the annual meetings by the liquidator of said company, John A. Prescott, and several others, who have on formal request made in writing therefor declined to give the petitioners, Shedd and Shedd, the names of the various stockholders appearing of record on the books of said trust company.

That therefore petitioners have no opportunity to appeal to the large number of widely scattered stockholders, either those appearing upon the face of the books or those who are such stockholders through the medium of holding certificates in said voting trust.

Petitioners are advised, however, that their petition is plainly in the interest of all the stockholders of said company, and that they therefore fully and sufficiently represent a stockholders' appeal in respect to the subject matter of this petition; and do not believe

it wise or necessary to use up resources or time in mere attempts to find additional stockholders, and to get them to join herein.

These petitioners hereby ask the court for leave to file suggestions in support of the following appeal, viz.:

That this court embody in its proposed order of reversal
1196 to be entered herein in pursuance of the opinion heretofore filed—

A special finding to the effect that the said litigation commenced by said Cambria Steel Company, and prosecuted by the Kansas City Suburban Belt Railroad Company in the way of an ancillary bill filed in this cause, which issues were raised, and said suits instigated at the instance and bequest of and prosecuted in reality on behalf of the Kansas City Southern Railway Company, and that the said intervening petition filed and prosecuted by said Southern Company were each and all instituted and prosecuted without good faith, and that said entire litigation has been trivial, wanton and oppressive.

That thereupon:

1st. This court direct the lower court upon entering the decree against the said Southern Company, as ordered by the opinion lately filed herein,

(1) To reserve jurisdiction to inquire as to the amount of attorney's or solicitor's fees, stenographer's fees, expert accountant's fees, and such other expenses reasonably and necessarily incurred by said Guardian Trust Company in making its defenses to such bill and ancillary bill and intervening petition and in asserting its claims herein;

(2) That upon petition or suggestion as to the same being filed in said cause by the Trust Company and upon evidence taken by affidavits or otherwise as the court may direct, the said court make a finding as to the amount of such fees, costs and expenses;

(3) That it thereupon order the same to be taxed as costs in said cause and a further decree be entered against said Cambria Company and Southern Company for said amounts respectively, in
1197 favor of said Trust Company, and that it be awarded execution therefor—the said inquiry and taxation of costs not to delay the entry of the said principal decree, as heretofore directed by said opinion, and not to stay the collection of the same in any manner.

Or,

2nd. In the alternative that the court be disposed not to enter the orders or directions herein above requested, that then the court direct specifically that the decree to be entered by the court below shall be entered without prejudice to the right of the Guardian Trust Company to commence such suit or suits at law or otherwise, as it may be advised may be proper against said Cambria and Southern Companies for such damages, expenses, costs, attorney's or solicitor's fees, stenographer's fees, expert witness' fees, and all such other expenses and damages as may have been incurred by said Trust Company in making its defenses to said bill of complaint,

the ancillary bill and intervening petition, and in asserting its claims in said cause or causes.

3rd. That in respect to the damages, costs, fees and expenses which may have occurred to, or been incurred by, said Guardian Trust Company from the issuance of the two injunctions referred to in said opinion, restraining said Trust Company from prosecuting the actions at law in the state courts of Missouri—which injunctions were respectively ordered dissolved in the cases of Guardian Trust Company v. Kansas City Southern Railway Company, 146 Fed. Rep. 337 and Guardian Trust Company v. Kansas
1198 City Southern Railway Company, 171 Fed. Rep. 43—the said decree to be entered herein in the court below shall include such costs, solicitors' fees an dother expenses and damages adjudged supplemental to the main case involved in the record herein; as to such items involved in said first mentioned case the said decree shall not prejudice the right of the Guardian Trust Company to move in said cause, if the same be still pending for the purpose, to have such costs, solicitor's fees and other expenses and damages adjudged therein to the Guardian Trust Company—unless the said Southern Company and said Trust Company shall expressly elect to have the same and the amount thereof adjudicated along with other solicitors' fees, costs and damages taxed herein or in the court below in this cause.

Your petitioners, as a basis for their said appeal, refer to the facts stated in the two petitions of Messrs. Shedd and Law filed heretofore in this cause and in this court, and the affidavits filed therewith, and to the following affidavit; and they suggest as grounds therefor those which are stated in their brief annexed hereto.

Respectfully submitted,

NEWELL H. CLAPP,
ENOCH J. PRICE,
HARRY S. MECARTNEY,
Counsel for said Petitioners.

1199 STATE OF ILLINOIS,
County of Cook, ss:

Harry S. Mecartney, being duly sworn, deposes and says:

1. That he is an attorney at law.

2. That he is one of the counsel for the petitioners in the above and foregoing petition.

3. That he knows the facts stated in the said petition, and that the same are true.

4. That he was formerly counsel for the Trust Company in this cause.

5. That the present regular counsel for said Trust Company in said cause, Messrs. Gates & English, have had called to their attention from time to time the claims made by affiant as counsel for the Trust Company, to the effect that said Trust Company should be allowed its solicitor's fees and other fees and costs and expenses suffered or incurred by it in making its defenses and in asserting

its claims in said cause. That affiant made such claim in a printed report to the Trust Company, made by him immediately prior to his formal retention in said cause in December, 1904. That affiant made said claim in various reports and letters from time to time to the Executive Committee of said company. That affiant made said claim in arguments and briefs filed in said cause before the master, and that Messrs. Gates & English have had copies of said documents in their possession for more than 3 years last past.

6. That therefore affiant believes it to be proper and timely
1200 to submit said claim for fees, expenses and damages in the name of the above petitioners and on behalf of said Trust Company and all of its stockholders.

Further affiant saith not.

HARRY S. MECARTNEY.

Subscribed and sworn to before me this 20th day of December, A. D. 1912.

B. H. MONTGOMERY,
Notary Public.

* * * * * * *

(Here follows a brief in suppport of the foregoing Petition for Leave to File Further Suggestions.)

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Jan. 20, 1913.

1201 United States Circuit Court of Appeals, Eighth Circuit.

No. 3489.

CENTRAL IMPROVEMENT COMPANY et al., Appellants,
vs.
CAMBRIA STEEL COMPANY et al., Appellees.

No. 3490.

GUARDIAN TRUST COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al., Appellees.

Suggestions of Guardian Trust Company in Respect to a Decree for a Specific Judgment Against the Kansas City Southern Railway Company.

This court, having found upon the record, that the Kansas City Southern Railway Co. owes the debt of the Belt Company to the Trust Company, reserved for consideration the question of whether a decree should be rendered against the Southern Company in this suit to the effect that the Trust Company recover this amount from

the Southern Company, and have execution therefor. The facts which would move a court of conscience to grant this relief, if it might be done under the pleadings and in accordance with the principles of equity, are stated in the court's opinion fully, fairly and tersely. The only obstacle in the way lies in the fact
1202 that the answer of the Trust Company to the intervening petition of the Southern Company, does not pray for the specific relief to which, under the findings of the court, the Trust Company is justly and equitably entitled. Precisely the same question has been repeatedly before the Supreme Court and other courts of lesser, though unquestioned authority. The settled principles of chancery practice have been found sufficient to accomplish the high aim of equity and to enable the court to do full and complete justice.

We call the court's attention to the following precedents:

In the case of Wiggins Ferry Company v. Ohio & Mississippi Railway Company, 142 U. S. 396, 35 L. Ed. 1055, the action was in equity, wherein the Ferry Company claimed under certain deeds and contracts that certain tracks, ties and switches, upon an island in the Mississippi River belonged to it, and that its rights were for reasonable compensation for the use and occupation of the island and for certain property and material removed from it.

The Supreme Court found that the Ferry Company was not entitled to the relief sought in its bill, but that it was enitled to other relief, which relief it had never asked for, but on the contrary, even after a similar finding by a master and a recommendation that such relief be granted it, had refused to act upon such recommendation. The court said:

"When the facts of the case show the plaintiff to have an equitable title for relief, this court, while it may be unable to afford such relief upon the case made by the bill, has in several instances asserted its power to remand the case to the court below for an amendment of the pleadings, and such further proceedings as may be consonant with justice. * * * Rules of pleading are made for the attainment of substantial justice, and are to be construed so as to harmonize with it if possible. A mistaken view of one's rights or remedies should not be permitted wholly to defeat a claim founded upon principles of equity and justice, and if the pleadings can be so amended as to admit proof of such claim, and such amendment does not introduce a new cause of action, though it may set up a new measure of damages, or work a real hardship to the party defendant, it is within the discretion even of the appellate court to permit such amendment to be made."

Accordingly, the decree of the court below was reversed and the case remanded for such proceedings as should be consonant with justice and in conformity with the opinion.

1203 In Goodman v. Niblack, 102 U. S. 556, 26 L. Ed. 229, the bill was fatally defective because of the lack of certain parties defendant. The court said:

"If the decree of the Circuit Court had dismissed the case without prejudice for want of proper parties, we should have been bound

to affirm it. But standing as it does now, it is a decision on the merits of the case and a bar to any other suit. It must, therefore, be reversed, and remanded to that court. If the complainant shall ask leave to amend his bill my making Cheever and Wiles, defendants, he should be permitted to do so and proceed with his case. If he does not do this, a decree should be entered dismissing the bill for want of these parties and without prejudice to any other suit on the merits."

In Crockett v. Lee, 7 Wheat. 522, 5 L. Ed. 513, the pleadings were defective in failing to controvert the location and entry of the land in dispute. Though the court expressed itself as being inclined to the opinion that the decrees on the merits were right, still rather than reverse the cases on a question of pleading, it remanded them to the Circuit Court with directions to permit the parties to amend their pleadings.

In Walden v. Bodley, 14 Peters, 156, 10 L. Ed. 398, Bodley had sought an injunction against Walden, the dispute being in respect to the title to certain lands in Kentucky. Walden in his answer stated that he had obtained judgment in an action at law against the complainants who were tenants on the land, and had been a long time delayed by the complainants from obtaining possession. The prayer of his answer was merely for a dissolution of the injunction and that the bill be dismissed, just as here; but the court found that equity and good conscience required that the value of the improvements be estimated, the rents and profits ascertained, as well as any damages that might have been done to the land, and then that an order or decree should be made that the tenants should relinquish possession to Walden. The court said:

"It is true, the answer prays merely for a dissolution of the injunction, and that the bill may be dismissed. But the court have, by the bill, answer and evidence, the equities of the parties before them; and having jurisdiction of the main points, they may settle the whole matter. A court of equity cannot act upon a case which is not fairly made by the bill and answer. But it is not necessary that these should point out in detail, the means which the court shall adopt in giving relief."

1204 Accordingly, the court affirmed the decrees, with the modification that the circuit court was directed to take such steps in regard to the improvements as the putting of Walden or his representatives in possession of the premises, and should be conformable to the decrees affirmed and the principles of equity.

In Thompson v. Maxwell, 95 U. S. 391, 24 L. Ed. 481, the bill was wrongly conceived and complainants were entitled to no relief under it. The court said:

"But, so far as the present decree undertook to reverse and modify the decree of September, 1866, we think it is clearly erroneous. Still, although we feel obliged to reverse the present decree, we do not think that the bill should be absolutely dismissed. And, as the whole question between the parties has been fully litigated on the proofs, it would be unreasonable to require that these should be taken over again.

Our conclusion is, that the present decree must be reversed, with the costs, and that the cause be remanded to the court below, with directions to allow the complainants to amend their bill as they shall be advised, and with liberty to the defendants to answer any new matter introduced therein; and that all the proofs in the cause shall stand as proofs upon any future hearing thereof, with the liberty to either party to take additional proofs upon any new matter that may be put in issue by the amended pleadings."

In Hardin v. Boyd, 113 U. S. 756, 28 L. Ed. 1141, the supreme court considered the propriety of the action of the lower court in permitting the complainants, at the hearing, to amend the prayer of their bill so as to obtain relief not before specifically asked. The court held this amendment to be proper, and among the reasons assigned for its ruling stated:

"The amendment had no other effect than to make the bill read just as it might have been originally prepared, consistently with the established rules of equity practice. It suggested no change or modification of its allegations, and in no just sense made a new case. * * * The amendment here did not introduce new allegations, nor make additional parties, nor incumber the record, nor increase the expenses of the litigation, nor complicate the suit, nor make new issues of fact. It simply enabled the court, upon the case made by the original bill, to give the relief which that case — plaintiff. * * * We are of the opinion, for the reason stated, that the amendment of the prayer of the bill was properly allowed."

1205 In Lewis v. Darling, 16 Howard 1, the bill was defective for want of proper parties. The supreme court said:

"As the case stands it is not too late to amend the bill by making the proper parties. The rule in equity, permitting it to be done, is this; that upon the hearing of a cause, even upon an appeal, an order may be made for the cause to stand over, with the liberty to the plaintiff to amend by adding proper parties, if it appears that the plaintiff is entitled to relief, but that it cannot be given for the want of proper parties. The equity of the plaintiff is sufficiently obvious in this case for the application of the rule. The proofs in the case show that she has a strong claim upon the appellant for the payment of the legacy for which she sues him. It is manifest that the legacy has been made by the testator a charge upon both the real and personal estate which he means to give to his daughter. It will not do then to permit it to be defeated in this suit by any mistake or unskillfulness in pleading. We shall then reverse the judgment appealed from in conformity with the first objection made against it. But we will remand the case to the circuit court for further proceedings and for the proper parties to be made."

In Union Central Life Insurance Company v. Phillips, 102 F. 19, 41 C. C. A. 263 (5th Circuit), the insurance company had wrongfully refused to deliver an insurance policy, upon which by a misapprehension as to who the beneficiaries were, a suit at law had been brought by the wrong party. The proper party, after the period of limitation prescribed in the policy, filed a bill in equity

to compel the defendant to deliver the policy and for a decree for the amount due thereon. The court found the complainant entitled to equitable relief but not that contemplated in the bill. It therefore ruled as follows:

"In the present instance the variance between the case-made by the evidence and that by the bill is such that the latter requires amendment to support the decree, and under the controlling authorities cited to take such action as will permit such amendments as the equity rules warrant, and as counsel may advise, upon such terms as may be just.

In Hubbard v. Manhattan Trust Company, 87 F. 51, 80 C. C. A. 520 (2nd Circuit), the bill was demurrable on its face for several reasons. A demurrer had been sustained below with leave to to complainants to file an amended bill within thirty days. No amended bill having been filed, the bill was dismissed. Yet
1206 the appellate court in view of the equities stated in the bill, reversed the case and remanded it with directions to allow complainants to amend their bill.

In Street's Federal Equity Practice, Article 1126, it is said:

"In passing on records where the proofs shows an undoubted right to certain equitable relief but where the bill appears not to be so framed as to justify the granting of exactly that relief, the supreme court will sometimes remand the cause to the lower court in order that the bill will be so amended as to permit the relief in question to be granted. The supreme court here acts upon the idea that rules of pleading are made for the attainment of substantial justice and are to be so construed as to harmonize with it, if possible. A mistaken view of one's rights or remedies, it is said, should not be permitted wholly to defeat a claim founded on principles of equity and justice."

In Jones v. Meehan, 175 U. S. 1, 44 L. Ed. 49, after the coming in of all the evidence, the defendant's solicitor moved the trial court for leave to file a supplmental answer, wherein the devolution of the title in question (an Indian title) was differently stated than in the original answer. The new contention was clearly inadmissible under the allegations of the original answer, and the trial court denied leave to file the same. The supreme court said:

"The reasons for denying the motion in this case are *noted stated in the record. They may have been the late stage of the case at which the motion was made, and a failure to satisfy the court that the facts now attempted to be set up were not known, or, at least accessible to the defendant or his solicitor long before. But as this court might, even now, if justice appeared to require it, allow an amendment of the pleadings, this part of the case may be more satisfactorily disposed of by considering what the effect of these facts would have been, had they been duly pleaded."

The early case of Estho v. Lear, 7 Peters, 129 8 L. Ed. 632, is illustrative of the distance to which the court has gone, even from its earlier days, in order to arrive at a decree which should be adequate to the rights of the parties. The case was a bill in equity to contest the will of the celebrated Polish patriot, Kosciuszko, in

which Thomas Jefferson was named as executor. Justice Marshall rendered the opinion of the court, and apparently of the court's own motion suggested the inadequacy of the record to dis-
1207 close the essential facts necessary for a complete determination of the rights of the parties. He stated that "in its opinion the court thought the case was not properly prepared for a decision." It, therefore, directed that the decree be reversed and the cause remanded with liberty to the plaintiff to amend his bill.

In Liverpool, etc., Co. v. Phœnix Insurance Co., 129 U. S. 397, 32 L. Ed. 788, defendant's answer was defective in failing to aver the material facts of the existence of a certain British law and its applicability to the case. Application had been made below for leave to amend the answer in this respect, which had been denied. The Supreme Court said:

"On such a question we should be slow to overrule a decision of the Circuit Court. But we are not prepared to say that if, upon full consideration, justice should appear to require it, we might not do so, and order the case to be remanded to that court with directions to allow the answer to be amended and proof of the foreign law be introduced."

In Moran v. Hagerman, 64 Fed. 499 (C. C. A. 9th), Moran Bros., owning 310 out of 600 railway bonds brought two proceedings in equity—one to foreclose and the other to declare void the residue of the bond issue. In the latter proceeding, it was ultimately held by the Supreme Court that some of the residue were valid bonds and that their holders should share in the security on an equality with Moran Bros. In the meanwhile the property had been sold in the foreclosure suit and bought in by Moran Bros. at the amount of their debt and interest. On the return of the mandate of the Supreme Court the Circuit Court merely decreed, that the other bondholders share in the proceeds of the sale on an equality with Moran Bros. At a subsequent term of the Circuit Court, one of the other bondholders moved for a modification of the decree for an ascertainment of the amounts due him and for judgment against Moran Bros. for the amount, which the Circuit Court granted. The point was made on appeal that this was relief not within the issues of the pleadings, "since the appellees were content to answer the bill denying complainant's equities and filed no cross bill asking for affirmative relief." The court said:

"The petition on the application to amend the decree brought all the necessary facts before the court and for that purpose may be deemed a pleading in the way of a supplemental answer. Under such pleadings the court had the power to decree the relief the defendants were entitled to."

1208 The relief of a judgment against the Southern Company may be rendered upon the answer, if it contains an appropriate prayer and need not be by cross-bill.

Flournoy v. Lastrapes, 25 L. Ed. 406.

In the early case of Penhallow v. Doane, 3 Dall. 54, 1 L. Ed. 507, the court expressed itself as follows:

"It is alleged, damages were not prayed for by the libel. It is sufficient answer, that there is prayer for general relief. And so little do I think of this objection, and so much of the duty of a court, unaided by formal applications, where there is a substantial one, that I am strongly induced to think, if a case proper for a specific relief was laid before a civil law court, and the direct contrary to the proper relief was prayed for, yet the court even in this case would be justified in granting the relief that might be properly afforded, if the party who had committed the mistake consented to it; without that indeed it might be improper, for no court ought to force a benefit on a party unwilling to receive it."

In Clark v. Clark, 62 N. H. 267, the proceeding was in equity to foreclose mortgages. The pleadings are not given, but it appears that the defense was that the mortgages were without consideration. The plaintiffs were in possession, but the answer apparently did not ask for the relief of a decree awarding the defendant possession. The court held the defense good, and said:

"The defendant Tilden is entitled to a decree that the mortgage debts are extinguished; and if he desires it, upon amending his answer and asking for possession of the premises, he can have a decree accordingly."

The case of Trimble v. Bank, 71 Mo. App. 467, though involving a comparatively small amount, was carefully briefed by eminent counsel and was obviously decided after careful consideration by an eminent jurist of Missouri, Judge R. E. Rombauer sitting as special judge in that case. The plaintiff, Trimble, was the owner of certain shares of stock in the defendant bank. His clerk stole the stock and forged his name to an assignment. The defendant, Wollman, a stock broker purchased the stock from the clerk and with the aid of the clerk procured the issue of a new certificate in the name of Wollman. A portion of the proceeds of this sale were recovered from the forger. These proceeds the bank attached and ultimately obtained. Wollman's claim in his pleadings was to
1209 the stock. Although made a party to the attachment proceedings for the proceeds, he had refused to claim the money, nor did he in his pleadings in the reported case make any claim to it. The appellate court found that the plaintiff, Trimble, was entitled to the stock, that the money which was recovered from the forger was in reality Wollman's and that Wollman was equitably entitled to obtain this money back from the bank, notwithstanding that he only made claim to the stock, which claim was held to be unfounded. The court said (l. c. 484):

"This is a case in equity, and if a complete disposition can be made of the entire controversy between the parties, which will do complete equity between them, it is the duty of the court to do so. The fact that the pleadings do not warrant it is no obstacle, since the decree must necessarily be reversed, and may be reversed with directions to permit such an amendment of the pleadings as would warrant a decree in conformity with equity and good conscience, provided always that Wollman is not concluded by his election; that the necessary parties for making a complete disposition of the case

are before the court, and that the evidence warrants such a disposition."

After consideration of the question, the court held that Wollman was not bound by his election and said (l. e. 486):

"All the parties necessary to a final decree are before the court. The attachment for the $100 is still pending, and no reason is apparent why Wollman should not interplead in that suit even now, and obtain the money which is clearly his. Or, if the statute of limitations is likely to be interposed to such a plea, there is no reason why the garnishees should not amend their answer reciting the facts and stating that the money is the money of Wollman. Hence no disposition need be made of that action. The judgment will be reversed and the cause remanded with directions to the lower court to permit the defendant, Wollman, so to amend his cross bill as to pray for the relief herein indicated, and upon his cross bill being thus amended to enter judgment against the bank in his favor for the sum of $487.16, with interest from October 6th, 1891."

The foregoing authorities fully sustain the view that the practice of equity courts under the conditions disclosed in this case, is to remand the case with directions to permit an amendment and render a decree upon the pleadings as amended and the evidence already taken. The present case differs from many of the precedents above quoted, in that the amendment here in question would be merely the amendment of a prayer of the answer, and would not open up any new issuable fact, nor involve the taking of additional testimony, nor the addition of any new parties, but would merely "enable the court upon the case made by the original bill to give the relief which that case justified" (Hardin v. Boyd, supra).

1210

We, therefore most respectfully suggest and urge that this court, in remanding the case, direct the District Court to grant leave to the Guardian Trust Company to amend the prayer of its answer to the amended intervening petition of the Kansas City Southern Railway Company, so as to include a specific prayer that the Trust Company recover the amount which the Belt Company owes it from the Southern Company and have execution therefor, or to file the same answer with the formal requisites of a cross bill added and that, upon such amendment, a decree be entered in accordance with such prayer.

Respectfully submitted,

EDWARD P. GATES,
GEORGE H. ENGLISH, JR.,
Solicitors for Guardian Trust Company.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on January 20, 1913.

1211 *(Order Granting Leave to Shedd et al. to File Petition for Further Suggestions as to Decree.)*

December Term, 1912.

MONDAY, January 20, 1913.

These causes came on to be heard upon the motion of Edward A. Shedd, et al., petitioners, for leave to file "Further Suggestions" as to the form of decree to be entered in these causes in the Court below.

On consideration whereof, it is now here ordered that leave be, and is hereby, granted to file printed copies of said "Further Suggestions" forthwith.

(Order of Reargument of Certain Questions.)

December Term, 1912.

MONDAY, January 20, 1913.

These causes being now called for further hearing in pursuance of an order entered by this Court in these causes on the 22nd day of October, 1912, came on for reargument upon the question of liability and the subsidiary questions as to the stock of the Central Improvement Company.

Whereupon, argument was commenced by Mr. Samuel W. Moore for the Kansas City Southern Railway Company, continued by Mr. Harry S. Mecartney for Edward A. Shedd, et al., Petitioners, by Mr. George H. English, Jr., and Mr. D. J. Haff for the Guardian Trust Company and the Central Improvement Company, and concluded by Mr. Samuel Untermyer in behalf of the Kansas City Southern Railway Company.

Thereupon, the said questions were submitted and taken under advisement by the Court, and the hour for adjournment having arrived the argument of further questions herein was postponed until tomorrow.

(Order of Further Reargument of Certain Questions.)

December Term, 1912.

TUESDAY, January 21, 1913.

1212 The above causes having been called for further hearing, argument upon the questions as to the form of the decree and the value of the property, etc., was commenced by Mr. George H. English, Jr., in behalf of appellants, and the hour for adjournment having arrived further argument on said questions is postponed until tomorrow.

(Appearance of Mr. Delbert J. Haff as Counsel for Appellant in Cause No. 3489.)

No. 3489.

CENTRAL IMPROVEMENT COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al.

The Clerk will enter my appearance as Councel for the Appellant.
DELBERT J. HAFF,
Of Counsel.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Jan. 22, 1913.

(Appearance of Mr. Harry S. Mecartney as Counsel for Petitioners Shedd et al. in Cause No. 3489.)

The Clerk will enter my appearance as additional Counsel for the Petitioners, Edward A. Shedd, Charles B. Shedd and Robert H. Law.
HARRY S. MECARTNEY.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Jan. 22, 1913.

(Appearance of Mr. Delbert J. Haff as Counsel for Appellant in Cause No. 3490.)

No. 3490.

GUARDIA TRUST COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al.

The Clerk will enter my appearance as Counsel for the Appellant.
DELBERT J. HAFF,
Of Counsel for Guardian Trust Company.

1213 (Endorsed:) Filed in U. S. Circuit Court of Appeals on Jan. 22, 1913.

(Appearance of Mr. Harry S. Mecartney as Counsel for Petitioners Shedd et al. in Cause No. 3490.)

The Clerk will enter my appearance as additional Counsel for the Petitioners, Edward A. Shedd, Charless B. Shedd and Robert H. Law.
HARRY S. MECARTNEY.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Jan. 22, 1913.

1214 In the United States Circuit Court of Appeals, Eighth Circuit.

No. 3490.

GUARDIAN TRUST COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY, Appellees.

No. 3489.

CENTRAL IMPROVEMENT COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al., Appellees.

Reply to Petition of Edward A. Shedd and Others.

Counsel for Shedd et al. suggest that this litigation was neither instituted nor carried on in good faith, and they petition the Court to find that such was the case, and ask that a new precedent be established by this Court, under which the attorneys' fees and other expenses of the Trust Company may be taxed against the Southern Company.

This charge leveled against counsel instituting and carrying on these proceedings would be robbed of its seriousness if it
1215 were accompanied by the various written and printed attacks of a similar nature, made from time to time by one of the counsel for Shedd et al. against both State and Federal judges, the master, the receiver, the officers of both parties, opposing as well as associate counsel, in fact, against all who have been connected with this case. The charge now made would appear, in the light of these and other numerous effusions of a similar nature, to be more the result of a confirmed habit of indiscriminate vilification and abuse than of a conviction based upon any real or imaginary wrong. Its author obviously belongs to that class of persons who are ever ready to admit that they are always right, no matter how inconsistent or absurd their views may appear to others, and whose vocabulary of invective is quite insufficient to properly characterize those who disagree with them.

First, as to the institution of the accounting proceedings: Aside from the question of the standing and character of the counsel who signed the bill of the Cambria Company (Frank Hagerman and L. C. Krauthoff) as well as the ancillary bill of the Belt Company and its receivers (Thomas R. Morrow and C. W. Lucas) and thereby stood as professional sponsors for the proceedings, it is to be remembered that the accounting between the Belt Company and the Trust Company was provided for by stipulation (Rec. p. 570), signed by Judge Francis M. Black, the receiver of the Trust Company, as well as by Messrs. Trimble & Braley, its regular counsel. This stipulation provided that there should be an accounting upon an ancillary bill to be filed, the Trust Company apparently regarding an accounting

between the parties as inevitable and being desirous of speeding it as fast as possible. The ancillary bill of the Belt Company
1216 and its receivers was filed on November 20, 1901, pursuant to the stipulation referred to (Rec., p. 115). After the bill had been filed and the Trust Company and its counsel had had an opportunity to see and examine it, the Trust Company and Judge Black, its receiver, and Messrs. Trimble and Braley, its counsel, desired time, not to demur to the bill, but to file an answer to it, and it was accordingly stipulated (Rec., p. 136), that the time for answering should be extended to December 9, 1901, instead of December 2, 1901, as originally provided in the stipulation.

The answer of the Trust Company to the ancillary bill of the Belt Company and its receivers signed by Judge Black as well as by Messrs. Trimble and Braley, was filed on December 9, 1901, (Rec., p. 137). Exceptions to the answer were filed December 31, 1901 (Rec., p. 184). The exceptions were sustained on April 1, 1902 (Rec., p. 187), and the replication was filed to the Trust Company's answer on April 9, 1902 (Rec., p. 186). Thereupon the taking of testimony began.

Judge Black during his lifetime was an honored member of the bar of this State and for ten years was one of the judges of our Supreme Court. No man in the State stood higher as a citizen of incorruptible integrity. No able lawyer ever practiced at our bar, and no more just and upright judge ever sat upon the bench of the Supreme Court of this State. He, as well as Messrs. Trimble and Braley and the officers of the Trust Company, no less than the officers and counsel of the Belt Company, felt that an account between them was an imperative necessity. The relations between the parties for a period of more than ten years had resulted in complicated and confusing accounts and questionable charges
1217 and counter-charges, caused, it was thought, by common directors and common officers controlling all of the companies and advancing the interest of the Trust Company at the expense of the other companies. Judge Black, as receiver of the Trust Company, felt under obligation to enforce the notes of the Belt Company held by his trust, and he realized the propriety, under the circumstances, of an accounting, and therefore readily assented to it. The charge indulged in by counsel for Shedd et al., as to the institution of these proceedings, is not only an unmerited and unwarranted criticism of living counsel connected with the case at its inception, but is a wanton and unjustifiable attack upon the memory of one of the ablest and most conscientious lawyers of our State.

Next, as to the conduct of the litigation: One of the counsel for Shedd et al. came into this case as counsel of record for the Trust Company in December, 1904. He severed his connection with the Trust Company some four years later, at its request, leaving as a souvenir of his employment an action against it for attorney's fees in a large amount, which is yet pending undetermined. At the time of his advent into the case, some ten thousand pages of testimony had been taken on the accounting issue. If he thought the ancillary bill, which as before stated, had been filed under stipulation with Judge Black and the regular counsel for the Trust Company,

was bad on its face, and subject to demurrer, as is now claimed, what excuse can be offered for the failure on his part to at once file a demurrer and have it heard and sustained, and thus end this tedious and expensive litigation? If the bill is bad now, it was certainly bad then, and it was certainly the duty of counsel to stop the proceedings if it was so utterly devoid of merit. But nothing of the kind
1218 was done or attempted under his management of the case. He complacently proceeded with the taking of testimony until twenty-four thousand additional pages had been added to the record. So far from taking steps to end the case, he stipulated in February, 1905 (Rec., pp. 191-193), that the Southern Company should come into the suit as an intervenor, and again at the close of all of the evidence on July 2, 1906 (Rec., pp. 541-545), he stipulated for the filing of a second amended and supplemental ancillary bill of complaint, the filing of an answer thereto, and the withdrawal of objections to certain depositions, exhibits, etc.

The question arises as to how much good faith there is back of the charge of bad faith. Does not the charge of bad faith in the institution and prosecution of this litigation come with poor grace from one who should have put an end to the waste of time and substance, or at least have made an effort to do so, if he had entertained an honest conviction that the bill was bad on its face, or that the litigation was oppressive or vexatious. Should he not, in his generous distribution of criticism, apply some of it to himself? If the Trust Company could have stopped the litigation eight years ago, as is now insisted, is it in any position to impose upon the Southern Company, or upon anyone, the expense of attorneys' fees or other costs imposed by the willful neglect or oversight of its counsel?

We cordially invite the Court to scan the record in the case, the report of the Master, or any other proceedings, to ascertain if there is anything to criticise either in the institution of the litigation or its conduct thereafter. It is true there was a contest over the forum in which the liability issue should be determined, we insist-
1219 ing that it should be determined in the Federal Court in this case, and endeavoring to maintain our position by injunction under supplemental bills, the Trust Company contending just as strenuously for a decision of the issue in the state court, and insisting upon trial of its cases there. Each party was well within its rights in endeavoring to confine a decision of the liability issue to the forum of its preference, and neither is subject to criticism therefor. This court held that we were wrong in our injunctions, and this court also held that the Trust Company was wrong in its effort to eliminate the liability issue from the proceedings in this case in the lower court, as well as in this court.

The master, in the main, found the accounting issue in favor of the Trust Company. We filed exceptions to this finding before the master and in the lower court, and they were overruled. We did not take an appeal from that issue because the appeal taken by the Trust Company did not question the correctness of the finding of the master or the decree of the lower court on the liability issue, but sought only to eliminate that issue from the case. The master found that the Trust Company had dominated and controlled the affairs

of the Belt Company, but not to such an extent as to warrant opening up the accounts after the lapse of so much time, and the defense of laches interposed by the Trust Company was sustained. Whether the master, and the lower court in affirming the master were right or not, is a serious question. Perhaps we should have prosecuted a cross-appeal, but the enormous labor and expense involved in testing this question in the Appellate Court were not justified, in our judgment, in view of our belief that the liability issue was properly
1220 in the case and properly decided, and that the Appellate Court would so hold, as well as our belief that we were justly entitled to the properties of the Central Company, and that the ruling of the lower court in this respect would be affirmed upon appeal.

It is further contended by counsel for Shedd et al. that the Southern Company is not acting in good faith in resisting liability for the obligations of the Belt Company, and that the expense of counsel fees and other costs in that litigation should also be taxed against the Southern Company. We regard this contention as too absurd and childish to merit any consideration whatsoever.

SAMUEL UNTERMYER,
SAMUEL W. MOORE,
Solicitors for the Southern Company.

1221 STATE OF MISSOURI,
City of St. Louis, ss:

Samuel W. Moore, of lawful age, being duly sworn upon his oath, states:

I am now, and for many years have been, a member of the law firm of Lathrop, Morrow, Fox & Moore of Kansas City, Missouri, and have been in charge of the legal business of The Kansas City Southern Railway at Kansas City, Missouri, as its general solicitor, for the past ten years. I am familiar with the case of Cambria Steel Company v. Kansas City Suburban Belt Railroad Company et al., now pending in the United States Circuit Court of Appeals at St. Louis, Missouri, having had charge of the interests of the Southern Company, as well as of the Belt Company and its receiver, in that litigation, since early in the year 1905.

Mr. H. S. Mecartney and his assistant, Mr. Jules C. Rosenberger, succeeded Messrs. Trimble & Braley as attorneys for the Guardian Trust Company in this cause in December, 1904. At that time some 8,000 or 10,000 pages of testimony upon the accounting feature of the case had been taken.

On February 7th, 1905 (Rec., p. 191), I stipulated with Mr. Mecartney to make the Southern Company a party to the proceeding to test its right to the collateral held by the Trust Company, the order therefor being made on February 27th, 1905 (Rec., p. 194), and the intervening petition of the Southern Company being filed on the same day (Rec., p. 194), and answered by the Trust Company on March 7th, 1905 (Rec., p. 217).

Very soon after Mr. Mecartney assumed charge of the case for

the Trust Company he complained to the Master that the
1222 ancillary bill of the Belt Company and its receivers was too general, and that it did not point out specific matters with sufficient definiteness, and it was accordingly arranged between counsel and the Master—in reality by agreement, although the record does not so recite—that I should prepare and file an amended ancillary bill for the Belt Company and its receivers, surcharging and falsifying in accordance with equity practice. This I did, filing the same on March 22nd, 1905 (Rec., p. 236), having to go through all the testimony taken, and other records, for the purpose of preparing the bill, as I had not been familiar with the case before taking charge of it, except in the most general way. Neither Mr. Mecartney nor any one else filed any demurrer to the bill, or even suggested that one should be filed. The Trust Company answered the amended ancillary bill on June 1st, 1905 (Rec., p. 362).

Mr. Mecartney and I agreed from the first that the taking of testimony should be expedited in every way possible, to the end that there should be a speedy hearing and decision. He put his assistant Mr. Rosenberger, in charge of the taking of testimony, and I assigned my assistant, Mr. Marks, to the same duty. There were a number of unnecessary delays. On one occasion the Trust Company refused to produce its books upon an order made by the Master, and appealed to the Circuit Court, which affirmed the ruling of the Master, resulting in a delay of a number of weeks. On another occasion I tried to agree with Mr. Mecartney that some long complicated statements compiled by Mr. H. B. Johnson, the auditor of the Southern Company, in narrative form, covering the history of
the Central Improvement properties, should go in as his
1223 direct examination, reserving to him the right to cross-examine, but he declined to agree to this, and as a result considerable time was unnecessarily consumed in getting these facts into the record by question and answer.

The testimony, now amounting to 34,000 pages, had been completed some months before July 2nd, 1906, on which date a stipulation was entered into (Rec., p. 541) providing that the Belt Company and its receiver should file a second amended ancillary bill of complaint, which had been prepared, to conform to the proof in some minor particulars, and that the Trust Company should file its answer thereto, which had also been prepared, within ten days thereafter, all of which was done.

The case was argued before the Master in July, 1906. The argument had been delayed for some months for various causes, sometimes at my request and some ti-es at the instance of the Trust Company, and once to enable the parties in New York to get together and try to work out a settlement, which, however, failed of consummation. The argument consumed two weeks and was participated in by Mr. Mecartney, Mr. Rosenberger, Mr. Marks and myself.

Mr. Marks, under my direction, prepared and filed with the Master a most excellent abstract of all the evidence, covering each allegation of the bill and intervening petition and the evidence relating

thereto, and a reference to the volume and page of the record. This required months of the most arduous labor. Neither Mr. Mecartney nor any one else for the Trust Company ever prepared and filed an abstract or abridgment of the record to aid the Master or the lower court. The Master made his report and filed it in court in
1224 May, 1910. All parties filed exceptions, which were heard and disposed of by the lower court, and a final decree was rendered June 25th, 1910.

During the course of this litigation, and particularly after its submission to the Master in July, 1906, Mr. Mecartney made many bitter and uncalled for attacks on the Court, the Master, the receiver of the Central Company, and opposing counsel. On one occasion he prepared and his associate sought to file in the Circuit Court when this case was pending, a motion supported by his affidavit, which the Court considered so scandalous and abusive that he ordered it stricken from the files and to be sealed up and lodged in the safe in the office of the clerk. Afterwards Mr. Mecartney prepared another printed effusion which he proposed to file in the same court, which was so highly abusive and outrageous that the officers of the Trust Company intervened, as I am informed, and dispensed with his further services in the cause. He thereupon filed suit against the Trust Company for attorney's fees which is still undetermined. Mr. Mecartney represented the Trust Company in an action for attorney's fees brought by Messrs. Trimble and Braley, reputable attorneys of Kansas City, Missouri, and file- a counter-claim, in a large amount, charging them with malpractice and incompetency, which the referee found to be untrue. Mr. Mecartney wrote a long libelous letter to Mr. Samuel Untermyer, General Counsel of the Southern Company, complaining of my conduct in this cause. He has written, I am informed, a similar letter or letters, to the directors of the Trust Company abusing Mr. John A. Prescott, a gentleman of high character and standing, who has had charge of the affairs of the Trust Company for some years.

1225 I deny most emphatically that this litigation has been oppressive to the Trust Company, or that it has been carried on in bad faith. On the contrary, it is my opinion that the litigation against the Trust Company was properly instituted and properly carried on to a conclusion. My own view was that we should prosecute a cross-appeal from the decree of the lower court on the accounting issue, but this was abandoned finally, largely for the reason that the Trust Company did not except to the correctness of the Master's finding on the liability issue, and did not assign the action of the lower court thereon as error in this court. I firmly believe that the Trust Company, by its community of directors and officers, whose allegiance to the Trust Company was the greater, imposed upon the Belt Company, in a legal sense, to the amount of hundreds of thousands of dollars, and that the defense of laches or limitations, which was sustained by the Master, was of a very doubtful application in view of the relations of the parties. I personally secured the signature of Judge Black to the stipulation providing for an accounting (Rec., p. 115). He said that he was willing to

have an accounting between the Trust Company and the Belt Company—in fact, if we did not ask for one he would sue on the notes of the Trust Company against the Belt Company, and that he realized that if he did so we would answer, insisting on an accounting. He said that he would insist that the Belt Company itself should be a party complainant in the bill—the orginal bill had been in the name of its receivers alone—with a provision that if the balance on the accounting should be in favor of the Trust Company, it should be entered up as a judgment against the Belt Company, as well as against the receivers. He explained this by saying
1226 that if he obtained a judgment against the Belt Company he thought he could collect it from the stockholders of that company, as he was informed that its stock was not all paid up, and that there would be a stockholders' liability. The stipulation was prepared to meet his views, the Belt Company being made a party to it, and it being provided that judgment should be rendered against the Belt Company, if the balance should be against it, and he signed it.

SAMUEL W. MOORE.

Subscribed and sworn to before me this 20th day of January, 1913.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

[Endorsed:] Filed in U. S. Circuit Court of Appeals on January, 22, 1913.

1227 (*Order of Submission With Leave to File Further Briefs.*)

December Term, 1912.

WEDNESDAY, January 22, 1913.

The above causes having been called for further hearing upon the questions as to the form of the decree and the value of the property, etc., argument was resumed by Mr. George H. English, Jr., in behalf of the appellants and concluded by Mr. Sampel W. Moore in behalf of the Kansas City Southern Railway Company, and said questions were submitted to the Court.

Thereupon, the question of the taxation of certain costs in the trial court was brought on for hearing and was argued by Mr. Harry S. Mecartney in support of and in behalf of the suggestions by Edward A. Shedd, et al., petitioners, and by Mr. Sampel W. Moore in behalf of the Kansas City Southern Railway Company, opposing, and this question was then submitted to the Court.

Thereupon it was ordered by the Court that Counsel for appellants have leave to file further briefs in these causes within twenty days from and after this date with like leave to counsel for the Kansas City Southern Railway Company to file further briefs herein within twenty days thereafter.

(*Order Declining to Receive Further Briefs of Shedd et al., Petitioners.*)

December Term, 1912.

TUESDAY, April 8, 1913.

In these causes it appearing that counsel for Shedd et al., Petitioners, have prepared and tendered additional briefs in behalf of the Petitioners after the time limited by the former order of this Court for the filing of further briefs herein, it is now here ordered by this Court that the reception of said briefs be, and is hereby, declined and the Clerk of this Court is directed to notify counsel for all parties herein of this order.

April 8, 1913.

1228 (*Opinion of December 2, 1913, as Modified by Order of January 22, 1914.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1913.

No. 3489.

CENTRAL IMPROVEMENT COMPANY et al., Appellant,
vs.
CAMBRIA STEEL COMPANY et al., Appellees.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

No. 3490.

December Term, A. D. 1913.

GUARDIAN TRUST COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY et al., Appellees.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

Mr. George H. English, Jr., and Mr. D. J. Haff (Mr. Edward P. Gates and Mr. E. C. Meservey, on the brief), for Guardian Trust Company.

Mr. Frank Hagerman, for Cambria Steel Company.

Mr. Samuel Untermyer and Mr. Samuel W. Moore, for Kansas City Southern Railway Company.

Mr. Newell H. Clapp, Mr. Enoch J. Price and Mr. Harry S. Mecartney, for Edward A. Shedd, and others.

Before Sanborn, Circuit Judge, and Marshall and William H. Munger, District Judges.

PER CURIAM:

The paramount issue in these cases is, Did the Southern Company become liable to pay the unsecured debt of the Belt Company to the Trust Company by participating in the execution of a scheme whereby it acquired the title to the property of the Belt Com-
1229 pany, deprived its creditor, the Trust Company, of recourse thereto by execution to collect its claim and yet reserved to itself and other stockholders of the Belt Company an equity in its property and a benefit therefrom more valuable than the amount of the Trust Company's claim? After exhaustive arguments and briefs and a review of the master's report on which this case came to this court the conclusion was reached that this question should be answered in the affirmative. This question had been at issue between the Trust Company and the Southern Company in this suit and in actions at law in the state courts for many years. The prosecution of those actions had been repeatedly enjoined and delayed by orders of the court below and those orders had been as often reversed by this court. While the pleadings of the parties squarely presented the issue, while this issue had been litigated strenuously in this suit the Trust Company had not in any of its pleadings made a specific prayer for a decree for the payment of its claim by the Southern Company, nor for the seizure or sale to pay it of the property of the Belt Company which the Southern Company had taken. The question had been suggested by three of the stockholders of the Trust Company whether or not, in view of the long delay, this court could or should direct an entry of a decree for such relief in these cases rather than to leave that relief to be granted upon trials of the cases in the state court, and as this question had not been argued counsel for all the parties were permitted to be heard upon it. That hearing developed into a re-argument of all the salient issues in the cases and at the close of that hearing they were taken under advisement by the court. It is the purpose now to state the conclusions at which we have arrived after another consideration of the issues presented.

The history of this litigation, the issues and many of the facts found by the master are set forth in our former opinion. Central Improvement Co. v. Cambria Steel Co., 201 Fed. 811, 120 C. C. A. 121.

(1) From all the facts pertinent to the issue which are set forth in many printed pages of his report, the master deducted this decisive conclusion. "That the Southern Company is not liable in any way for the floating indebtedness of the Belt Company." To this conclusion the Trust Company excepted on the ground that in view of other conclusions which the master reached adverse to it it was unnecessary for him to determine that issue. A considera-
1230 tion after argument of all the facts relating to this issue which the master found in his report convinced this court that the conclusion lawfully deducible from them was that the Southern Company was liable to pay to the Trust Company the debt

which the Belt Company owed it. Counsel for the Southern Company now insist that his court was without power to consider or correct this conclusion of the master which the court below followed, and that the Trust Company must suffer the loss of this amount because its counsel did not state in its exception that the conclusion was wrong on the merits of the issue. They invoke the conceded general rule that where no exception is taken to the master's report it will be deemed to be true and where exceptions to parts of it are taken the parts to which no exception is taken will stand as correct and will not be open to review in an appellate court. Burns v. Rosenstein, 135 U. S. 449; Provident Life & Trust Co. v. Railway Co., 177 Fed. 854, 859. But this rule, like most rules of law or practice, is not without its exceptions. In Sheffield, etc. Ry. Co. v. Gordon, 151 U. S. 285, 291, the Supreme Court, while holding the exceptions in that case insufficient to present the questions argued, said: "It is true that if the report of the master is clearly erroneous in any particular it is within the discretion of the court to correct the error, but we see no occasion for exercising such discretion in this case." In 2 Daniell's Chancery Pleading and Practice, at page 1314, it is said that it is entirely discretionary with the court to grant an opportunity to except to a report after it has been absolutely confirmed. Counsel also claim that by the Trust Company's exception they were induced to forego a review of the finding of the master that the Belt Company was indebted to the Trust Company and that thereby an equitable estoppel from reviewing the issue of the liability of the Southern Company was created. But suits in chancery are tried and reviewed in view of the fact that a court of equity has and frequently exercises the power where justice may thereby be done, to grant to litigants the right remedy although they have sought the wrong one. Clark v. Clark, 62 N. H. 267, 272; Hardin v. Boyd, 113 U. S. 756; Wiggins Ferry Co. v. Ohio & Mississippi Ry. Co., 142 U. S. 396, 414, 415, 416; Bradford v. Bank, 13 How. 56, 69, 70; Walden v. Bodley, 14 Pet. 156, 164; Moran v. Hagerman, 64 Fed. 499, 503, 504. As an appeal in equity in the federal courts results in a trial de novo the appellate court is not, in our opinion, so powerless that it is compelled to affirm an unjust decree, nor is
1231 the appellant so conclusively estopped that it may not attack such a decree by the fact that it gave a wrong reason for its exception to the erroneous conclusion of the master it assails.

Moreover, the conclusion here challenged was a mere deduction from the facts disclosed in the master's report and where it appears on the face of the report that the master has drawn an erroneous conclusion from the facts he found, the absence of an exception does not disable the court from correcting the error and entering a just final decree. 2 Daniell's Chancery Pleading and Practice, * page 1310; 17 Encyc. of Pleading and Practice, 1048; Celluloid Mfg. Co. v. Cellonite Mfg. Co., 40 Fed. 476, 477; Burke v. Davis, 81 Fed. 907, 910, 26 C. C. A. 675, 678; Haymond v. Murphy, 64 S. E. (W. V.) 855, 857; Hayes v. Hammond, 44 N. E. (Ill.) 422, 423; Hurd v. Goodrich, 59 Ill. 450, 456; Von Tobel v. Ostrander, 42 N. E. (Ill.) 152, 153. The contention that the Trust Company was estopped

from seeking a correction of this error and that this court was powerless to correct it does not seem to be well founded, and this court is unwilling to affirm what it deems an unjust decree on account of the defect in the exception.

(2) It is conceded that by the transaction described in the former opinion of this court and deemed by it violative of the rights of the Trust Company, a creditor of the Belt Company, if that transaction be valid, was deprived of legal recourse to the property of the Belt Company to obtain payment of that company's debt to the Trust Company of about $360,000. At that time the Southern Company by an exchange of its stock and bonds for the stock and bonds of the Belt Company, and by a formal foreclosure by itself, as holder of about 89 per cent of its bonds, by means of its representative, the Provident Company, trustee for the bondholders, against and with the consent of itself as the holder of about 97 per cent of its stock, and by a foreclosure sale of the property of the Belt Company to itself obtained the title to the Belt Company's property to itself, the bondholders of the Belt Company secured about $1,330,000 par value of the bonds and $250,000 of the preferred stock of the Southern Company, aggregating at their par value $1,580,000 for their $1,000,000 par value of bonds of the Belt Company, and the stockholders of the Belt Company secured for their $4,750,000
1232 par value of the stock of that company about $1,187,500 par value of the preferred stock and about $3,562,500 par value of the common stock, in all about $4,750,000 par value of the stock of the Southern Company.

The following propositions of law are deemed incontestable: "A reorganization of an insolvent railroad company, by which both its mortgage bondholders and its stockholders, in exchange for their bonds and stocks, are given an interest in the new company, which purchases the property of the old company at a foreclosure sale made pursuant to such plan of reorganization and by the consent of the old company and its stockholders, is fraudulent in law as to unsecured creditors of the old company whose claims are left unpaid, and renders the new company liable for the claims of such creditors, at least to the extent of the value of the interest in the new company secured by the stockholders of the old company." Northeren Pacific Ry. Co. v. Boyd, 177 Fed. 804, 101 C .C. A. 18; Luedecke v. Des Moines Cabinet Co., 118 N. W. 456, 140 Ia. 223; Hurd v. New York & Commercial Steam Laundry Co., 167 N. Y. 89, N. E. 327.

Where such a transaction is consummated without offering to the unsecured creditor a fair share of the benefits to be derived from the vesting of the title in the purchaser at the foreclosure sale, the intent or purpose to deprive him of recourse to the property to collect his debt becomes immaterial and the fact that it has that effect charges the purchaser with liability. "As against him the sale is void in equity, regardless of the motive with which it was made. For if such contract reorganization was consummated in good faith and in ignorance of the existence of the creditor, yet when he appeared and established his debt the subordinate interest of the old stockholders would still be subject to his claim in the hands of the

reorganized company." Northern Pacific Ry. Co. v. Boyd, 228 U. S. 482, 502. "For, if purposely or unintentionally a single creditor was not paid or provided for by the reorganization, he could assert his superior rights against the subordinate rights of the old stockholders in the property transferred to the new company. They (the stockholders of the old company) were in the position of insolvent debtors who could not reserve an interest as against creditors. Their original contribution to the capital stock was subject to the payment of debts. The property was a trust fund charged primarily with the payment of corporate liabilities. Any device whether by private contract or judicial sale under consent decree whereby
1233 stockholders were preferred before the creditors was invalid. Being bound by the debts, the purchase of their property, by their new company, for their benefit, put the stockholders in the position of a mortgagor buying at his own sale. If they did so in good faith and in ignorance of Boyd's claim they were none the less bound to recognize his superior right in the property when years later his contingent claim was liquidated and established." Northern Pacific Ry. Co. v. Boyd, 228 U. S. 505. "No such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee but of every creditor of the corporation. * * * Any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of prior rights of either class of creditors comes within judicial denunciation." Louisville Trust Co. v. Louisville etc. Ry. Co., 174 U. S. 674, 683, 684.

The transaction in hand, if valid, had the effect to deprive the creditors of the Belt Company of and to secure to the stockholders of that company out of its property the value of $1,187,500 par value of the preferred stock and $3,562,500 par value of the common stock of the Southern Company, and upon its face it seems to fall within the denunciation of these rules of law.

But counsel for the Southern Company argue that although the completed transaction has the effect of an illegal proceeding it is not such because it is composed of two independent and valid transactions, to-wit: (1) the organization in March, 1900, of the Southern Company and the exchange of the bonds and stock of the Belt Company for the bonds and stock of the Southern Company, so that by April 1, 1900, the latter had acquired 97 per cent of the stock and 89 per cent of the bonds of the Belt Company, and the taking possession of the property of the Belt Company by the Southern Company by virtue of its ownership of these bonds and stock on April 1, 1900, when it filled the offices of the Belt Company with its chosen agents and proceeded to control and operate it, and (2) the filing on September 6, 1900, by the Provident Trust Company, the trustee in the Belt mortgage, at the instance of the Southern Company, the owner of 89 per cent of the bonds, of the bill to foreclose the mortgage of the Belt Company, 97 per cent of whose stock was owned by the Southern Company, the appearance and consent of the
1234 Belt Company on the same day to the appointment of receivers of its property, its answer on October 19, 1901, admit-

ting the material averments of the bill, the decree on November 6, 1901, of foreclosure and sale of the Belt property and the sale thereof on December 31, 1901, under this decree to the Southern Company, the owner of nearly all its bonds and stock. The contention is that while the former transaction was the result of the scheme of reorganization, the latter was independent and free from the influence thereof, and that each of these transactions taken by itself, as counsel insist they should be, is free from any just objection by any creditor of the Belt Company.

The plan of reorganization was made November 7, 1899, and it became effective December 20, 1899. This plan was made a part of the reorganization agreement and it stated that it was expected and intended that the property of the Gulf Company would be purchased by the reorganization committee, that a successor of the company would be organized to which this property and the stocks and bonds of the Belt Company deposited under the plan would be conveyed, that all this property was to be made subject to the mortgage of the new company and that it was "intended, as soon as practicable, that the new company acquire the property of the terminal companies in fee and bring them directly under the lien of the mortgage." It was then one of the objects of the scheme of reorganization which the committee and the Southern Company, which it organized, were empowered and expected to carry into effect, that the latter company should acquire the property of the Belt Company "in fee" and bring it "directly under the lien of the mortgage," and the acquisition of the stocks and bonds of that company and their pledge under that mortgage were but the means to the accomplishment of this end which the plan contemplated.

It is conceded that the organization of the Southern Company, its purchase of the Gulf Company property, its exchange of its stocks and bonds for those of the Belt Company, and its possession and control of its property on April 1, 1900, by means of its ownership of this stock, were steps in the execution of the scheme. But the reorganization committee did not cease its work until October 1, 1900, and before that date the Southern Company by its representative, the Provident Company, had, on September 6, 1900, commenced the suit to foreclose the Belt mortgage and to put its property in the hands of receivers and had caused the Belt Company to consent to the receivership. For what purpose did the
1235 Southern Company take these steps? It had the possession and absolute control of the Belt property by its ownership of 89 per cent of its bonds and 97 per cent of its stock. A default on its bonds was in reality a default of itself to itself. Foreclosure could give it no more power over the Belt Company than it already had. For what purpose then was the foreclosure? Evidently to carry out the reorganization agreement, as it was within the power and as it was the duty of the committee and of that company, its creature, to do, to acquire the property of the Belt Company in fee and bring it directly under the lien of the mortgage. Why did the Southern Company exchange its stock for the stock of the Belt Company? Was it not for the purpose of silencing

the opposition of the Belt stockholders to the coming foreclosure, and to its acquisition of the fee of the Belt Company's property, and was not the scheme of reorganization the primary cause, the vesting of the fee of the Belt property in the Southern Company by the foreclosure the object and effect of that scheme and the exchange of the stock and the foreclosure of the Belt mortgage the means contemplated and authorized by that scheme to attain that end? To the minds of the members of this court the record in this case leaves no alternative but to answer these questions in the affirmative.

Moreover, the property of the Belt Company was a trust fund. The stockholders of that company were trustees charged with the duty to apply that property to the payment of the claims of the trust company and of the other creditors of the Belt Company before they took to themselves any share in or benefit therefrom. When the Southern Company took their stock and gave them $4,750,000 par value of its stocks and bonds for their interest in the property of the Belt Company, it stepped into their shoes and became a trustee for the creditors of the Belt Company with plenary notice that the interest of those creditors in the property was at least as much as the value of the stocks and bonds it was giving for the interest of the stockholders, for the rights of the creditors in the Belt property were prior and superior to those of the stockholders. By virtue of the plan of reorganization the Southern company had become such trustee. The agreement of reorganization and its ownership of 89 per cent of the bonds and 97 per cent of the stock of the Belt Company gave the committee and the Southern Company unrestricted power to discharge its duty to the creditors of
1236 the Belt Company, as their trustee, and to accomplish the object of the agreement regarding this property, the vesting of the fee of it in the Southern Company. They had the power to attain this object in a just and lawful way, to pay, to buy or to compromise the claims of the creditors, or to offer them a just share in the benefits of the reorganization, a share at least as valuable as that given to the stockholders. They did neither, but in the face of the danger signal that "any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation," the Southern Company proceeded by a foreclosure caused by itself, the owner of 89 per cent of the bonds, trustee for the creditors, really against and with the consent of itself as such trustee, owner of 97 per cent of the stock, to obtain against the protest of the Trust Company, whom the court expressly excepted in the decree from its effect, a foreclosure decree and sale of this property in effect by itself as trustee to itself as trustee, and thenceforth to insist that it had thereby secured to itself and deprived its cestuis que trust, the creditors of the Belt Company, of all interest in the property. In view of the fact that the acquisition of the fee of the Belt property by the Southern Company was stated in the reorganization plan and agreement to be one of their intended results, that this result has been obtained,

that the exchange of the stocks and bonds were the means specified therein to attain it, and were the means by which the consent decree of foreclosure and sale of the Belt property to the Southern Company was effected, and that this foreclosure and sale were the means by which the intended result of the plan of acquisition of the fee of the Belt properties by the Southern Company was secured, this court is unwilling to hold that the validity of these proceedings can be sustained against the rule that "any device whether by private contract or judicial sale under consent decree whereby stockholders were preferred before the creditors was invalid," 228 U. S. 504, by contemplating or treating them as two separate and independent transactions, one consisting of that part of the proceedings conducted before and the other of that part of the proceedings conducted after April 2, 1900. They appear to this court to constitute a single transaction instituted, conducted and consummated pursuant to the preconceived plan to vest the fee of the properties of the Belt Company in the Southern Company and to bring them directly under the lien of its mortgage.

1237 (3) Counsel for the Southern Company contend that the Trust Company is entitled to no favorable decree for the payment of the liability of the Southern Company to it and to no affirmative relief because it did not obtain a judgment against the Belt Company and a return of nulla bona to an execution before it presented its claim and demanded relief. But that is an objection only to the jurisdiction of a national court in equity of an original and independent bill to charge a fraudulent trustee. A claim of the nature of that made by the Trust Company in the absence of judgment or execution may be presented by intervention in a foreclosure suit and may there, or in any other suit wherein the court has acquired jurisdiction of the subject matter and the parties, be adjudicated. Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 379. The objection is not tenable here because the decision of the question of the liability of the Southern Company to the Trust Company became, as conceded by counsel for the Southern Company, necessary to the disposition of this case, 201 Fed. 817, to which the Trust Company was originally made a defendant against its will. This is now a suit in equity in which the court below and this court have full jurisdiction of the subject-matter and the parties to the controversy regarding this liability, and under a familiar and salutary rule the power is conferred and the duty is imposed upon a court of equity, which has acquired such jurisdiction, to consider and determine all the rights and claims of the parties relating to the subject-matter and to enter a decree that will finally determine them to the end that a multiplicity of suits may be avoided and litigation may cease. Hopkins v. Grimshaw, 165 U. S. 342, 358; Sunflower Oil Co. v. Wilson, 142 U. S. 313, 325; Ward v. Todd, 103 U. S. 327, 329; In re Blake, 150 Fed. 279, 283, 80 C. C. A. 167, 173; United States v. Standard Oil Company, 152 Fed. 290, 296; Campbell v. Golden Cycle Mining Co., 141 Fed. 610, 614, 73 C. C. A. 260, 264.

It is contended that the remedy of the Trust Company is limited

to a pursuit of the stockholders of the Belt Company who exchanged their stock for the stock of the Southern Company. But the liability of those stockholders is founded on their relation as trustees for the creditors of the corporation. The Southern Company with full notice of their and its liability and duty to the creditors of the Belt Company by the exchange of stock became such a trustee, and by as much as its power over the property of the Belt Company by its ownership of nearly all its bonds, as well as stock, was
1238 greater than that of the former stockholders, by so much was its duty to protect the rights and interests of its cestuis que trust, the creditors, higher and more imperative. It owed them the duty to exercise good faith, care and diligence to secure and deliver to them their full equitable share of the property or the value of that share. Any sale or conveyance of the property to itself whereby they were deprived of and it secured that share, or its value, was a breach of duty and of trust which invokes plenary relief from a court of chancery, and as by its formal foreclosure sale to itself of the property of the Belt Company it took to itself and deprived the creditors of their equitable interest in the property and of the value of that interest it is not less liable in equity for this breach of trust then were the stockholders with whom it exchanged its stock. The duty and liability of the majority stockholders to minority stockholders is not less than this, Jones v. Missouri Edison Electric Co., 144 Fed. 765, 771, and cases there cited, and their duty to creditors whose equitable rights and interests in the property of the corporation are superior to those of stockholders cannot be less.

Moreover, where the property of a corporation is sold to a purchaser and part or all of the purchase price thereof is paid or distributed to its stockholders to the exclusion of its creditors from a collection of their debts from the property of the corporation, the latter may recover that part of its value from the purchaser with notice, on the ground that the conveyance is fraudulent in law, Central of Georgia Ry. Co. v. Paul, 93 Fed. 878, 882, 884; Luedecke v. Des Moines Cabinet Co., 118 N. W. 456, 457; Hibernia Ins. Co. v. St. Louis & N. O. Trans. Co., 13 Fed. 516; Grenell v. Detroit Gas Co., 70 N. W. (Mich.) 413; Northern Pacific Ry. Co. v. Boyd, 228 U. S. 482, and the fact must be constantly borne in mind in the consideration of this case, that as against the Trust Company the entire transaction was in effect that the Southern Company knowingly purchased and took to itself without even a formal foreclosure the property of the Belt Company and paid the latter's stockholders the value of $4,750,000 of its stock therefor to the exclusion of the Belt Company's creditors therefrom, for by the express provision of the foreclosure decree the Trust Company was excepted from all its effects.

Another argument is that the Trust Company is entitled to no relief because the equitable interest of the creditors in the property of the Belt Company was of no value. This contention is
1239 founded on the findings of the master that there was no direct testimony of the fair value of the Belt Company's property at or before the time of the foreclosure, no proof that it was worth

more than the $1,000,000 for which it was sold at the foreclosure sale, and therefore that it was sold at its fair market value. The mortgage was $1,000,000 and the deduction is that the equitable interest of the creditors was valueless. But the crucial issue here was not what the fair market value of the mortgaged property was, nor was it how much more the mortgaged property was worth than the amount of the mortgage. Although evidence upon these subjects would have been competent in the consideration of the real issue here in the absence of an estoppel, that issue was, what was the equitable interest of the creditors in the mortgaged property of the Belt Company worth during the execution of the scheme and immediately after the foreclosure sale and the appropriation of it thereby by the Southern Company, the trustee for the creditors, to itself, for a trustee who violates his trust may not profit thereby. Ervin v. Oregon Railway & Navigation Co., 27 Fed. 625, 633; Jones v. Missouri Edison Electric Co., 144 Fed. 765, 779. The creditors were entitled to the highest value their interest had during this time, either for the purpose of sale or for the purpose of preventing a foreclosure of the mortgage upon the Belt property, or for the purpose of compromising their claims or conditioning the foreclosure, or for the purpose of the present or future control of the property. "If the value of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control. In either event it was a right of property out of which the creditors were entitled to be paid before the stockholders could retain it for any purpose whatever." Northern Pacific Ry. Co. v. Boyd, 228 U. S. 508.

The report of the master discloses other facts than that he received no direct evidence of the fair market value of the property except the bid at the foreclosure sale, which leave no doubt that the equitable interest of the creditors was worth much more than the amount of the Trust Company's claim, $360,000. That report shows that the Southern Company paid $1,330,000 of its bonds and $250,000 of its preferred stock, or $1,580,000 of its new bonds and stock for the $1,000,000 of the old bonds of the Belt Company.

The fact to which counsel call attention, that the new bonds
1240 drew but three per cent interest per annum while the old bonds drew five per cent, has not been over-looked. But even so, the reorganization committee and the Southern Company would not have given for these old bonds a bonus of 33 per cent in new bonds and $250,000 in the stock of the Southern Company unless the old bonds had been well secured. The master's report also shows that the Southern Company gave $1,187,500 of its preferred stock and $3,562,500 of its common stock to the stockholders of the Belt Company for their equitable interest in the property of that company, that at the same time stockholders of the Gulf Company paid, and the Southern Company received, ten dollars per share in cash and an equal number of shares of the stock of the Gulf Company for tens of thousands of shares of the Southern Company's common

stock. That stock must, therefore, have been worth at least the ten dollars cash per share which was paid for it, and it was worth as much more as the value of the stock of the Gulf Company. The preferred stock of the Southern Company could not have been worth less than its common stock. The Southern Company, therefore, paid in value at least $475,000 for the equitable interest of the stockholders of the Belt Company in its property when it gave them $4,750,000 of its preferred and common stock for their stock in that company. But the equitable interest of the creditors in the property of the Belt Company was superior to that of the stockholders and its value could not have been less, and was undoubtedly greater, than the $475,000. That interest was, therefore, worth more than enough to have paid the $360,000 which the Belt Company owed to the Trust Company and the Southern Company cannot escape liability on the ground that it was worthless. The fact that at the foreclosure sale, where there was no competition, the Belt Company was bid in at $1,000,000 fails to disprove or to even render doubtful this conclusion, and the Southern Company which gave $4,750,000 of its full paid stock, which it was readily selling for ten dollars cash per share, and Gulf stock of equal amount, for the inferior stock of the Belt Company, cannot be heard to say that the superior equity of the creditors therein was worthless. Northern Pacific Ry. Co. v. Boyd, 228 U. S. 508; Rankin v. Gardner, 34 Atl. (N. J. Eq.) 935, 937; Garrison v. Monaghan, 33 Pa. St. 232, 234.

Deliberate consideration has been given to the earnest objection to the consideration by this court of the question of the value of this equitable interest of the creditors in the Belt property on
1241 the ground that the master found that there was no direct evidence that the property of the Belt Company was worth more than $1,000,000 and hence that this was its fair value, that no exception was taken to that finding and that the evidence is not here. But because the finding of the fair market value of the mortgaged property is not conclusive of the value of the creditors' equity therein and because other facts and findings contained in the master's report, all of which are available to this court for the determination of that issue, have convinced that the value of that equity was more than $475,000, the objection of counsel has not been thought fatal to the consideration and determination of this question.

Counsel say that because the original stockholders of the Belt Company, by the exchange of their stock for that of the Southern Company retained, as they claim, only 3½ per cent of the value of their equitable interest in the Belt property, therefore the Southern Company is liable for only 3½ per cent of that interest. But the measure of the creditors' recovery is the value of the creditors' equity which was diverted from them by their trustees, the stockholders of the Belt Company, including the Southern Company, the successory trustee, and vested in that trustee. If the Southern Company had been the owner of the bonds of the Belt Company only and knowing the condition and indebtedness of the Belt Company, as it did, had paid to the stockholders of that company $475,000 to the exclusion of the creditors for a conveyance of its property

by the Belt Company to the Southern Company, it could not have escaped liability to the creditors of that company for that amount. Much less can it do so when it became owner of nearly all the Belt Company's stock, and in equity a trustee for its creditors. Story's Equity Jurisprudence, Secs. 1261, 1262; Grenell v. Detroit Gas Co., 70 N. W. (Mich.) 413; Camden Interstate Ry. Co. v. Lee, 84 S. W. (Ky.) 332, 333; Central of Georgia Ry. Co. v. Paul, 93 Fed. 883, 884; Luedecke v. Des Moines Cabinet Co., 118 N. W. 457, 458; Hibernia Ins. Co. v. St. Louis & N. O. Trans. Co., 13 Fed. 516, 519.

It is another contention of counsel for the Southern Company that the remedy of the Trust Company in this court of equity is limited to the subjection of the property of the Belt Company in the possession of the Southern Company to the payment of its claim and that it may not have a decree that the Southern Company pay it. This court does not concede the soundness of this po-
1242 sition and the leading case on the subject cited by counsel for the Southern Company does not sustain it. The quotation they make from that case is in these words:

"A sale may be void for bad faith though the buyer pays the full value of the property bought. This is the consequence, where his purpose is to aid the seller in perpetrating a fraud upon his creditors, and where he buys recklessly, with guilty knowledge. When the fact of fraud is established in a suit at law, the buyer loses the property without reference to the amount or application of what he has paid, and he can have no relief either at law or in equity. When the proceeding is in chancery, the jurisdiction exercised is more flexible and tolerant. The equity appealed to—while it scans the transaction with the severest scrutiny—looks at all the facts, and giving to each one its due weight, deals with the subject before it according to its own ideas of right and justice. In some instances it visits the buyer with the same consequences which would have followed in an action at law. In others, it allows a security to stand for the amount advanced upon it. In others, it compels the buyer to account only for the difference between the under price which he paid and the value of the property. In others, although he may have paid the full value, and the property may have passed beyond the reach of the process of the court, it regards him as a trustee, and charges him accordingly. Where he has honestly applied the property to the liabilities of the seller it may hold him excused from further responsibility. The cardinal principle in all such cases is, that the property of the debtor shall not be diverted from the payment of his debts to the injury of his creditors, by means of the fraud." Clements v. Moore, 6 Wall. 299, 312.

The application of the principles there announced in that suit, which was in equity, was this: Nicholson, the debtor, had sold his property to Moore for $6,310.35 to defraud his creditors, and Moore had paid Nicholson for the goods in cash and his own notes which Nicholson had disposed of and Moore had sold the goods. But Nicholson had applied all of the $6,310.35 to the payment of his debts except $1,500.00. The Supreme Court held that Moore was liable to the creditor Clements for that amount. By the same mark

the Southern Company became liable to the Trust Company to the extent of its claim for the value of the $4,750,000 of its stocks which it issued to the stockholders of the Belt Company to secure
1243 the property of the Belt Company and divert it from its creditors. Central of Georgia Ry. Co. v. Paul, 93 Fed. 883, 884; Camden Interstate Ry. Co. v. Lee, 84 S. W. (Ky.) 332, 333.

The question, however, is not material in the case at bar because the transaction was a conveyance of the property of the Belt Company in fraud of creditors and a breach of trust by the Southern Company, which company, with full knowledge of all the facts, actively participated in the entire transaction and thereby acquired the property of the Belt Company so that that property and the improvements the Southern Company has made thereon, free from the $1,000,000 Belt Mortgage and free from any charge for the expenses which the Southern Company has made thereon, stands in its hands charged with a trust to pay the claim of the Trust Company against the Belt Company which the court may execute by a seizure and sale by its master or receiver. Railroad Company v. Soutter, 80 U. S. 517, 522, 524; Guckenheimer v. Angevine, 81 N. Y. 394, 397; Goble v. O'Connor, 61 N. W. (Neb.) 131, 132.

And if the Southern Company has disposed of the property or destroyed it, or placed it beyond the reach of the Trust Company or the court, or given a mortgage or incumbrance upon it to a party without notice, the court has plenary power and it is its duty to require the Southern Company to account for and pay over the proceeds of the property or the value of it, or the proceeds of the mortgage, or the amount of it, to the extent of the Trust Company's claim and to so conduct its proceedings and mold its decrees that full relief may be secured by the Trust Company. And as the property of the Belt Company was worth many times the amount of the claim of the Trust Company at the time of its transfer to the Southern Company the ultimate result will be the same whether the decree be for the seizure and sale of the Belt property or for the payment of the claim of the Trust Company by the Southern Company, for it must ultimately be paid either out of the property in its hands or by the Southern Company itself. 20 Cyc. 630, 631; Doherty v. Holliday, 32 N. E. (Ind.) 315, 317, 36 N. E. 907, 908; Jones v. Reeder, 22 Ind. 111; Swinford v. Rogers, 23 Cal. 234, 237; Mason v. Pierron, 34 N. W. (Wis.) 921, 925; Blair v. Smith, 15 N. E. (Ind.) 817, 819, 820; Williamson v. Williams, 11 Lea 355; Murtha v. Curley, 90 N. Y. 372; Post v. Stiger, 29 N. J. Eq. 554, 561; Chamberlin v. Jones, 16 N. E. (Ind.) 178, 179; Muskegon Valley Furniture Co. v. Phillips, 21 So. (Ala.) 822, 823; Coale v. Moline Plow
1244 Co., 25 N. E. (Ill.) 1016, 1018; Dilworth v. Curts, 29 N. E. (Ill.) 861, 864; Hulley v. Chedic, 36 Pac. 783, 786; Morrell v. Miller, 43 Pac. (Ore.) 490, 494.

(4) Counsel argue with great force and ability that the Trust Company is estopped from enforcing against the Southern Company its claim for its breach of trust to it as a creditor of the Belt Company, (1) because it signed, and induced others to sign, the trust agreement which contained this paragraph: "No right is conferred,

nor any trust, liability or obligation (except the agreements herein contained in favor of the holders of certificates of deposit hereunder), is credited by this agreement or the plan, or is assumed hereunder, or by or for any new company in favor of any bondholder or any other creditor or any holder of any claims whatsoever against the said companies, nor in favor of any company now existing or to be formed hereafter (whether such claim be based on any bonds, coupon stocks, securities, lease, guaranty or otherwise) with respect to any security deposited under this agreement or any moneys paid to or received by the Committee or by the depositor hereunder, or with respect to any property acquired by purchase at any foreclosure sale, or with respect to any new certificates to be issued hereunder, or with respect to any other matter or thing." (2) because it was one of the depositories under the agreement and on June 26, 1900, it accepted bonds and stock of the Southern Company in exchange for bonds and stock in the Gulf Company and other companies reorganized under the agreement, and especially because it accepted stock of the Southern Company in exchange for stock of the Belt Company which it held, and (3) by its laches in presenting its claim against the Southern Company.

It may be that if when the Trust Company signed the agreement that instrument had disclosed a purpose or had by its terms required the committee, or the stockholders of the Belt Company, or their successory trustee the new company, the Southern Company, to violate their trust and divert the equity of the creditors of the Belt Company in its property to its stockholders, the Trust Company's signature to it, its action as a depository of the bonds and stocks under it and its exchange of its Belt Company stock for the Southern Company stock might have wrought an estoppel against it. But the agreement must be read in the light of the law which was necessarily a part of it. It was to execute a plan, which
1245 it disclosed, to transfer the property of the Belt Company to a new company by means of the exchange of the stock of the new company for that of the Belt Company. The law was that as against creditors of the Belt Company such a plan could be lawfully executed in but one way, and that was by offering and if accepted, by paying to the creditors of the Belt Company either in cash or in stock of the new company, or in some other property at least as much in value as the stockholders should receive, and, in the absence of such an offer or payment the transfer would be fraudulent and voidable as to the creditors. Unless there was in the agreement some term or provision which required the committee or the Southern Company to violate this law and to make a transfer fraudulent and voidable as to the creditors, the legal presumption was that the agreement contemplated, and that the committee and the Southern Company would make, such an offer and payment to the creditors, and upon that presumption the Trust Company had the right to rely when it signed the agreement and thenceforth until it was clearly notified to the contrary. The legal presumption was that the committee and the new company, the Southern Company, which was to succeed to the trusteeship of the stockholders of the Belt

Company, and all others executing the agreement would obey the law, would refrain from making the transfer of the property from the Belt Company fraudulent and voidable and would make it fair, just and valid. The Trust Company had the right to calculate the natural and probable result of its signature to the agreement and of all its acts and omissions in reliance upon this presumption. Indeed, it could reckon upon no other, for it is alike impracticable and impossible to predicate and administer the rights and remedies of men upon the theory that their associates and fellowmen will either violate the laws or disregard their duties. Cole v. German Savings & Loan Co., 124 Fed. 113, 119, 59 C. C. A. 593, 599; Little Rock & M. R. Co., v. Barry, 84 Fed. 944, 950, 28 C. C. A. 644, 650; Burt v. Advertiser Newspaper Co., 154 Mass. 238, 247; American Bridge Co. v. Seeds, 144 Fed. 605, 609, 75 C. C. A. 407, 411.

The reorganization agreement has been searched in vain for any provision which required or notified the committee or the new company that they must violate the law and make the transfer fraudulent and void as to creditors. On the other hand, that agreement declared that the results of its execution would be (*a*) the placing of the properties of the Belt Company, the Gulf Com-
1246 pany and the Dock Company under one corporate ownership, management and control, "(*b*) the payment of the floating debt and the existing car trust obligations." It set apart $475,000 for the payment of floating debts; it expressly authorized the committee to acquire, hold or extinguish "any obligation in the nature of floating debt or otherwise against any company or property embraced in said plan," and under this power the committee actually expended $1,154,172.50. It declared that it was intended to confer on the committee any and all powers which they might deem necessary or expedient towards carrying out and promoting the purposes of the plan and the agreement, and that the methods to be adopted for carrying out the reorganization consolidation and unification of the properties should be entirely discretionary with the committee. The committee and the Southern Company, therefore, had ample power to realize and pay to the creditors of the Belt Company the value of their equity in the property of the Belt Company before they transferred that property to the Southern Company. Let us now turn to the paragraph in the agreement on which counsel for the Southern Company rely for their estoppel by deed. So far as material it provides that "no right is conferred, nor any trust, liability or obligation * * * is created by this agreement or the plan, or is assumed hereunder, or by or for any new company in favor of * * * any holder of any claims whatsoever against the said companies, * * * with respect to any property acquired by purchase at any foreclosure sale." There are two reasons why the Trust Company did not, by signing this paragraph, deprive itself of its equity in the property of the Belt Company, which it held as the cestui que trust of its stockholders, nor of its claim against the Southern Company, the stockholder's successory trustee. First, if that equity and trust were created or conferred by or under the agreement they were created and conferred, not by the just and lawful execution of that

agreement, but by the inequitable and fraudulent appropriation of the Trust Company's equity in the property to the benefit of its stockholder or stockholders, and the paragraph in question barred the Trust Company from asserting only such rights, trusts, liabilities and obligations as arose out of the lawful and equitable execution of its contract. It did not bar it from enforcing its claims accruing from illegal or inequitable acts or omissions of those engaged in the execution of the agreement. If the committee or anyone engaged in such execution had unlawfully appropriated to their or his
1247 benefit the property, money or securities of signers of the contract which came to them or him under the agreement, the signers would not have been estopped by that paragraph from recovering the property or from enforcing the personal liability of the appropriators; second, the Trust Company's right, trust and equity in the property of the Belt Company acquired by the Southern Company "by purchase at any foreclosure sale" was neither created nor conferred by the reorganization agreement. It existed in all its force and inhered in the Belt Company's property by virtue of the relation of the Trust Company as a creditor of the Belt Company to the latter's stockholders before the agreement was made, and there it still inheres so that it did not fall within the terms of the paragraph in question and therefore was not affected thereby. Nor did the liability and obligation of the Southern Company for its breach of that trust now here in suit fall within the terms of that paragraph, for it was not created by that agreement, but by the Southern Company's subsequent transfer of the equity of the creditors of the Belt Company to itself, its stockholders and the trustee for its creditors without securing and paying to them the value of that equity. For these reasons the court is of the opinion that the Trust Company was not estopped by its signature to and activity in inducing others to sign the agreement from enforcing its claims as a creditor of the Belt Company against the Southern Company and against the property of the Belt Company in its possession or control.

Was the Trust Company equitably estopped from presenting and enforcing its claim by its promotion of the reorganization agreement, its participation in its execution and its acceptance on July 26, 1900, of stock of the Southern Company in exchange for its stock in the Belt Company and its acceptance of stock and bonds of the Southern Company in exchange for its stock and bonds in the Gulf Company and some of the other reorganized companies, or by its laches? Laches is equitable estoppel under another name and these two claims of estoppel will be considered together. A statement in chronological order of the salient facts material to the issue here presented will greatly aid in its disposition.

The plan of reorganization was made on November 7, 1899. It became effective on December 20, 1899. In December, 1899, or during the early part of the year 1900, the Trust Company requested a prominent member of the reorganization committee to ad-
1248 just or settle and pay its claim against the Belt Company, and he answered that it was asserted that the Belt Company

did not owe the Trust Company anything, that an examination of the books of the Belt Company and the books of the Trust Company was being made and that when that was completed he would take up the question of whether anything could be done towards an equitable settlement of the claim. On February 5, 1900, the decree of foreclosure and sale of the Gulf Company's property was rendered. On March 19, 1900, the Southern Company was incorporated. On March 19, 1900, the Southern Company purchased the property of the Gulf Company at its foreclosure sale. By April 1, 1900, it had acquired, by its exchange of its stocks and bonds for those of the Belt Company, 97 per cent of the Belt Company's stock and 89 per cent of its bonds. On April 1, 1900, it placed its chosen agents in the offices of the Belt Company and took possession of its books and property by virtue of its ownership of its stock. On June 6, 1900, the reorganization committee purchased of the Trust Company and paid it $35,000, which they applied in part payment of the debt of the Belt Company to it, for certain shares of the stock of the Terminal Company and of the Airline Company, which the Trust Company held in pledge to secure the payment of its claim against the Belt Company. On July 26, 1900, the Trust Company exchanged its stock and bonds in the old reorganized companies for the stocks and bonds of the Southern Company. On September 1, 1900, the Trust Company gave notice of its proposed sale on September 7, 1900, of the securities which the Belt Company had pledged to it to secure the payment of the latter's debt. On September 6, 1900, the Provident Company, the trustee in the mortgage of the Belt Company and in duty and in reality the agent of the Southern Company which held 89 per cent of the bonds of the Belt Company and 97 per cent of its stock, brought a suit to foreclose the mortgage, for the appointment of receivers of the Belt Company's property and for an injunction against its sale or disposition. On September 6, 1900, the Belt Company appeared in that suit and consented to the appointment of receivers. On September 6, 1900, the Cambria Company, with the consent of the Belt Company the agent of the Southern Company which held 97 per cent of its stock, recovered a judgment and obtained a return of nulla bona to an execution against the Belt Company. On September 6, 1900, the Cambria Company commenced the suit here in hand against the Belt Company and against the Trust Company to enjoin the
1249 latter company from selling its collaterals and applying their proceeds to the payment of the debt of the Belt Company, a suit which it founded on the averment, which has been adjudged untrue, that the Belt Company was not indebted to the Trust Company and on other allegations so baseless that it has become clear that the Cambria Company had no cause of action against the Trust Company. On September 6, 1900, the Belt Company, the hand of the Southern Company, appeared in the Cambria suit and on the same day the Trust Company was restrained by the court from selling its collaterals, and receivers of the property of the Belt Company were appointed in this suit. On November 5, 1900, the Trust Company answered and set up its claim against the Belt Company and

the pledging of its collaterals. On December 3, 1900, the Cambria Company filed a replication to that answer. On that day the issue of the indebtedness of the Belt Company to the Trust Company was made in this suit and that issue really existed then between the Trust Company and the Southern Company, for the Southern Company by its ownership of 97 per cent of the Belt Company's stock controlled it and in all subsequent proceedings directed its course and is as much bound by its action as though it had been the Belt Company itself. This issue was referred to the special master and it was not until May 21, 1910, after testimony had been taken for years and after a record of approximately 34,000 pages had been accumulated, that the Trust Company succeeded in obtaining an adjudication thereof, and that issue was first determined by the court below a few days later. It will be interesting to note a few of the proceedings which resulted in this delay. Before the Trust Company reached the decision of the master more than fifteen pleadings were filed in this case by other parties to this suit, and the Trust Company was compelled to file six. On October 20, 1900, the Trust Company filed a petition in the Provident Company's foreclosure suit for leave to be made a party and to plead therein, wherein it set forth its claim against the Belt Company, that the Southern Company would cause the Belt Company to waive all defenses and to consent to a foreclosure of the mortgage upon its property to the detriment of the Trust Company and the creditors of the Belt Company. On October 22, 1900, the Provident Company amended its bill and asked that the Trust Company be made a defendant, and the court so ordered. On November 5, 1900, the Trust Company answered the Provident Company's bill and in its answer set forth the debt of the Belt Company to it, the control of the Belt Company
1250 by the Southern Company and its purpose to waive all defenses to and to consent to the foreclosure of the Belt Company's mortgage and the sale of its property for the purpose and with the effect of appropriating the equity of its unsecured creditors to itself. On September 12, 1901, and again on October 14, 1901, the Trust Company applied for leave to file its amended and supplemental answer in which it set forth the debt of the Belt Company to it, the facts regarding the reorganization agreement, the organization of the Southern Company, its exchange of its stock for the stock of the Belt Company and its purpose, by the control of the Belt Company and of its bonds and stock, to appropriate to itself the equity of the creditors of the Belt Company in its property by means of the foreclosure suit, and prayed that the bill of the Provident Company be dismissed, and for such further orders and decrees as it was entitled to receive. On October 19, 1901, the court ordered the application denied on condition that the Provident Company should file a stipulation to the effect that the decree of foreclosure to be rendered in its case should not bar the right of the Trust Company to plead and insist in any future litigation that the Southern Company was legally and equitably bound by reason of the method by which it would obtain the property of the Belt Company to pay the debt of the Belt Company to the Trust Company. On October

19, 1901, the Provident Company filed such a stipulation and the court denied the Trust Company leave to file its amended answer. On October 19, 1901, the Trust Company presented to the court in the Provident Company suit a petition for leave to prepare and file a cross-bill setting forth the facts stated in its amended answer and praying for an adjudication of its claim against the Belt Company for the sale of its collaterals and for a provision in the decree of foreclosure that any purchaser of the Belt Company's property at the sale thereunder should take and hold it subject to the payment of the Trust Company's claim and to the payment of the claims of all the unsecured creditors of the Belt Company. On October 19, 1901, the court denied this application. On October 19, 1901, the Belt Company filed its answer whereby it admitted the averments of the Provident Company in its bill. On November 6, 1901, the court entered the decree of foreclosure and sale of the Belt Company which contained the express condition stipulated by the Provident Company that the decree should not bar the right of the Trust Company to recover of the Southern Company personally or out
1251 of the property of the Belt Company the amount of its claim against that Company. On November 20, 1901, the Trust Company and the Belt Company and its receivers stipulated in the Cambria Company's suit that the accounting between the Trust Company and the Belt Company should be expedited and that a judgment should be entered in that suit against the party found to be the debtor. On December 31, 1901, the Southern Company bid in the Belt property at the Provident Company's forecosure sale and the master conveyed it to the Southern Company.

On February 27, 1905, the Southern Company filed an intervening petition in the Cambria Company's suit by which it sought to recover certain collaterals pledged by the Belt Company to the Trust Company to secure the Belt Company's debt and certain moneys which the Trust Company had collected. On March 7, 1905, the Trust Company filed its answer to this petition wherein it denied the validity of the claim of the Southern Company and alleged that by virtue of the proceedings which resulted in the foreclosure sale and conveyance of the Belt Company's property to the Southern Company that property remained bound and the Southern Company became bound to pay the Trust Company's claim against the Belt Company. On May 1, 1905, the Southern Company filed an amended intervening petition seeking substantially the same relief on the same grounds. On May 25, 1905, the Trust Company answered it in substantially the same way as it answered the Southern Company's former petition, and the issues thus formed were, by order of the court, referred to the special master for hearing and report. Then followed objections and arguments and testimony until on May 21, 1910, the master finally filed his report and in a few days thereafter the court rendered its decree. The Trust Company, however, was not idle during this time, nor did it limit its endeavors to enforce its claim to the prosecution of it in the court below. On March 15, 1905, and on March 28, 1905, it commenced actions at law in a state court against the Southern

Company for certain parts of its claim against the Belt Company. On July 3, 1905, the Southern Company filed a supplemental bill in the Provident Company's foreclosure suit to enjoin the Trust Company from prosecuting those actions. On August 29, 1905, the Circuit Court ordered the Trust Company enjoined from prosecuting it. On May 31, 1906, this court reversed that order. In May, 1907, the Southern Company made a motion in the
1252 State court to stay the proceedings in these actions at law and in June, 1907, that motion was denied and the cases were set for trial on December 2, 1907. On November 16, 1907, the Southern Company filed another bill to enjoin the Trust Company from prosecuting those actions and the court below granted the injunction. On April 2, 1909, this court reversed that order.

Where is the evidence of any laches of the Trust Company in these proceedings? It presented to one of the members of the committee its claim against the Belt Company for adjustment and settlement and was told that when the examination of the books were completed he would take up the matter whether anything could be done towards an equitable settlement of its claim, and there that matter rested until the Trust Company was enjoined from selling its collaterals in September, 1900. By a sale of some of its collaterals to the committee it collected and applied the proceeds thereof to its claim against the Belt Company in June, 1900. It gave notice of its sale of its remaining collaterals on September 1, 1900, and was enjoined from proceeding in the baseless suit of the Cambria Company, a suit based on a judgment to which the Southern Company consented in the name of the Belt Company, and it is difficult to wink so hard as not to see that the Cambria suit was in reality the suit of the Southern Company. Twice in October, 1901, it set forth in answers to the Provident Company's suit its claim against the property of the Belt Company and against the Southern Company, and prayed the adjudication and payment thereof, to be met by a denial by the court doubtless secured by the objections of the Provident Company and by that Company's stipulation that the decree should not foreclose, bar or affect the Trust Company's claim against the Southern Company, or the property of the Belt Company which it should acquire thereunder. On October 19, 1901, it applied for leave to plead this claim on a cross-bill in that suit and to pray for a decree that its claim should be paid out of the property of the Belt Company, to be met by like denial. In this way the Trust Company was prevented from obtaining a hearing on the merits and an adjudication of its claim in the foreclosure suit and subjected to the objection to an original bill which it might otherwise have brought against the Southern Company that it had no judgment against the Belt Company and no execution returned unsatisfied thereon. Therefore it pressed for that judgment.
1253 November 20, 1901, it joined the Belt Company and its receivers in a stipulation to expedite the trial of that issue and the entry of such a judgment, but new pleadings, tens of thousands of pages of testimony delayed the result. When that result seemed

nearer and on February 27, 1905, the Southern Company intervened and claimed some of the Trust Company's collaterals, and on March 7, 1905, the Trust Company answered the intervening petition and again pleaded and pressed its claim against the Southern Company. On March 17, 1905, and on March 28, 1905, apparently despairing of reaching an adjudication in this suit in equity, it brought actions at law against the Southern Company upon its claim, but was prevented from trying them by injunctions procured and other proceedings conducted by the Southern Company until April 2, 1909, when the last injunction against its proceeding in the state court was reversed by this court. Meanwhile the Trust Company had pressed the issues in this suit through the hearings, they had been submitted to the master, and on May 21, 1910, he found that the Belt Company was indebted to the Trust Company in 1900, and that the amount of that debt with interest to June 22, 1910, was $639,558.86. There is much evidence of promptness, diligence and persistence, and none of laches, on the part of the Trust Company in the printed record before us. Nor does it lie in the mouth of the Southern Company to make or urge a charge of laches here. By its use of 89 per cent of the bonds of the Belt Company which the Provident Company was bound to represent in the foreclosure suit, and of 97 per cent of the stock of the Belt Company, it controlled the action of each of those companies in that suit. By means of those companies it prevented the hearing and adjudication of the Trust Company's claim upon its answers and upon its application to file a cross-bill in that suit. By the Belt Company's consent to a judgment against it in favor of the Cambria Company it laid the technical foundation of the Cambria Company's unwarranted suit which prevented the Trust Company from selling its collaterals, and held the issue of the Belt Company's indebtedness to it suspended for more than eight years. It prevented the trial of that issue in the actions which the Trust Company brought in the state courts in 1905 by injunctions it procured from the court below and there is no equity in its claim that the Trust Company unduly delayed the presentation or the prosecution of its claim against it or against the property of the Belt Company.

1254 But counsel argue that the Trust Company is equitably estopped from maintaining its claim by the fact that it was one of the depositories under the reorganization agreement, that it persuaded others to sign it and that on July 26, 1900, it exchanged its $76,972.00 par value of stock in the Belt Company and the stocks and bonds it held in the Gulf Company and the other reorganized companies for $1,480,909.00 par value of stock of the Southern Company. Let us see. The indispensable elements of an estoppel in pais are (1) intentional or reckless misrepresentation of a known and material fact inconsistent with the subsequent claim of him who makes the misrepresentation, (2) ignorance of the truth and absence of equal means of knowledge of it by the party who claims the estoppel, (3) action by the latter induced by the misrepresentation and (4) injury to the latter if the truth is permitted to be proved. Bigelow on Estoppel, 4th Ed. page 679; Illinois

Trust & Sav. Bank v. City of Arkansas City, 76 Fed. 271, 293; 22 C. C. A. 171, 193; Farmers' & Merchants' Bank v. Farwell, 58 Fed. 633, 638, 639; 7 C. C. A. 391, 395, 397; New York Life Ins. Co. v. McMaster, 87 Fed. 63, 66, 67, 30 C. C. A. 532, 535, 536. The estoppel here probably lacks all and it certainly lacks at least three of these essential elements: (1) the requisite misrepresentation of any material fact which the Trust Company knew, (2) ignorance or absence of equal means of knowledge of that fact by the Southern Company or its stockholders and bondholders, and (3) injury to them if the truth is permitted to be proved. First, the reorganization agreement, as we have seen, disclosed a scheme whereby the property of the Belt Company might be honestly and lawfully vested in the Southern Company by offering, and if the offer was accepted by paying, to the creditors of that company at least as much in value as the scheme offered to the stockholders of the Belt Company. The Trust Company presented its claim against the Belt Company to one of the committee and was told before it made its exchange that the indebtedness of the Belt Company was denied, but was under investigation, and that when that investigation was completed he would take up the claim and see if anything could be done about its settlement, and there the matter rested until after the exchange of stock was made. Meanwhile the Southern Company had the books of the Belt Company evidencing the state of the account between the Belt Company and the Trust Company in its possession. The Trust Company never made any representation that it had no claim against the Belt Company nor that it
1255 would not press it for payment by the committee, by the Belt Company and by the Southern Company, but it gave notice of its claim and requested its payment and neither the committee nor the Southern Company ever declared before the Trust Company exchanged its stock and bonds that they would not settle or pay it if the Belt Company really owed it.

The legal presumption was and the Trust Company had a right to rely thereon, that the scheme disclosed by the reorganization agreement would be executed in a just and lawful way and that its claim and the claims of all creditors of the Belt Company would be adjusted and settled by full or partial payment by the committee and neither its action as a depositor nor its activity to persuade others to accept the plan, nor its exchange of its stocks and bonds constituted any representation that the plan would not be so executed, that the transfer of the property of the Belt Company to the Southern Company would be illegal and fraudulent as to creditors nor any consent to or participation in such an execution of the agreement. That transfer had not then been made, the Southern Company held the stock of the Belt Company charged with the trust to secure for its creditors at least as much as it had paid to its stockholders and there was no notice or presumption that it would violate its trust. The Trust Company made no misrepresentation by any of its acts or omissions of any known fact on which an estoppel in favor of the Southern Company can be based. Second, the reorganization agreement showed that under it the title in fee of

the property of the Belt Company was to be transferred to the new company, the Southern Company, and brought under the lien of its mortgage by means of the exchange of the stock of the Belt Company for the stock of the Southern Company and this disclosure and the law notified the Southern Company and everyone who received any stocks or bonds of that company that the acquisition of that stock in that way and its pledge under the mortgage charged the Southern Company, its bondholders and its stockholders with a trust to secure and distribute to the creditors of the Belt Company the value of their equity in the property of that company, and the answers of the Trust Company in the Provident Company's foreclosure suit, its application to file its cross-bill and the paragraph in the decree of foreclosure which exempted the Trust Company from the effect of that decree, kept that notice flaming in the record so that neither the Southern Company nor any of
1256 its bondholders, or stockholders were without equal means of knowledge nor without notice under the law that the transfer of the property of the Belt Company to the Southern Company without offering to pay or paying anything to its creditors was a breach of trust, fraudulent and voidable as to them. Moreover, although it is immaterial under the opinion in Northern Pacific Ry. Co. v. Boyd, 228 U. S. 502, whether they were notified of the Trust Company's claim or not, they all had notice of it by its presentation to one of the committee, by the Southern Company's possession of the books of the Belt Company as early as April 1, 1901, by the answers and the application to file the cross-bill in the foreclosure suit and by the terms of the decree therein. The committee, the Southern Company, its stockholders and bondholders had at least equal means of knowledge and had notice under the law of the truth regarding all material things in this transaction to which the Trust Company's acts and omissions, and its exchange of stock and bonds relate. There were no innocent stockholders or bondholders of the Southern Company in or since this transaction. Third, neither the Southern Company nor its stockholders nor bondholders will suffer any injury by proof of the truth in this transaction and the granting to the Trust Company of the equitable relief to which it was entitled in 1901. They took to themselves by a breach of trust and a transfer fraudulent as to creditors by the foreclosure sale on December 31, 1901, an equity in the property of the Belt Company of a value in excess of the amount of the Trust Company's claim, then about $360,000, which belonged to that company, and they have held and enjoyed it ever since. Each stockholder and bondholder has had and still has the benefit of his just proportion of that equity. If now the Southern Company is required to restore that equity or its value in 1901, with interest from that date, each stockholder and bondholder will lose the benefit of its just proportion of that equity which it wrongfully holds and nothing more. Nor will the Trust Company secure or retain any unjust share or advantage. While it will receive the value of that equity to which it as a creditor of the Belt Company was entitled in 1901 with interest, its stocks and bonds issued by the Southern Com-

pany will lose the benefit of that equity in the same proportion as will the stocks and bonds of others. The stocks and bonds of the Trust Company and of all the others holders of stocks and bonds in the Southern Company will be diminished in value in the exact proportion by which they were enhanced in value by the
1257 wrongful appropriation of the equity of the Trust Company in the property of the Belt Company which the Southern Company wrongfully took and holds, and the justice and equity to all which should have been done many years ago will now as nearly as practicable be administered.

This question of estoppel was ably and exhaustively argued. It has not failed to receive the study and meditation of each member of this court. But for the reasons which have now been stated, perhaps at too great length, this study and meditation have but confirmed the court in its former view and its conclusion still remains that the Trust Company was not estopped either by its promotion of the reorganization agreement, its signature to it, its exchange of stock, or its alleged laches, from prosecuting its claim against the Southern Company to adequate relief.

In the course of their argument counsel have invoked the maxims that he who seeks equity must do equity and that he who seeks equity must come into court with clean hands, and have claimed that the Trust Company is entitled to no relief because it participated in the formation and execution of a fraudulent scheme. The answer has been given. The fraud and breach of trust which made the transfer voidable as to creditors were not committed nor disclosed until after the Trust Company's acts in the formation and execution of the plan had been done. The presumption of law was, when it exchanged its stock, that the fraud and breach of trust were not being perpetrated and it did not participate in their perpetration. Its hands are not soiled and if its claim is paid by the Southern Company it, and all the parties in interest in this transaction, will have done and received equity.

(5) Counsel have argued the question whether the Trust Company or the Southern Company has the superior equity in the lands of the Central Company, but the court is not convinced that it was in error in the conclusion upon this subject which it announced in its former opinion at pages 824, 826, 827 and 828 of 201 Federal Reporter, and as, unless the court is in error on the questions which have already been discussed, that question is no longer material because the Southern Company may have no relief in that regard, unless it pays the claim of the Trust Company, the court refrains from another discussion of it.

1258 (6) Objection is made to the entry of a decree at this time in favor of the Trust Company for the payment of its claim by the Southern Company on the grounds that the Trust Company filed no cross-bill and made no specific prayer for such relief in its answer and because the Southern Company should have an opportunity to offer evidence and to be heard upon the question whether or not the Trust Company is entitled to such relief. But the issues whether or not the property of the Belt Company taken

by the Southern Company, whether or not the property of the Central Company by reason of the pledge of its stock and whether or not the Southern Company itself, was liable to pay the debt of the Belt Company to the Trust Company, were all necessarily presented and litigated under the pleading and litigation of the controlling issue whether or not the Southern Company by its acquisition of the property of the Belt Company, its exchange of stock and its foreclosure sale deprived the Trust Company of its equity in that property and exempted itself from liability. Opportunity was offered and embraced to present evidence to consider and argue these questions. The Southern Company received ample notice of the claim of the Trust Company that it and the property of the Belt Company which it acquired were liable to pay its claim against the Belt Company. In its petition for leave to file a cross-bill in the foreclosure suit in October, 1901, the Trust Company asserted its right to be paid out of the property of the Belt Company to be superior to that of the expected purchaser at the foreclosure sale of that property and the liability of such purchaser to pay it and the right of the Trust Company to assert its claim against the property and the purchaser, were expressly reserved by the decree. In its answer to the amended intervening petition of the Southern Company in this suit filed on May 20, 1905, it made a like averment which was denied by the replication of the Southern Company. A review of the facts disclosed by the master's report and of the pleadings and proceedings printed in the record before us, has convinced that the indisputable facts and the law of this case are such that an opening of the case and the reception of further evidence would not change the result or benefit any party thereto.

The court has ample power to remand the case and permit the filing of a cross-bill or an amendment of the answer so as to pray for the specific relief to which the Trust Company is entitled. Wiggins Ferry Co. v. Ohio & Mississippi Ry. Co., 142 U. S. 396, 413-416; Hardin v. Boyd, 113 U. S. 756; Clark v. Clark, 62 N. H. 267, 272; Trimble v. Bank, 71 Mo. App. 467, 484, but that would be a useless proceeding and neither the law nor the rules and practice in equity require the performance of futile acts. An answer may be treated as a cross-bill and the rights and remedies which the defendant has alleged in its answer and at the hearing has proved it is entitled to enforce may be maintained and enforced although its prayer is limited to a dismissal of the bill. Bradford v. Union Bank of Tennessee, 13 How. 56, 68, 69; Walden v. Bodley, 14 Pet. 156, 164; Moran v. Hagerman, 64 Fed. 499, 503, 504; Wyatt v. Sweet, 12 N. W. (Mich.) 692, 693. In Walden v. Bodley, 14 Pet. at page 164, the Supreme court said on this subject: "It would be a reproach to the administration of justice, if in this case, the parties should be left, by the decision of this court, apparently, as remote from a final determination of it as they were forty years ago. It is true, the answer prays merely for a dissolution of the injunction and that the bill may be dismissed. But the court have, by the bill, answer and evidence, the equities of the parties before them; and having jurisdiction of the main points they may settle

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the whole matter. A court of equity cannot act upon a case which is not fairly made by the bill and answer. But it is not necessary that these should point out in detail the means which the court should adopt in giving relief." These rules and authorities and the principle of equity that a court of chancery which once acquires jurisdiction of the subject matter and the parties to a controversy ought, if possible, to determine the entire matter and grant just relief to each party, the length of time this litigation has already been pursued and the greater danger of injustice from its continuance than from its termination, have persuaded that the ends of justice will be best served by the entry of a decree in this case upon the issue of the mandate in favor of the Trust Company for the relief to which it is entitled.

(7) Counsel for three of the stockholders of the Trust Company have been heard upon their petition that this court adjudge that certain of the litigation herein instituted by the Cambria Company, the Belt Company and the Southern Company was commenced and prosecuted in bad faith and that it direct the court below to find the amount of attorneys' fees, stenographers' fees and expert accountants' fees necessarily incurred by the Trust Company in that litigation, and, after the entry of the main decree, to render a
1260 further decree in favor of the Trust Company and against the Southern Company for the aggregate of these amounts, or that this court direct the court below to insert in its decree an adjudication that it is rendered without prejudice to the right of the Trust Company to sue the Southern Company for those sums, that this court also direct the court below to include in the costs herein the damages, costs, fees and expenses incurred by the Trust Company in the injunction suit reported in 171 Federal, 43, and also to insert in the decree an adjudication that the decree shall not prejudice the right of the Trust Company to move for such damages, costs, fees and expenses in the injunction suit reported in 146 Federal, 337. A deliberate consideration of this petition and of the exhaustive arguments of counsel have, however, persuaded that inasmuch as the questions suggested came for the first time into this suit at the rehearing in this court, as no evidence has been taken relative to them and as the evidence upon the issues tried in this case was not brought to this court it would be unwise and might be unjust to adjudicate the questions presented by the petition of these stockholders. Moreover, as this court cannot rightly determine the questions relating to the costs to be taxed at this time, as there are established rules of practice concerning them and as directions to the court below to open and try new issues might, and probably would, prolong this litigation through several years more, our conclusion is that our just course is to leave the taxation of costs to the court below under the principles, rules and practice in equity.

And the conclusion of the whole matter is that the decree below should be reversed and the District Court should render a decree which should contain the first five paragraphs of the former decree, except that the proceeds of the sale of ninety-nine first mortgage bonds and coupons of the Kansas City & Northern Connecting Rail-

road Company, amounting to $40,001.25, referred to in paragraph five of the former decree, together with all interest which has accrued and shall accrue, has been and shall actually be earned on said sum, shall be applied as a credit at the time when the Trust Company shall receive said sum as its own, upon the amount which the Southern Company should pay to the Trust Company, as hereinafter provided, which future decree should also adjudge that the Southern Company is indebted to and should pay to the Trust Company the amount of the indebtedness of the Belt Company to the Trust Company, that is to say, the sum of $639,658.86
1261 and interest from the date of the former decree, on $473,723.59 at six per cent per annum, on $46,565.76 at seven per cent per annum and on $119,369.51 at eight per cent per annum, and the costs of this suit, that the Trust Company's right to and equity in the property of the Belt Company which was transferred to the Southern Company by means of the exchange of the stock of the Belt Company for the stock of the Southern Company and by the foreclosure proceedings, sale and conveyance and otherwise, was and is prior in time and superior in equity and right to the extent necessary to pay the debt, to the right, title and equity of the Southern Company therein, that by virtue of the indebtedness of the Belt Company to the Trust Company and the pledge to it of 1,120 shares of the stock of the Central Company, the equity and right of the Trust Company in the property of the Central Company described in the sixth paragraph of the former decree is superior, to the extent necessary to pay that debt, to the right, title, claim and equity of the Southern Company therein, that in case the Southern Company shall pay its debt to the Trust Company and the costs of this suit adjudged in this suit by a day to be named in the decree, then all the collateral security described in paragraph five of the former decree which has not then been disposed of, and all the proceeds of such security which has not then been disposed of or applied, shall be surrendered and delivered to the Southern Company, that in case the Southern Company fails to pay its debt to the Trust Company and the costs of this suit by a day to be named by the court in the decree then the said property of the Central Company and the property of the Belt Company which was transferred to the Southern Company as aforesaid, and the collateral security then remaining in the possession of the Trust Company, or such part or all said property as it shall be necessary to sell in order to pay the debt and costs out of the proceeds of the sale or sales to which the Trust Company, in view of the pledge to it of only 1,120 shares of the stock of the Central Company and the possible equities of the Central Company's other stockholders and creditors, shall be equitably entitled, be sold by a master or receiver to be named by the court, and the proceeds of such sale or sales to which the Trust Company shall be equitably entitled be applied to the payment of the debt and of the costs after as well as before the decree, until they are completely paid and that the remainder of the proceeds, if any, be paid to the Southern Company or to such other

party as may be equitably entitled thereto, that on the de-
1262 mand of the master the Southern Company, the Trust Company, the Central Company and its receiver, surrender and deliver to him, or to the purchaser or purchasers of any of this property as the master shall direct, such part or all of said property as he shall specify, and that if an amount to which the Trust Company shall be equitably entitled sufficient to pay the debt with interest and the costs before and after the decree is not realized from the sales, then that the Trust Company have judgment and execution against the Southern Company for the remainder unpaid. The decree should adjudge that the Trust Company may recover its costs down to the entry of the decree of the Cambria Company as well as of the Southern Company, and the court may apportion those costs between them, but not as against the Trust Company which should be permitted to pursue either or both of them until its costs are paid. The district court should reserve in the decree full jurisdiction to render such further decrees and take such subsequent proceedings in the suit as equity and good conscience may require.

Let the decree be reversed and let the cases be remanded to the District Court with directions to render a decree for the Trust Company in accord with the views expressed in this opinon.

Filed December 2, 1913.

1263 (*Decree of U. S. Circuit Court of Appeals of December 2, 1913, as Modified by Order of January 22, 1914.*)

United States Circuit Court of Appeals, Eighth Circuit.
December Term, 1913.

TUESDAY, December 2, 1913.

No. 3489.

CENTRAL IMPROVEMENT COMPANY, H. H. CRITTENDEN, Receiver of Central Improvement Company, Appellants,
vs.
CAMBRIA STEEL COMPANY, THE KANSAS CITY SUBURBAN BELT Railroad Company, Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company; The Kansas City Southern Railway Company and Guardian Trust Company.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

No. 3490.

GUARDIAN TRUST COMPANY, Appellant,
vs.
CAMBRIA STEEL COMPANY, THE KANSAS CITY SUBURBAN BELT Railroad Company, Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company; The Kansas City Southern Railway Company, Central Improvement Company, H. H. Crittenden, as Receiver of Central Improvement Company.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

These causes came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of Missouri, and were argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in these causes, be, and the same is hereby, reversed with costs; and that the Central Improvement Company, H. H. Crittenden, Receiver of Central Improvement Company, in case No. 3489, and the Guardian Trust Company, in No. 3490, have and recover against the Cambria Steel Company, The Kansas City Suburban Belt Railroad Company, Edward F. Swinney, as Receiver of the Kansas City Suburban Belt Railroad Company and The Kansas City Southern Railway Company, their costs in this behalf expended in the respective cases to be taxed by the Clerk of this Court.

1264 It is further ordered that these causes be, and the same are hereby, remanded to the District Court of the United

States for the Western District of Missouri, as the successor of the Circuit Court for said District, with directions to render a decree for the Trust Company in accordance with the views expressed in the opinion of this Court.

December 2, 1913.

(*Order Modifying Opinion and Decree of U. S. Circuit Court of Appeals.*)

December Term, 1913.

THURSDAY, January 22, 1914.

These causes having been called to the attention of the Court, upon due consideration, it is hereby ordered that the Per Curiam opinion in the above entitled causes, which was filed on December 2, 1913, in this Court, be, and the same is hereby, modified so that it shall read as does Exhibit "A" hereto attached, and it is further ordered that the said Exhibit "A", and the modification hereby made in the opinion, and such modification of the decree in this Court as shall be necessary by reason thereof, shall take effect and be in force as of the date of December 2, 1913.

January 22, 1914.

(Attached to the foregoing order is Exhibit "A" being the opinion of the United States Circuit Court of Appeals as modified, which said opinion is omitted here for the reason that a copy thereof appears at page 1228 of this transcript.)

(*Motion of Cambria Steel Company for Leave to Amend Original Bill of Complaint.*)

Comes now the Cambria Steel Company and prays leave to amend its original bill filed in this cause on September 6, 1900, by adding, by way of interlineation, at page 15 of said original bill (bottom of Record, page 13), the folowing:

And your orator alleges that by the Act of Congress of August 1, 1888, entitled "An Act to Regulate the Liens of Judgments and Decrees of the Court- of the United States", (25 Stat. L. 357) it is provided "that judgments and decrees rendered in a circuit
1265 or district court of the United States within any state shall be liens on property throughout such state in the same manner and to the same extent and under the same conditions only as if such judgment and decree had been rendered by a court of general jurisdiction of such state"; that the laws of the State of Missouri now in force and in force and effect at the date of your orator's aforesaid judgment against the Belt Company, to-wit: Sections 3712 and 3713 of the Revised Statutes of Missouri of 1889, provide:

SECTION 3712. Judgments and decrees obtained in the Supreme

Court, in any United States District or Circuit Court, held within this state, in the Kansas City Court of Appeals or the St. Louis Court of Appeals, shall, upon the filing of a transcript thereof in the office of the clerk of any such court, be a lien on the real estate of the person against whom such judgment or decree is rendered situate in the county in which such transcript is filed.

SECTION 3713. Judgments and decrees rendered by any Court of Record shall be a lien on the real estate of the person against whom they are rendered situate in the county for which the court is held.

that by virtue of said Act of Congress and the aforesaid laws of the State of Misouri all the real estate of each and every one of the said auxiliary companies is subject to the lien of your orator's aforesaid judgment against the Belt Company, and your orator therefore avers that this is a suit arising under the laws of the United States.

All the matters contained in said proposed amendment existed at the time of the filing of said original bill. The purpose of said amendment is to make express reference to the laws of the United States whose construction and application are involved in the original bill of this complainant, and to expressly assert that the cause of action made by said original bill is one arising under the laws of the United States.

CAMBRIA STEEL COMPANY,
By FRANK HAGERMAN,
Its Solocitor.

[Endorsed:] Filed in U. S. Circuit Court of Appeals on January 22, 1914.

1266 (*Order Denying Motion of Cambria Steel Company for Leave to Amend Original Bill of Complaint.*)

December Term, 1913.

THURSDAY, January 22, 1914.

These causes having been called for further hearing, came on to be heard upon the motion of the Cambria Steel Company for leave to amend its original bill of complaint herein as stated in the motion and was argued by counsel.

On Consideration Whereof, it is now ordered by this Court, that said motion of the Cambria Steel Company for leave to amend its original bill of complaint, be, and the same is hereby denied.

January 22, 1914.

(Order Fixing Amount of Supersedeas Bond on Appeal to the Supreme Court of the United States.

December Term, 1913.

THURSDAY, January 22, 1914.

Upon application of counsel for the Kansas City Southern Railway Company, it is now here ordered that the amount of the bond on an appeal to the Supreme Court of the United States, to operate as a supersedeas of the decree of this Court, in the above entitled causes, be, and the same is hereby, fixed at the sum of Six Hundred Thousand Dollars ($600,000.00).

January 22, 1914.

(Petition of Kansas City Southern Railway Company for, and Order Allowing Appeal to the Supreme Court, U. S.

The Kansas City Southern Railway Company respectfully shows that the above entitled cause, in which there are separate appeals by the Guardian Trust Company and by the Central Improvement Company, is now pending in the United States Circuit Court of Appeals for the Eighth Circuit, and that a final judgment and decree has therein been rendered on the 2nd day of December, 1913,
1267 reversing the decree of the Circuit (now District) Court of the United States for the Western Division of the Western District of Missouri, and directing said District Court to enter a specified judgment and decree in favor of the Guardian Trust Company; that the matter in controversy in said suit exceeds the sum of One Thousand Dollars ($1,000) besides costs; that this cause is one in which the United States Circuit Court of Appeals for the Eighth Circuit has not final jurisdiction, and that it is a proper case to be reviewed by the Supreme Court of the United States on appeal.

Wherefore, the said appellant prays that an appeal be allowed it in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by the said appellant may be reviewed and that if error be found, corrected according to the laws and customs of the United States.

SAMUEL UNTERMYER,
SAMUEL W. MOORE,
Solicitors for Appellant.

Appeal allowed and bond in the sum of Six Hundred Thousand Dollars ($600,000) is hereby approved to operate as a supersedeas this 24th day of January, A. D. 1914.

WALTER H. SANBORN,
Presiding Judge U. S. Circuit Court of Appeals, Eighth Circuit.

[Endorsed:] Filed in U. S. Circuit Court of Appeals on January 24, 1914.

(Assignment of Errors by Kansas City Southern Railway Company on Appeal to Supreme Court, U. S.)

Now comes the appellant, The Kansas City Southern Railway Company, and says that in the record and proceedings herein, there is manifest error, and that the United States Circuit Court of Appeals for the Eighth Circuit erred in this, to-wit:

1. In holding and deciding that The Kansas City South-
1268 ern Railway Company was liable for and required to pay to the Guardian Trust Company the indebtedness of the Kansas City Suburban Belt Railroad Company to the Guardian Trust Company.

2. In holding and deciding that the rights and equities of the Guardian Trust Company in the properties and capital stock of the Central Improvement Company were prior and superior to the rights and equities therein of The Kansas City Southern Railway Company.

3. In holding and deciding that the Guardian Trust Company was not estopped by its participation in, and the benefits received and retained by it from, and growing out of the plan of reorganization involved herein, from maintaining that The Kansas City Southern Railway Company was or is liable for the indebtedness of the Kansas City Suburban Belt Railroad Company to the Guardian Trust Company.

4. In deciding and passing upon the issue of the alleged liability of the appellant for the indebtedness of the Belt Company, in the absence of any exception taken before the master, or in the lower court, challenging the correctness of the finding of the master that the appellant was not liable for such indebtedness.

Wherefore, the appellant prays that said judgment and decree of the said Circuit Court of Appeals may be reversed in all things.

SAMUEL UNTERMYER,
SAMUEL W. MOORE,
Solicitors for Appellant.

[Endorsed:] Filed in U. S. Circuit Court of Appeals on January 24, 1914.

(Supersedeas Bond on Appeal to Supreme Court of the United States by Kansas City Southern Railway Company.)

Know all men by these presents: That, The Kansas City Southern Railway Company, as Principal and American Surety Company of New York as Surety, acknowledge themselves to be jointly indebted unto the Guardian Trust Company in the full and just sum of Six Hundred Thousand Dollars ($600,000) for the payment of which to the Guardian Trust Company they bind themselves and

each of their successors and assigns jointly and severally,
1269 firmly by these presents.

Sealed with our seals and dated the 23rd day of January, A. D. 1914.

Whereas the appellant in the above entitled suit has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said cause in the Circuit Court of Appeals for the Eighth Circuit on the 2nd day of December, 1913.

Now, therefore, the condition of this obligation is such that if the said appellant shall prosecute said appeal to effect and answer all damages and costs if it fails to make said appeal good, then this obligation shall be void; otherwise to remain in full force and virtue.

In witness whereof said The Kansas City Southern Railway Company has caused this instrument to be executed by its Treasurer, he being thereunto duly authorized, and the American Surety Company of New York has caused the same to be executed by its resident Vice-President, its corporate seal to be hereunto affixed and attested by its resident Assistant Secretary.

THE KANSAS CITY SOUTHERN RAILWAY CAMPANY,
By H. VISSCHER, *Its Treasurer.*
[SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,
By R. E. VALENTINE, *Resident Vice-President.*

Attest:

ROBERT S. KING,
Resident Assistant Secretary.

The above and foregoing bond is hereby approved to operate as a supersedeas this 24th day of January, 1914.

WALTER H. SANBORN,
Presiding Judge U. S. Circuit Court of Appeals, Eighth Circuit.

O. K.

——— ———,
——— ———,
Solicitors for Guardian Trust Company.

1270 *Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.*

The first meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 21, 1913, at eleven o'clock A. M.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees of the American Surety Company of New York.

"GENTLEMEN: The Committee appointed by the Executive Committee of this Company at their meeting held Tuesday, December 10, 1912, for the purpose of nominating * * * officers of the Company, * * * for the ensuing year and until their successors are elected, beg leave to report as follows:

"We nominate for * * *

Place.
Kansas City, Mo.

Resident Vice Presidents:

A. A. Tomlinson,
E. F. Swinney,
Robert F. Porter,
R. E. Valentine.

Resident Assistant Secretaries:

Robert F. Porter,
R. E. Valentine,
C. E. Chadduck.

* * * * * * *

"Whereupon, it was

"Resolved, that the Secretary be authorized to cast one ballot on behalf of the Trustees present, for the Members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

1271 * * * * * * *

"The following resolution was adopted:

"Resolved, that the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by the Resident Assistant Secretary."

* * * * * * *

STATE OF NEW YORK,
County of New York, ss:

I, H. A. Reiss, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with

the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 5th day of February, 1913.

[SEAL.]

H. A. REISS,
Assistant Secretary.

Extract from the Record Book of the Executive Committee of the American Surety Company of New York.

"A meeting of the Executive Committee of the American Surety Company of New York was held on the 18th day of
1272 March, 1913.

* * * * * * *

"The following resolution was adopted:

"Resolved, that Robert S. King, of Kansas City, Mo., be and he is hereby constituted and appointed a Resident Assistant Secretary of this Company at the town or city aforesaid, with full power and authority to attest any and all surety bonds and undertakings, for or on behalf of this Company, in its business and in accordance with its charter; such bonds and undertakings to have in every instance, however, the seal of this Company affixed thereto, and to be executed on behalf of this Company by one of its Resident Vice Presidents."

STATE OF NEW YORK,
County of New York, ss:

I, W. H. Riley, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Executive Committee of the American Surety Company of New York, with the original record of said Executive Committee, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolution with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution; and that the said resolution has not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 20th day of Nov., 1913.

[SEAL.]

W. H. RILEY,
Assistant Secretary.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Jan. 24, 1914.

1273 (*Affidavit as to Notice to and Refusal of Cambria Steel Company to Join in Appeal to the Supreme Court U. S.*)

STATE OF MISSOURI,
City of St. Louis, ss:

S. W. Moore, of lawful age, being duly sworn upon his oath states: On January 19th, 1914, as counsel for The Kansas City Southern Railway Company in the Guardian Trust Case pending in the United States Circuit Court of Appeals for the Eighth Circuit, I sent to Frank Hagerman as counsel for the Cambria Steel Company, the Complainant in said action, the following telegram signed by myself and addressed to him at the Biltmore Hotel, New York City, "Please wire me acceptance of service of notice in behalf of Cambria Company to join in appeal in Guardian Trust Case and your refusal to join, unless you are willing to join in appeal, in which event please wire me to that effect".

The answering telegram from Mr. Hagerman was received by me January 21st, 1914, before 10 o'clock A. M. of that day, dated New York, January 20th, 1914, addressed to me and signed Frank Hagerman, as follows: "On behalf of Cambria Steel Company I accept notice as served but decline to join in your appeal."

S. W. MOORE.

Subscribed and sworn to before me this 21st day of January, 1914.

[SEAL.] JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals on Jan 22, 1914.

1274 United States of America to Guardian Trust Company, Central Improvement Company, Cambria Steel Company, and Kansas City Suburban Belt Railroad Company, Greeting:

You are hereby notified that, in a certain case in equity in the United States Circuit Court of Appeals for the Eighth Circuit, wherein Central Improvement Company and Guardian Trust Company are separate appellants, and Cambria Steel Company, The Kansas City Southern Railway Company, and others, are appellees, an appeal has been allowed the Kansas City Southern Railway Company, appellee therein, to the Supreme Court of the United States. You are hereby cited and admonished to be and appear in said court at Washington, D. C., thirty (30) days after the date of this citation to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable Walter H. Sanborn, Presiding Judge of the United States Circuit Court of Appeals for the Eighth Circuit, this the 24th day of January, A. D. 1914.

WALTER H. SANBORN,
Presiding Judge of the U. S. Circuit Court of Appeals, Eighth Circuit.

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri:

We hereby acknowledge due service of the within citation this 27th day of January, 1914.

EDWARD P. GATES,
GEO. H. ENGLISH, JR.,
Solicitors for Guardian Trust Company.
FRANK HAGERMAN,
Solicitor for Cambria Steel Company.
THOMAS D. MARKS,
Solicitor for Kansas City Suburban Belt Railroad Company.
J. A. EDSON,
President Central Improvement Company.

1275 [Endorsed:] Supreme Court of the U. S., October term, 1913. No. —. Kansas City Southern Railway Company, appellant, vs. Guardian Trust Company et al. Citation. Filed Jan. 30, 1914, John D. Jordan, Clerk.

1276 (*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript composed of two volumes, Volume I consisting of pages *a* to 1080, inclusive, and Volume II consisting of pages 1081 to 1275, inclusive, contains the transcript of the record from the Circuit Court of the United States for the Western District of Missouri as prepared and printed for use on the hearing in said Circuit Court of Appeals and also full, true and complete copies of all the pleadings, record entries and proceedings, including the opinions, had and filed in the United States Circuit Court of Appeals for the Eighth Circuit except the full captions, titles and endorsements in the proceedings had and filed in said Circuit Court of Appeals which are omitted in pursuance of the rules of the Supreme Court of the United States, in certain causes in said Circuit Court of Appeals, wherein the Central Improvement Company, et al., are Appellants, and the Cambria Steel Company, et al., are Appellees, No. 3489, and wherein the Guardian Trust Company is Appellant, and the Cambria Steel Company, et al., are Appellees, No. 3490, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon, on the appeal of the Kansas City Southern Railway Company to the Supreme Court of the United States, is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this thirtieth day of January, A. D. 1914.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 24,092. U. S. Circuit Court of Appeals, 8th Circuit. Term No. 387. The Kansas City Southern Railway Company, appellant, vs. Guardian Trust Company, Central Improvement Company, Cambria Steel Company, and Kansas City Suburban Belt Railroad Co. Filed March 10th, 1914. File No. 24,092.

Office Supreme Court, U. S.
FILED
APR 20 1914
JAMES D. MAHER
CLERK

—IN THE—

Supreme Court of the United States

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Petitioner*,
vs.
GUARDIAN TRUST COMPANY, *Respondent*.

No. 941.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Petitioner*,
vs.
CENTRAL IMPROVEMENT COMPANY, *Respondent*.

No. 385

Petition for Certiorari and Brief in Support Thereof.

SAMUEL UNTERMYER,
SAMUEL W. MOORE,
Solicitors for Petitioner.

—IN THE—

Supreme Court of the United States

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Petitioner*,

vs.

GUARDIAN TRUST COMPANY, *Respondent*.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Petitioner*,

vs.

CENTRAL IMPROVEMENT COMPANY, *Respondent*.

PETITION FOR CERTIORARI.

Now comes The Kansas City Southern Railway Company, herein called the Southern Company, and respectfully petitions this court to grant a writ of *certiorari* to the Circuit Court of Appeals for the Eighth Judicial Circuit, to remove therefrom, for review here, the record in the case therein pending, being separate appeals numbered 3489 and 3490 in the same case, wherein the petitioner is appellee, and the Guardian Trust Company and the Central Improvement Company are appellants in said appeals respectively, a copy of the record being presented herewith.

The main question involved therein is whether, in a reorganization of several allied railway companies, participated in by both bondholders and stockholders, the respondent, Guardian

Trust Company, which was a stockholder and bondholder in, and creditor of one of the companies involved, could, as an unsecured creditor of one of the old companies, impose a liability for that debt on the new company (the petitioner), based upon the alleged fraudulent character of the reorganization plan, under the rule of *Northern Pacific Railway Company* v. *Boyd*, 228 U. S., 482, *in the face of the following conceded facts*:

(a) The Trust Company, as bondholder and stockholder, had previously exchanged its securities, *under the reorganization plan and agreement*, (its stock alone, amounting to $407,474.00, would have been a total loss but for the plan) and received in lieu thereof and still retains $865,927.70 par value of the stocks and $614,981.50 par value of the bonds of the new company.

(b) The Trust Company had executed a covenant at the time it became a party to the reorganization plan and as a part of the reorganization agreement, in consideration of the stocks and bonds of the new company, by which it *agreed* not to hold the new company for the debt of the old companies, to the following effect:

> No right is conferred nor any trust, liability, or obligation is created by this agreement or the plan, or is assumed hereunder by or for any new company, in favor of any creditor or any holder of any claim whatsoever against the said companies (including the Belt Company), with respect to any moneys paid to or received by the Committee, or with respect to any property acquired by purchase at any foreclosure sale, or with respect to any other matter or thing.

(c) The petitioner purchased the properties involved under decrees of foreclosure and sale rendered by the Circuit Court of the United States which purported to convey to it the properties free and clear of claims or liens, but without prejudice to the rights of the Trust Company in certain particulars.

(d) The property of the Belt Company (which was the debtor of the Trust Company), was encumbered with a mortgage of $1,000,000, its property was sold to the petitioner at foreclosure sale for that amount, and the proceeds of the sale were paid in

and distributed under the order of the court. The "fair market value" of the property of the Belt Company at the time of the foreclosure sale and during the reorganization was litigated in the case at bar, and the master found (this finding is not conceded, but it is established by the record, pp. 990, 991) *that the value of its property at that time did not exceed the mortgage indebtedness.* The Trust Company did not except to this finding, or assign it as error.

The Circuit Court of Appeals (reversing the lower court) holds that, under these circumstances, the Trust Company may hold the Southern Company for the debt of the Belt Company and is, therefore, entitled to judgment against the Southern Company in an amount exceeding $700,000 on that account.

Thereupon, petitioner respectfully shows:

I.

Cause pending below and sought to be certified.

(1) *The bill of the Cambria Company.* In September, 1900, the Cambria Company filed a creditor's bill (Rec., 5-34), based on a judgment rendered in its favor by the Federal Circuit Court for the Western District of Missouri, against the Belt Company, the issue of execution and a return of *non est*, against the Trust Company and others, the general purpose being to secure an accounting between the Belt Company and the Trust Company, and to subject certain collateral held by the Trust Company to the payment of the complainant's judgment if, as a result of the accounting, the alleged indebtedness should be canceled and the collateral should be released. The finding and decree below were against the complainant on the issues made by the bill, and no appeal was taken.

2. *The ancillary bill of the Belt Company and its receivers.* The Belt Company, and its receivers, by direction of the court (Rec., 35), and by stipulation (Rec., 1034) which provided that there should be an accounting between the Belt Company and the Trust Company, filed an ancillary bill and amendments (Rec.,

116, 237, 456) against the Trust Company and others, seeking an accounting as between the Belt Company and the Trust Company and the release of the collateral held by the latter. The decree below (Rec., 1050) eliminated three items from the account, and gave judgment (Rec., 1052) in favor of the Trust Company and against the Belt Company in the total sum of $639,658.86. No appeal was taken by the Belt Company or its receivers.

3. *The intervening petition of the Southern Company.* In February, 1905, it was stipulated (Rec., 191) that the Southern Company should be made a party to the Cambria case either as joint complainant or by bill of intervention, as it might elect, and that the testimony theretofore or thereafter taken should be considered in support of the issues made. Its intervening petition was immediately filed (Rec., 195) in which it alleged that it was the purchaser at foreclosure sales under foreclosure decrees of the United States Circuit Court of the properties of the Belt Company, the Gulf Company, and the Air Line; that the mortgages executed by those companies upon their properties respectively contained after-acquired property clauses, and that the liens of said mortgages attached in equity to the collateral held by the Trust Company as security for the alleged indebtedness of the Belt Company to it; and the Southern Company prayed that the collateral be awarded to it. In particular the Southern Company alleged that certain terminal properties in Kansas City, Missouri, and in Kansas City, Kansas, had been purchased by the Belt Company, Gulf Company, and the Air Line, with moneys contributed by those companies respectively for terminals and rights-of-way needed by them, the legal title being taken, for convenience, in the name of the Central Company which, it was charged, had been reorganized solely for the purpose of conveniently holding the legal title to such properties. The Southern Company averred that the equitable lien of the mortgages of the Belt Company, the Gulf Company, and the Air Line attached to said properties at the times of their purchase and acquisition, and that the equitable title thereto had passed to it under the foreclosure sale, and it demanded either a conveyance of the properties to it, or a return to it of the capital stock of the Central Company which was held by the Trust Company as a part of its collateral security.

4. *The answer of the Trust Company to the intervening petition of the Southern Company.* The main controversy in this case arises over the Trust Company's answer, which was filed in March, 1905, (Rec., 218), in which it was alleged (Rec., 233) that a reorganization plan, contemplating the reorganization of the Gulf Company and its allied companies had been prepared and promulgated by a reorganization committee; that such plan contemplated the deposit with the committee of the stocks and bonds of the companies involved in the reorganization, and the organization of a new company, to-wit, the Southern Company, which should issue its stocks and bonds in exchange for the stocks and bonds of the old companies in certain specified proportions; that the exchange of stocks resulted in the stockholders of the Belt Company securing a large amount of the stock of the Southern Company which was alleged to be more valuable than the Trust Company's claim against the Belt Company, and it was averred that said scheme legally implied the payment by the Southern Company of all of the Trust Company's claims against the Belt Company.

5. *The Master's report and decree.* The Master's report was filed in May, 1910, (Rec., 659-1033). In addition to the finding upon the bill of the Cambria Company and upon the ancillary bill of the Belt Company and its receivers, above referred to, the Master found (Rec., 1031-1032) that the Southern Company was entitled to a conveyance to it of the lands of the Central Company; and that the Southern Company did not, by reason of the reorganization plan, or otherwise, assume or agree to pay or become liable for the indebtedness of the Belt Company to the Trust Company. The Trust Company filed exceptions to the master's report. It excepted to the *inclusion* in the report of any finding on the issue of the liability of the Southern Company, but did not except to the *correctness* of the finding itself.

The final decree was entered on June 25, 1910, (Rec., 1049), confirming the master's report, dismissing the bill of the Cambria Company, rendering a judgment in favor of the Trust Company against the Belt Company in the sum of $639,658.86, and finding that the Southern Company did not assume or agree to pay the

indebtedness of the Belt Company, and directing the Central Company to convey certain specified lands to the Southern Company.

6. *The appeal to the Circuit Court of Appeals.* The Trust Company was allowed an appeal, without supersedeas, to the Circuit Court of Appeals for the Eighth Circuit on August 10, 1910. An appeal was allowed on behalf of the Central Company on August 10, 1910, but on October 8, 1910, the orders allowing the appeal of the Central Company, and approving its supersedeas bond, were set aside and vacated by the Circuit Court upon the ground that counsel purporting to represent the Central Company were not, in fact, authorized to appear for or represent it (Rec., 1081). The record on appeal contained the pleadings and the report of the master. It did not contain any of the evidence.

7. *Proceedings in the Circuit Court of Appeals.* The case was argued before the Court of Appeals, composed of a circuit judge and two district judges, in May, 1911. Three questions only were raised by the assignments of error: first, that the issue of the liability of the Southern Company to the Belt Company was not in the case and should not be decided; secondly, that the decree was erroneous in requiring the Central Company to convey the specified property to the Southern Company; and, thirdly, that the court erred in requiring one-third of the costs to be paid by the Trust Company. There was no assignment of error directed to the *correctness* of finding on the liability issue, assuming that issue to be in the case.

In June, 1911, the judges of the Circuit Court of Appeals advised counsel that they thought the liability issue was one of the issues made by the pleadings, and asked counsel to brief that question so that the court might determine whether it could consider the liability issue, under the state of the record, and if so, whether there was a plain error in that regard which the court could notice of its own motion. Briefs were accordingly filed on December 1, 1911, and the case was submitted thereon, oral argument being denied.

On October 22, 1912, the Court of Appeals handed down the opinion reported at 201 Fed., 811, revising the decree of the cir-

cuit court and directing the lower court to enter a specific decree in favor of the Trust Company and against the Southern Company for some $700,000. In January, 1913, a re-argument was had, and on December 2, 1913, a second opinion was handed down, adhering to the former conclusions of the court, a copy of the opinion being annexed to the brief in support of this application.

II.

Reasons for granting this petition.

1. *Grave and serious questions affecting the rights of the petitioner are involved.*

An enormous judgment in favor of the Trust Company for over $700,000 is imposed upon the Southern Company for the alleged reason that the reorganization plan, under which the latter acquired the Belt property, was "fraudulent" as against *assenting* creditors, although the Trust Company had been *benefited* by the plan to the extent of $1,480,909.20 in the exchange of its old securities (a large part of which, but for the plan, would have been a total loss) for the securities of the Southern Company, which it still retains. The Trust Company is permitted to claim *under* and *against* the same instrument.

This court, in the *Boyd* case, referring to a similar reorganization, said that "the transaction would be *binding between the parties,*" and was only invalid as to *"non-assenting* creditors," yet the Circuit Court of Appeals holds that the plan was sufficiently *valid* to enable the Trust Company to reap enormous benefits from it, but that it was sufficiently *fraudulent,* as a conveyance in fraud of creditors, to permit the Trust Company, which was a *consenting* creditor, to recover of the Southern Company its debt against the Belt Company. The doctrines of equitable election, ratification or estoppel, it is said, have *no application.* In other words, although the Trust Company, by becoming a party to the plan, *consented* to the diversion of assets to stockholders which, it is said, should have gone to creditors, yet it is

permitted to *base its action* against the Southern Company on the doing of the *very thing* to which it assented.

A rule so revolutionary, and so in conflict with settled principles and with decisions of this court should not, it is respectfully submitted, be given a fixed place in our jurisprudence until it has received the approval, after mature consideration, of the highest court in the land.

2. *Effect is denied to the solemn covenant of the Trust Company that it would not hold the Southern Company for the debt of the Belt Company.*

The substance of the covenant of the Trust Company (Rec., 953), which was supported by ample consideration, is quoted *supra*.

The obvious purpose of this covenant was to put security holders to their *election*. If they accepted the benefits of the plan they thereby waived the right to hold the new company liable for any debts of the old companies. The purpose was a lawful one. No rule of public policy is violated. The Trust Company, for an exceedingly valuable consideration moving to itself, and after balancing the advantages and disadvantages, accepted the plan, determining that its interests would best be served by accepting its benefits and by waiving any claim it might have to hold the new company for the debt of the old one.

The Court of Appeals holds that the Trust Company may *ignore* its covenant and enforce a trust, or liability or obligation of the new company for the debts of the old company, notwithstanding its agreement that it would not do so.

3. *The decision of the Circuit Court of Appeals leads to alarming and disastrous consequences.*

(a) An equity "of at least $475,000.00" is *created* in the property of the Belt Company where *none* existed before. The bonded indebtedness of the Belt Company was $1,000,000 (Rec., 218), which was the amount of the purchase price paid by the Southern Company at the foreclosure sale. The master found that, at the time of the foreclosure sale in December, 1901, after

the reorganization was complete, all the properties involved then being operated together in one interest and as one system, its value (Rec. 990-991), *did not exceed the mortgage indebtedness.* Furthermore, the floating indebtedness of the Belt Company *alone* at that time was $900,000 (Rec. 973).

By what just and logical process of reasoning can it be said that the Belt Company, under these circumstances, possessed an equity which could be subjected to the payment of a judgment in the sum of $700,000 to an unsecured creditor? If the Belt Company had no equity out of which the Trust Company's claim could be satisfied, how can the Southern Company be held?

It is not, we submit, any satisfactory answer to say that $4,750,000 par value of stock of the *Southern Company* had been previously issued to old stockholders of the Belt Company. That stock, prior to the foreclosure sale of the Belt Company, represented the physical property of the Gulf Company and its allied compaines, *other than the Belt Company,* and only represented the *stocks and bonds* of the Belt Company (which property was only 3 1/3 per cent of the whole reorganization), and they could not have been worth more than the Belt Company's physical property, which the master valued at $1,000,000 at the time of its foreclosure sale.

(b) What would have been the result if the rule of the *Boyd* case, providing for a "fair offer" to unsecured creditors, had been followed at the time of this reorganization, and there had been issued to the Trust Companies "preferred stock on equitable terms," which we will assume to mean dollar for dollar, taking the indebtedness (if it could have been ascertained at that time) and the stock at par, which is most favorable to the Trust Company, in view of the value of the property of the Belt Company and the amount of its secured and unsecured indebtedness. The Trust Company would have received $360,000 par value (its debt without interest) of preferred stock of the Southern Company, the average market value of which, during the year 1900 was $33.75 per share, making an aggregate value of $124,000. Add all the dividends that have been paid on the preferred

stock (at four per cent during the past six years only) and interest thereon, and the result to date would be approximately $225,000.

The present market value of the preferred stock is $57.50 and on that basis the value of the Trust Company's holdings with dividends and interest thereon to date would be approximately $300,000.

The effect of the decision of the Court of Appeals is to award the Trust Company *over* $400,000 more than it would have realized to date if it had received "preferred stock on equitable terms" as a creditor, under the ruling in the *Boyd* case, which this court has said is the measure of its equitable rights.

The difference is so enormous as to at least suggest the necessity of some further consideration of the reasoning by which the Court of Appeals has reached its conclusion.

If the Southern Company is to be held liable at all (which we strenuously deny) should not the court *now* prescribe equitable terms, as of the date of the reorganization, instead of enforcing a judgment for the full amount with the accumulated interest?

A judgment awarding payment in full of the Trust Company's claim and accumulated interest is, we submit, without justification in the absence of proof as to what was the equitable interest of the Trust Company in the reorganized property and without proof of its *pro rata* share therein.

(c) The court of appeals (Opinion, p. 13) reaches the conclusion that the Southern Company paid in value "at least $475,000" for the equitable interest of the stockholders of the Belt Company in its property, and that this amount is available to creditors; and it concludes, therefore, that that interest was worth more than enough to have paid the $360,000 which the Belt Company owed to the Trust Company.

But the court apparently overlooks the *conceded fact* that the reorganization committee and the Southern Company paid out $1,164,172.56 (Rec. 999) on account of the floating debt of the reorganized companies. There is nothing in the present record to show how much of this was on account of the indebtedness of the *Belt Company*. There is nothing to indicate that the whole

of the $475,000 has not been already paid to creditors. The fact that there was a diversion to stockholders of $475,000 which belonged to creditors, furnishes no guide as to what part of that sum belonged to this particular creditor in the absence of proof of the total debts.

4. *The rulings of the Court of Appeals in two respects are in conflict with rulings of Circuit Courts of Appeal in other circuits, and also with rulings of this court.*

(a) The ruling of the Court of Appeals in respect to the properties of the Central Company (201 Fed. 826), is adhered to without comment in the second opinion (p. 30). The properties involved were purchased with the moneys of the mortgagor companies for rights of way needed by them respectively, the naked legal title being taken in the Central Company, whose stock was held by the mortgagor companies in the proportion in which their moneys went into the properties. The equitable title to the properties was thus in the mortgagor companies. Afterwards, and while the mortgagor companies held the equitable title to the properties themselves and also the corresponding stock of the Central Company, the stock of the Central Company was pledged to the Trust Company, which was trustee in all the mortgages, as collateral for *its* indebtedness. Before this pledge of stock of the Central Company occurred, the after-acquired property clauses of the mortgages of the mortgagor companies had attached in equity to the properties, and the title thereto afterwards passed to the Southern Company as purchaser at the foreclosure sales of the properties of the mortgagor companies.

In denying the Southern Company's title to the properties of the Central Company the Court of Appeals is in direct conflict with the following decisions of Courts of Appeal of other circuits.

Guranty Trust Company v. *Atlantic R. R. Co.*, 138 Fed., 517,Third Circuit;

New England Water Works Company v. *Farmers' Loan and Trust Company*, 136 Fed., 521, Seventh Circuit.

And the Court of Appeals is also in conflict with the ruling of this court in the following cases:

> *Wade* v. *Railway Company,* 149 U. S. 327, 341;
> *Central Trust Company* v. *Kneeland,* 138 U. S. 414;
> *McGourkey* v. *Toledo Ry. Co.,* 146 U. S. 536, 566.

(b) The Trust Company's exceptions to the report of the master (Rec. 1038) were that:

> The master, in his report should have *omitted reference to* or *recommendation concerning* the question of the liability of the Southern Company for said floating indebtedness of the Belt Company for the following reasons.

The grounds specifically assigned were that that issue was *not in the case* for various reasons, but it is nowhere stated that the issue had been decided incorrectly. The assignments of error in the Court of Appeals followed the foregoing exception, the *deliberate purpose* of the Trust Company in its exceptions to the master's report, and in its assignments of error in the Court of Appeals, being to *avoid a decision* in this proceeding upon its merits of the question of the liability of the Southern Company for the floating indebtedness of the Belt Company.

The Court of Appeals holds that under these circumstances it may consider and pass upon this question of liability, and it did consider and pass upon it, notwithstanding the fact that the *correctness* of the master's conclusion that the Southern Company was not liable for the floating debt of the Belt Company went unchallenged before the master and before the circuit court.

The conclusion of the Court of Appeals in this respect is in conflict with the following decisions of the Courts of Appeal of other circuits:

> *Provident Life and Trust Co.* v. *Camber Ry. Co.,* 177 Fed., 854, 859, Third Circuit;
>
> *City of New Orleans* v. *Fisher,* 91 Fed., 574, Fifth Circuit.

And the Court of Appeals is also in conflict with the following decisions of this court:

Burns v. *Rosenstein*, 135 U. S. 449;
Coughlan v. *South Carolina Ry. Co.*, 142 U. S. 101, 115;
Topliff v. *Topliff*, 145 U. S. 156;
McMicken v. *Perrin*, 18 How. 587;
Medsker v. *Bonebreak*, 108 U. S. 66, 72.

The question is important and material for the reason that exceptions to the report of the master (Rec. 1049) were filed by the Belt Company upon the issue of debt or no debt as between the Trust Company and the Belt Company. These exceptions were overruled, but the Belt Company did not appeal, for the reason that the Trust Company, in its exceptions and in its appeal, did not question the correctness of the finding of the master and the decree of the lower court, to the effect that the Southern Company was *not liable* for the indebtedness of the Belt Company. It was not until after the Belt Company had *lost* its right to an appeal upon the question of the existence or amount of the indebtedness between the Belt Company and the Trust Company that the Court of Appeals decided that it would determine and pass upon the *correctness* of the finding of the master and decree of the lower court upon the liability issue.

5. *Grave and serious questions affecting generally the reorganization of insolvent quasi-public corporations are involved.*

In the Eight Judicial Circuit Court, where the rule of the Court of Appeals is controlling, there are, at the present moment, five railway companies in the hands of receivers appointed by the Federal Court, their aggregate outstanding stock and bond issue being as follows: (Poor's Manual 1913 as to all except the last named company):

St. Louis & San Francisco R. R. Co.	$381,765,462.31
Wabash Railroad Co.	198,481,575.89
Kansas City, Mexico & Orient Ry. Co.	49,538,000.00
Missouri, Oklahoma & Gulf Ry. Co.	17,252,463.15
Metropolitan Street Railway Company	33,684,035.44
	$680,721,536.79

These properties are in process of reorganization either actually or prospectively. Their aggregate outstanding *capital stock* issue is $226,441,526.66. The enormous value thus represented by the capital stock must be *destroyed* unless stockholders participate in the reorganization of these properties. Many difficult and vital questions are left unsettled by the *Boyd* case, and their proper determination has been rendered *more difficult* by the decision of the Court of Appeals in this case. Rights will be sacrificed and protracted litigation will result until there can be an authoritative answer given to certain vital and fundamental questions, among which may be mentioned the following:

(a) May a security holder exchange his securities under a plan of reorganization, and having done so, may he afterwards, notwithstanding the doctrine of estoppel, election and ratification, and without making restoration, recover from the new company for the debts of the old one, for the sole reason that stockholders are given an interest in the new company?

(b) Is it competent for a security holder who accepts the plan and exchanges his old securities for new ones to enter into a valid covenant to waive the assertion of any and all other claims against the new company by reason of his dealings with the old company?

(c) If a court shall hold, in some subsequent proceeding, that the terms offered to a non-assenting creditor fell short of being "equitable," will the court prescribe and enforce terms which it finds should have been offered, or will the creditor be entitled to enforce a money judgment against the new company for the face of his claim and accumulated interest? Can the reorganization committee invoke the judgment of some court to determine what will constitute "fair terms," or must it act at its peril?

(d) If the existence of a creditor be unknown at the time, and he subsequently appears and brings suit against the new company, or if his debt is disputed at the time, but is afterwards established, will the court permit the new company to offer the creditor such equitable terms as would have constituted a "fair offer" at the time of the reorganization, or shall his debt and accumulated interest be paid?

(e) May a bondholder decline to come into a reorganization

in which stockholders receive any benefit, accept his distributive share of the proceeds of the foreclosure sale, credit the same upon his bond and recover the balance against the new company, realizing both principal and interest in full, thus making it impossible to induce bondholders to come into any reorganization?

(f) What rule is to govern the "issuance on equitable terms, of income bonds or preferred stock" to non-assenting creditors? Should preferred stock or income bonds at par equal the face of the creditor's debt? If not, how should the proportion or ratio of stock or bonds to debt, as well as the relative value of securities and debt, be determined?

(g) If stockholders are assessed as a condition to participation in the plan, may creditors also be assessed in a similar manner as a condition to the issuance to them of income bonds or preferred stock? Will creditors be denied relief, as stockholders are, if they fail to pay their assessment?

(h) If in an "adversary proceeding" it is determined that the valid mortgage indebtedness of the debtor equals or exceeds the fair value of the debtor's property so that there is, in fact, no equity out of which the debt can be satisfied, will the new company, nevertheless, be required to satisfy the debt if it issues its stock in exchange for the stock of the old company?

These and other vital questions are involved, directly or indirectly, in this case, and their proper and prompt determination is of immense importance to those charged with the duty of reorganizing insolvent railway properties who, on the one hand, should not unnecessarily sacrifice the interests of stockholders, and, on the other hand, should give due consideration to the protection of the rights of creditors.

6. A brief in support hereof is attached hereto, reference to which is made as fully as if incorporated herein.

SAMUEL UNTERMYER,

SAMUEL W. MOORE,

Solicitors for Petitioner.

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—IN THE—

Supreme Court of the United States

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Petitioner*,

vs.

GUARDIAN TRUST COMPANY, *Respondent*.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Petitioner*,

vs.

CENTRAL IMPROVEMENT COMPANY, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

An outline of the controlling facts:

(a) Receivers were appointed for the Gulf Company in April, 1899 (Rec. 956) in foreclosure proceedings. Receivers were appointed for the Belt Company and the other allied terminal companies in September, 1900 (Rec. 956). The names of the companies involved in the reorganization and the amount of their outstanding bond issues are as follows (the property of the Belt Company being 3 1/3 per cent of the total):

Gulf Company	$24,000,000
Belt Company	1,000,000
Union Company	2,000,000
Consolidated Company	750,000
Air Line	300,000
Dock Company	1,635,000
Total	$29,685,000

(b) The modified plan of reorganization under which the reorganization took place was dated November 7, 1899 (Rec. 943-956). The property of the Gulf Company was foreclosed and sold to the Southern Company and possession taken April 1, 1900. (Rec. 956). The property of the Belt Company and its allied terminal companies were foreclosed and sold to the Southern Company on December 31, 1901 (Rec. 956).

(c) The reorganization plan provided for the issue by the Southern Company of $30,000,000 par value of first mortgage bonds, $21,000,000 par value of preferred stock, and $30,000,000 par value of common stock, to be disposed of as follows: (Rec. 945-950)

BONDS.

For exchange for old securities	$23,197,500	
For cash requirements	3,000,000	
For future requirements	3,802,500	
Total		$30,000,000

PREFERRED STOCK.

For exchange for old securities	$17,417,500	
For cash requirements	3,000,000	
Unappropriated balance	582,500	
Total		$21,000,000

COMMON STOCK.

For exchange for old securities	$29,561,250	
Unappropriated balance	438,750	
Total		$30,000,000

(d) Prior to the reorganization the Trust Company owned the following old securities, par value (Rec. 1008):

Union Terminal bonds	$ 410,000.00
Air Line bonds	42,000.00
Dock Company bonds	325,000.00
Gulf Company bonds	642.00
Gulf Company stock	1,327.00
Belt Company stock	76,972.00
Dock Company stock	438,900.00
	$1,294,841.00

On July 26, 1900, the Trust Company, in accordance with the provisions of the plan of reorganization and the agreement annexed to it, received the following bonds and stocks, par value, of the Southern Company in exchange for its old securities (Rec. 1008):

Bonds	$ 614,981.50
Preferred stock	295,196.70
Common stock	570,731.00
	$1,480,909.20

The Trust Company was one of the depositaries under the reorganization plan, receiving $8,847.72 as compensation for its services in that behalf (Rec. 1006); it co-operated with the Reorganization Committee and used its influence by correspondence and otherwise to induce other bondholders and stockholders to deposit their securities with the Committee, (Rec. 1010). The master says (Rec. 1010):

> The respondent was well acquainted with the purpose of the reorganization scheme, and with such knowledge entered into the same, depositing its own securities, and exchanging them for the new Southern securities, and advising others to make like exchanges.

(e) The depositing stockholders, including the Trust Company, executed the reorganization agreement, which contained, among other things, the following (Rec. 953):

> No right is conferred, nor any trust, liability or obligation (except the agreements herein contained in favor of the holders of certificates of deposit hereunder) is created by this agreement or the plan, or is assumed hereunder, or by or for any new company in favor of any bondholder or any other creditor or any holder of any claims whatsoever against the said companies, nor in favor of any company now existing or to be formed hereafter (whether such claim be based on any bonds, coupons, stock, securities, lease, guaranty or otherwise) with respect to any security deposited under this agreement or by the depositor hereunder, *or with respect to any property acquired by purchase at any foreclosure sale*, or with respect to any new certificates to be issued hereunder, or with respect to any other matter or thing.

(f) The mortgage indebetedness of the Belt Company was $1,000,000, and was sold at foreclosure sale in December, 1901, for that amount, which the master found (Rec. 990-991), was the fair market value of the property at that time. The floating indebtedness of the Belt Company, in addition to its mortgage indebtedness at the time of the sale, was $900,000 (Rec. 873).

(g) The debt of the Trust Company represents, in the main, the loss sustained by the Belt Company upon an *ultra vires* contract entered into in 1896 between the Belt Company and the Northern Connecting Company, by the terms of which the former agreed to construct the railroad of the latter in consideration of the bonds and stocks of the Connecting Company, and was brought about by the Trust Company, which dominated and controlled both of the contracting companies (Rec. 697-700, 738, 769-770).

I.

The action of the court of appeals is final so that an application for certiorari at this time is not premature.

The Circuit Court of Appeals reversed the decree of the circuit court with specific directions. Every question between the Trust Company and its adversaries has been settled. Even the question of costs is settled so far as the Trust Company is concerned, although the apportionment of costs as between the Cambria Company and the Southern Company is yet to be made. Nothing remains for the district court to do except to enter a decree in accordance with the mandate. The decree, therefore, of the Circuit Court of Appeals was final for the purpose of this application:

Merrill v. *National Bank of Jacksonville*, 172 U. S. 131;
Beasley v. *Texas & Pacific Ry. Co.*, 191 U. S. 492;
Denver v. *New York Trust Co.*, 229 U. S. 123;
Harriman v. *Northern Securities Co.*, 197 U. S. 244.

II.

The Plan of Reorganization is binding upon the Trust Company because it actively participated in the plan and greatly benefited by it in the exchange of its own securities in the old companies for those of the Southern Company. Equity will not permit the Trust Company to retain the benefits of the plan and at the same time attack it as fraudulent. It cannot claim both under and against the plan.

(a) The master found (Rec. 1010), that:

> The Trust Company, a depositary in the reorganization plan, co-operated with the committee and used its influence by correspondence and otherwise, to induce other bondholders and stockholders to deposit their securities with the Committee. It was well acquainted with the purposes of the reorganization scheme and with such knowledge entered into the same, depositing its own securities and exchanging them for the new Southern securities, and advising others to make like exchanges.

As heretofore stated, the Trust Company received $1,480,909 par value of the new securities of the Southern Company, under the plan of reorganization. Of this amount, $407,474 par value, represented stock of the Belt Company, the Dock Company, and the Gulf Company, previously owned by the Trust Company, which would have been a total loss to the Trust Company but for the reorganization plan. The par value of the stock of the Southern Company which the Trust Company received and retains is $865,927.70.

No one can deny that the Trust Company, by its participation in the reorganization plan, is held to have *assented to the plan*, and in particular to have *assented to the issue of the stock of the Southern Company in exchange for the stock of the Belt Company and of the Dock Company*, and to the "appropriation of the benefits of the property of the Belt Company, which, in law and in equity, belonged to the unsecured creditors of that company," to use the language of the Court of Appeals. (201 Fed., p. 823).

It is the *exchange* of these securities, by which it is said property or value was diverted from creditors to stockholders, which the Court of Appeals, in its opinion, condemns as amounting to a conveyance in fraud of creditors, ***but it is this exchange to which the Trust Company consented,*** and upon which it placed its stamp of approval. How can it *approve* the transaction sufficiently to receive the benefits therefrom, and then *disapprove* it to the extent necessary to collect its debt? Shall it be permitted to *approbate* and *reprobate* at one and the same time? How can it in one breath approve the action of the Reorganization Committee and of the Southern Company in issuing the securities of the new company in exchange for those of the Belt Company, and at the same time base a cause of action *upon the fact that such exchanges were made?* How can it consistently say:

> We have received new stock for our old securities, and have thereby appropriated to ourselves the benefits of the property of the Belt Company, which in law and in equity belong to the unsecured creditors of that company, but other security holders of the Belt Company were similarly situated and they availed themselves of the benefits of the plan and received an interest in the property of the Belt Company which should have gone to its general creditors, and therefore we demand that the Southern Company shall account to us for the amount of our debt.

(b) *Views of the Court of Appeals on this question.*

The Court of Appeals, in its first opinion (201 Fed. 823) answered our contention upon this question with the statement that,

> The Trust Company may well have supposed that its claim, as well as the claims of other creditors of these foreclosed companies, which were paid to the amount of over $1,000,000, would be paid by the Committee.

In the second opinion a wholly different answer is returned (Opinion 27). There it is said:

> The indispensable elements of an estoppel *in pais* are (1) intentional or reckless misrepresentation of a known and material fact inconsistent with the subsequent claim of him who makes the misrepresentation, (2) ignorance of the truth

and absence of equal means of knowledge of it by the party who claims the estoppel, (3) action by the latter induced by the misrepresentation, and (4) injury to the latter if the truth is permitted to be proved.

And it is further said (Opinion 27):

> The estoppel here probably lacks all and it certainly lacks at least three of these essential elements; (1) the requisite misrepresentation of any material fact which the Trust Company knew, (2) ignorance or absence of equal means of knowledge of that fact by the Southern Company or its stockholders and bondholders, and (3) injury to them if the truth is permitted to be proved.

(c) *The application of the doctrine of "quasi-estoppel" or of estoppel by the acceptance of benefits is fatal to any right of recovery on the part of the Trust Company.*

By the overwhelming weight of authority the acceptance of benefits under the reorganization plan prevents the Trust Company from claiming that the plan or anything done under it, either at *the time* of its execution or subsequently, was in fraud of its rights as a creditor. It is not material whether the rule be called "estoppel" or "quasi-estoppel" or "estoppel by acceptance of benefits" or "equitable election," nor is it *by any means* conclusive, or even important, that the four elements of estoppel *in pais* referred to by the Court of Appeals are absent.

The whole doctrine is concisely stated by Prof. Bigelow, 16 Cyc., 784, as follows:

> The term "quasi-estoppel" has been applied to certain legal bars which are in some respects analogous to estoppel *in pais* and which have the same practical operation as an estoppel *in pais*, but which nevertheless differ from that form of estoppel in essential particulars. The term includes the doctrine of election, the principle which precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him, and certain forms of waiver.
>
> * * * * * * * *
>
> Where one having the right to accept or reject a transaction takes and retains *benefits* thereunder, he becomes bound by the transaction and cannot avoid its obligation or effect by

taking a position inconsistent therewith. Thus it has been repeatedly held that a person by the acceptance of benefits may be *estopped* from questioning the existence, validity, and effect of a contract. So, too, under similar circumstances one may be estopped from questioning the existence, validity, and effect of a deed, mortgage, or bond, or of proceedings under which his property has been taken for a public or quasi-public use. In order to constitute an estoppel, however, the benefit received must be direct, and must have been voluntarily received, and with a knowledge on the part of the person receiving it of his rights.

The rule is well expressed by the Court of Appeals of New York (*Wormser* v. *Metropolitan Street Railway Company*, 76 N. E., 1036), as follows:

> Where the objection to the acts of a corporation is that they are *ultra vires*, without being either *male prohibita* or *mala in se*, a stockholder cannot maintain an action in his own behalf based on such objection, where he himself, with knowledge of the character of the acts, *has acquired and accepted pecuniary benefits thereunder*. Whether his conduct in so doing constitutes an estoppel in the strict sense of that term, or a quasi-estoppel, as Mr. Bigelow puts it (Bigelow on Estoppel [4th Ed.], c. 19), or be denominated merely an *acquiescence* or an *election*, or the *assumption of a position inconsistent with an attack*, makes no essential difference here. The point is that the seeking and acceptance of a substantial *benefit*, which would be unavailable to the stockholders, *except as a result of the acts which he would attack as ultra vires* preclude him from assailing those acts on that ground. A litigant is not at liberty to deny the validity of a contract, which is neither prohibited by law nor evil in itself, *after he has knowingly sought and obtained pecuniary advantages, pay or compensation, under and by virtue of such contract.*

The case there under consideration involved the reorganization of the street railway company. The plaintiff brought suit to prevent the carrying out of the reorganization plan on the ground that it was *fraudulent*. It appeared that after suit was brought the plaintiff *availed himself of the plan* by subscribing to the capital stock of the new company and then sold his option or privilege to third persons for over $5,000. He made the subscription under

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IN THE SUPREME COURT OF THE UNITED STATES

Stearns Coal & Lumber Company, *Petitioner,*

vs.

John S. VanWinkle, et al., *Respondents.*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner brings this petition to review and reverse a final judgment pronounced against it in the United States Circuit Court of Appeals for the Sixth Circuit, and avers that the cause in which said judgment was pronounced is one of gravity and importance. The case involves the construction of a Kentucky Statute and Code, and the decision is erroneous and out of harmony and uniformity with the decision of the Court of Appeals of Kentucky construing the same Statute and Code, and with the decisions of the United States Court of Appeals of other Circuits, and Courts of last resort of other States on similar statutes, all of which may fully appear from the following:

I. STATEMENT OF THE CASE

The Wayne County-Beaty Oil Well Company was incorporated by an act of the Legislature of Kentucky on January 31st, 1865. Its charter was made to expire by an act of the Legislature of Kentucky on January 31st, 1895. At the time its charter expired, it claimed mineral rights and incidental surface rights in Wayne County, Kentucky, aggregating one thou-

sand acres. It had carried on no mining operations on the land in question. No steps were taken to wind up the corporation. This present suit was begun in December, 1910, in the State Court of Kentucky by several stockholders of the Wayne County-Beaty Oil Well Company, on behalf of themselves and other stockholders to recover the mineral and other rights referred to. In due time, the case was removed to the United States District Court, for the Eastern District of Kentucky, by reason of diversity of citizenship of the parties. The defendant denied that the plaintiffs had any meritorious claim to the interest sued for, and plead adverse possession and the statute of limitation. The case was tried by agreement of the parties to the Court, without a jury, and judgment rendered for plaintiffs. That it may be seen precisely how the question involved arises, we submit herewith as part of this statement of the case a brief statement of the pleadings and proof:

1. The Petition avers, in substance, that in 1895, the Wayne County-Beaty Oil Well Company held the legal title to the mineral and incidental rights in the one thousand acres of land, and that two years after the expiration of the charter, such legal title vested, by operation of law, in the stockholders as tenants in common, and that they were, at the time of the institution of the action, the owners in fee of such mineral and incidental rights, and sought to recover same in an action in ejectment. The defendants traversed the allegations and plead the statute of limitations and adverse possession. At the trial, it was one of the contentions of the defendant that the stockholders of the expired corporation did not hold the legal title to the mineral at the time the action was instituted, and therefore could not recover in ejectment, for the reason that in the Federal Court, in order to recover in ejectment, the plaintiff must be clothed with the legal title to the real estate, and that one joint tenant could not sue for the benefit of another

co-tenant. The trial Court rendered judgment for the plaintiffs therein. The Petitioner excepted to the ruling of the Court, and to the action of the Court in giving said judgment in favor of the plaintiffs. The motion and grounds for a new trial were over-ruled, and from which judgment writ or error was duly prosecuted to the United States Circuit Court of Appeals for the Sixth Circuit.

2. The case was duly heard by the Circuit Court of Appeals, and on April 14th, 1915, the judgment of the District Court was affirmed, with costs. The Court of Appeals held that the Kentucky Statutes, Section No. 561, were applicable. It was of the opinion that two years after the expiration of its charter legal title to the real estate of a corporation vested in the stockholders as tenants in common, and that such stockholders could maintain an action in ejectment, and it was further of the opinion that the Court of Appeals of Kentucky, the highest tribunal in the State, had so construed said section of the Statute. The United States Circuit Court of Appeals was further of the opinion that by Section No. 25 of the Kentucky Code, one joint owner could recover for the benefit of himself and other joint owners in an action in ejectment.

II. KENTUCKY STATUTES

For convenient reference, the Kentucky Statutes and Code involved are printed in the Appendix to this Petition, with numbers as in the Carroll's Edition of said Statutes and Code. Petitioner particularly complains of the holding of the United States Circuit Court of Appeals that the Kentucky Statutes are applicable to and will cause the legal title to the real estate of a corporation to descend and to vest in stockholders two years from the date its charter expires, and vest in such stockholders such legal title as will enable them to maintain an action in ejectment, and of its holding

that one tenant in common may maintain an action in ejectment for the benefit of other tenants in common. The questions involved are important, and the opinion and judgment of the trial court as well as the Court of Appeals are, as we insist, contrary to the construction of the Statutes and Code as construed by the State Courts of Kentucky. Moreover, the construction given to the Kentucky Statutes and Code by the United States Circuit Court of Appeals is contrary to the construction universally given such statutes by the courts, and especially by the decision of the Kentucky Courts construing same.

III. ERRORS ASSIGNED

1. To support the action in ejectment, the plaintiff must be clothed with the legal title to the lands in question, and the stockholders of a dissolved business corporation are the equitable owners of its property and not the legal owners, and the Kentucky Statutes do not operate to vest the legal title to the corporate real estate two years or at all after the expiration of the charter, and the Court of Appeals erred in holding that the plaintiffs were entitled to recover in this action in ejectment upon such title.

2. The tenants in common may sue separately or jointly in ejectment. They are not in any case to be made to join. Therefore, one joint tenant cannot sue for the benefit of all, and it was erroneous for the Circuit Court of Appeals to hold and adjudge that the plaintiffs in the action were entitled to recover for themselves and the benefit of other joint tenants. It has been repeatedly declared by the Courts of Kentucky that tenants in common may sue separately or jointly in ejectment. They are not in any case to be made to join, and one tenant cannot sue for the benefit of all, and it has been repeatedly held and declared by the Courts of Kentucky that the stockholders of a

dissolved corporation are the equitable owners only of its property.

BRIEF AND ARGUMENT

1. The case, therefore, presents for determination the question whether in the State of Kentucky the stockholders of a corporation whose existence has ceased acquire the legal title to the real estate which it then owns. It is not sufficient that they become the equitable owners thereof. It is essential that they become the legal owners. This is so because in the United States Circuit Court no recovery can be had at law on an equitable title. In the case of *Johnson vs. Christian*, 128 U. S. 374, Mr. Justice Lamar said:

> "It is the general rule that in the United States Court, a recovery in ejectment can be had upon the strict legal title only."

This is so whatever may be the rule in the State Court. *Hooper vs. Heimer*, 23 Howard 235. The pivotal question on which the validity of this judgment must turn is whether the stockholders of the expired corporation had legal title to the property and incidental rights of the corporation at the time they instituted this suit.

2. Section No. 561, of the Kentucky Statutes, (See Appendix to this Petition), has remained upon the Statute books of Kentucky for more than a quarter of a century, and it has never received such construction by the Supreme Court of the State as the construction given it by the United States Circuit Court of Appeals. It was enacted as a guide to officers and stockholders of the corporation to follow in the winding up the business of a corporation. The rights of the stockholders of a dissolved corporation in the assets of the corporate property are clearly and fully set forth

in the opinion of the Kentucky Court of Appeals in the case of *Craycraft vs. B. & L. Association*, 117 Ky. 229. In the opinion of the Court it is said:

> "The question of the rights of the stockholders, as among themselves, is one of implied contract. It is that upon the dissolution of a joint enterprise for which they formed a corporation, its assets, after paying its indebtedness will distribute pro rata among the stockholders according to interest. It may be that, if these assets were of a quality capable of an exact partition in the proportion represented by each stockholder's interest, they might be distributed in specie, but that can rarely happen. The only dividends which can ordinarily receive the divisor of share interests is money. The basis of contribution of reckoning liability and of apportioning the final results in money. To liquidate, in law, is to make certain or exact, in units of money, and, in the sense in which the word is used in winding up a corporation, to discharge in lawful money the liabilities so ascertained. Each stockholder is entitled, as a matter of right, and as an incident of his contract to participate in the distribution on that basis. Although the majority in interest and numbers may conceive their interest to be, and although it may be a fact that their interest is, to hold the assets of the corporation for future enhancement of value or for the uses, the dissenting members are not bound to yield their rights to a legal liquidation to the welfare of the others. To make them do so would be compelling them against their wills to enter into a different contract from the one originally made. The doctrine being discussed is thus stated by Cook on Stock and Stockholders (1st Edi), 636: 'When the regular business of a corporation has been brought to a close, the shareholders have a

right to an immediate distribution of the corporate assets. They cannot, therefore, be compelled to accept other property or rights in lieu of cash.'"

In the case of *Castle's Administrator vs. Acrogen Coal Company*, 145 Ky. 595, the Court said:

> "Under Section 561 of the Kentucky Statutes the existence of a domestic corporation after its dissolution is continued for the purpose of enabling it to wind up its affairs and settle its business, and for this purpose it may not only sue but be sued in its corporate name and capacity. Its right to bring actions necessary to enable it to settle up its business and its liability in actions that arose against it before its dissolution, are not lost or destroyed by its dissolution."

In the case of *Neptune Fire Engine and Hose Company vs. Board of Education of Mason County*, 166 Ky. 14, the Court in its opinion said:

> "Under the modern doctrine the real property of a dissolved business corporation does not revert to the grantor, and the personalty does not escheat to the Commonwealth; but both species of property vest in a receiver or other trustee, to be administered by him, for the benefit of the dissolved corporation's creditors and shareholders."

Under Section No. 561 of the Kentucky Statutes it is made the duty of the officers to expeditiously take steps to reduce the assets into condition for distribution.

The United States Circuit Court of Appeals was of the opinion that Section 561 of the Kentucky Statutes had been construed by the Kentucky Court of Appeals to cause the legal title of the property of the Respondents to pass to the stockholders. Such opin-

ion was based solely and alone on the case of the *Ewald Iron Company vs. Commonwealth*, 140 Ky. 692.

That the construction given the case by the Circuit Court of Appeals is clearly erroneous will be seen by an examination of *Ewald vs. City of Louisville*, 168 Ky. 71, which case was affirmed by the Kentucky Court of Appeals, because four judges of said Court could not agree, and only one of the seven judges followed the opinion of the Court in the Ewald Iron Company case, 140 Ky. 692. But the Ewald Iron Company case is not decisive of the question here involved. The facts were that the stockholders in the name of the corporation carried on a trading business after the expiration of the charter of the corporation. The law is well settled that where the corporation is dissolved, the stockholders are not entitled to continue business in the name of the corporation, and if they do so they will be held liable. 6561 Thompson's Corporation, 2nd Edition. And the case was in reference to the citus of personal property belonging to the partners for the purpose of taxation. The Court in the Ewald case said:

> "After the expiration of a reasonable time for the closing up of its business, the title to its property vests in stockholders for the purpose of taxation. The law will not let a man profit by his own wrong.'

Under the statute, Section 4023, it is the duty of the holder of the equitable title to list the property and pay the taxes thereon.

The court did not hold that the stockholders were the legal owners of the property, but the—

"title vested in them for the purpose of taxation."

Under the statute the equitable title is sufficient for the purposes of taxation, and the Court also based

its decision on the ground of estoppel—that is, that the stockholders could not escape taxation by failing to observe their plain statutory duty—

> "to settle up its affairs in business as speedily as possible."

And as estoppel, works against and never in favor of the one in default, one cannot entirely disregard the provisions of a statute and profit thereby.

The construction of the statute given by the Sixth Circuit Court of Appeals is contrary to the construction universally given like statutes by the Courts of other states, and contrary to the construction of like statutes by the Circuit Court of Appeals of other Circuits. A similar statute of Minnesota has been construed by the Circuit Court of Appeals of the United States in *General Electric Company vs. General Improvement Company*, 73 Fed. 386, *Boyd vs. Handkindson*, 92 Fed. 49. And a similar statute in the State of Maine in the case of *Style vs. Lumber Company*, 195 Fed. 319, which case, holding that upon the death of the corporation, the stockholders are the equitable owners of the corporate property and it is the duty of the officers to wind up the business of the corporation and make a distribution of the funds in money.

In a recent case, the Supreme Court of the United States (*Late Corporation of Church vs. U. S.*, 136 U. S. 1), said:

> "When a business corporation, instituted for the purpose of gain, or private interest, is dissolved, the modern doctrine is that its property, after payment of its debts, equitably belongs to its stockholders."

One of the first and leading cases holding that the stockholder's interest is equitable is that of *Bacon vs. Robertson*, 18 Howard 480, the court said:

> "And no reason can be given why the dissolution of a corporation, whose capital was contributed by shareholders for a lawful purpose, with the consent of the Legislature, should suspend the operation of these principles, or hinder the effective interference of the Court of Chancery for the preservation of individual rights of property in such case. The withdrawal of the charter—that is, the right to use the corporate name for the purpose of suit before the ordinary tribunals—is such as substantial impediment to the prosecution of the rights of the parties interested as would authorize equitable interposition in their behalf within the doctrine of chancery precedent.
>
> "The acquisition of real property by trading corporations is commonly made upon a bargain and sales for a full consideration.
>
> "It is a case, therefore, in which courts of chancery upon their well settled principles, would aid the party to realize the property belonging to the corporation, and compel its application to the satisfaction of the demands which legitimately rest upon it.
>
> "The trustee cannot deny the title of the stockholders to a distribution. To collect and distribute the property of the corporation among the creditors and stockholders is his commission."

That the interest of all stockholders in the assets of a dissolved corporation is purely equitable will be seen by the full discussion on the subject by Judge Lurton in the case of *Mason vs. Mining Company*, 66 Fed. 394.

In this opinion, Judge Lurton, speaking for the Circuit Court of Appeals when that bench was composed of Judge Taft, Lurton, and Ricks, employed the following language:

> "At common law, when the corporated life was terminated, by limitation, forfeiture, or otherwise, the corporation ceased to exist in legal contemplation for any purpose whatever, and pending suits abated as in the case of the death of a natural person. *Bank vs. Colby*, 21 Wall. 615. But this common law extinguishment of remedies, and the common law consequences, such as reverter and escheat, were obviated by the courts of equity, which regarded the corporation as a mere trustee, the creditors and stockholders being the cestui que trust. The death of the trustee was not allowed to defeat the trust nor to destroy the rights of the beneficiaries. In business corporations, the capital is contributed by the stockholders, and they are justly entitled to be regarded as the equitable owners of the corporate assets, after the payment of the corporate debts, and their relations inter sese are to be regarded as analogous to the relations of the partners. Equity, therefore, by reason of the flexibility of its remedies, was able to obviate the harsh common law consequences of dissolution, such as reverter and escheat, by administering the assets as a trust. This doctrine, so well known now to students of equity, is elaborately considered in the opinion of Justice Campbell in *Bacon vs. Robertson*, 18 How. 480. In most, if not in all of the States of the Union, statutes of like tenor to that of Michigan have been passed continuing the corporate life pro hac vice, for the purpose of enabling the corporation to wind up its affairs and convert its assets into money for the payment of debts and distribution of surplus among stockholders. These statutes are embodiments of equi-

table doctrines, and afford legal remedy where before there was none."

From this opinion it will be seen, first: That under the statutes such as Section 561 of the Kentucky Statutes, a corporation lives for the purpose of winding up its trust and as such retains the legal title to the property theretofore vested in it; and second, not only where such provisions are not made, but that in all events the title of the stockholders is purely equitable.

It is clear from the above that, conceding defendants in error were shareholders of a corporation at the time of dissolution, their rights to its assets were equitable—not legal—and such a title will not sustain ejectment.

So it is, that the true rule upon this subject, as gleaned from all the authorities, is substantially to the effect that the property after dissolution is, in equity, the property of the shareholders charged with the payment of debts, and when not by statutes committed to certain persons a court of equity will gather in the property and satisfy this charge, and divide the residue among the shareholders.

Craycraft vs. Building & Loan Association, 117 Ky. 229.
Weatherly vs. Capital City Water Co., 22 So. 143-144.
State vs. U. S., 136 U. S. 1.
State vs. Bank, 44 N. W., 1000.
Curran vs. State, 15 Howard 304.
Bacon vs. Robertson, 18 How. 480.
O'Connor vs. City, 6 Lea (Tenn.) 732.
State vs. Bank, 5 Baxt. (Tenn.) 106.
Mason vs. Mining Company, 66 Fed. 395.

Where it has been provided by statute that corporations shall after the expiration of their charter continue for the purpose of winding up its affairs, individual stockholders will not be permitted to file a bill for an accounting against a person alleged to be indebted to the dissolved corporation, not even to intervene for this purpose in a suit therefore existing between the corporation and the alleged debtor.

Also "before the affairs of the corporat on can be wound up each creditor and each stockholder must be called in to establish his claim. Coming in, they will have a right to dispute the conflicting claims." *General Elec'ric Company vs. Improvement Company*, 73 Fed. 386.

The United States Circuit Court in the case of *Stout vs. Shoe Company*, 195 Fed. 313, construing the statute said:

> "They provide for the dissolution of a corporation for administering its effects leaving nothing whatever to vest in the shareholders."

If, after dissolution, individual shareholders will not be permitted to file a bill for an accounting, or even to intervene in a proceeding already pending for the purpose, such refusal being upon the grounds that by statute the corporation itself is continued for the purpose of winding up its business—then certainly it cannot be successfully contended that the title to the corporate property actually passes so as to permit the individual stockholder to assert the same, notwithstanding by statute the corporation is continued for the purpose of winding up its business.

If, as assumed by respondents in this case, title vested in the stockholders upon the dissolution of the corporation then the Kentucky Court of Appeals

was wrong in holding that money WAS THE ONLY devisor and that he stockholders could not be compelled to accept property or rights but only cash.

If, as assumed by respondents, that the title vested in the stockholders, then they certainly become tenants in common, and they could not be compelled to accept cash, but only property or rights, and their method of procuring the money would be by partition or sale.

If, as alleged in the petition in this case, that the corporation does not and did not owe any debts at the time of its dissolution, and the stockholders become tenants in common, that is, the legal owners of the land owned by the corporation at the time of its dissolution, then there was no business of the corporation to wind up, and the Legislature of Kentucky ought to have said when it enacted Section 561 of the Kentucky Statutes, that in the event a corporation is dissolved and it has creditors, then it should be the duty of the officers of the corporation to wind up its business but the Legislature did not so state.

3. Tenants in common may sue separately or join in ejectment. They are not in any case to be made to join. Therefore, one joint tenant cannot sue for the benefit of all. The United States Circuit Court of Appeals was of the opinion, and so construed Section No. 25 of the Kentucky Code as to authorize the defendants in error to prosecute and recover the land in question for the benefit of themselves and other tenants. It has been held by the Kentucky Court of Appeals in *Craig vs. Taylor*, 6 B. M. 458, *Lockett vs. Sythe*, 7 Dana 311, and Section 126 of Newman's Pleadings that in actions for the recovery of land which is susceptible of division, co-parties or tenants in common may sue separately or some may sue without the others, and may recover a certain part of the whole, or as to a certain number of

acres which will be their part of the whole according to their title. We insist, therefore, that there is not any warrant for the holding of the Court that one joint tenant may sue for the benefit of others, or that the legal title to the property of a dissolved corporation vests in its stockholders. Section 240 Judicial Code provides that—

> "In any case, in which the judgment of the Circuit Court of Appeals is made final by the provisions of this title, it shall be competent for the Supreme Court to require, by certiorari, upon the petition of any party thereto, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

4. WHEREFORE, Petitioner respectfully prays that writ of certiorari be issued out of and under the seal of this Court, requiring the United States Circuit Court of Appeals for the Sixth Circuit to certify and send to this Court a full and complete transcript of the record and proceedings in this case of said Court of Appeals, the style therein *Stearns Coal & Lumber Company, Plaintiff in Error vs. John S. VanWinkle, et al., Defendants in Error*, to the end that said case may be reviewed and determined by this Court, as !provided by law, and that Petitioner may have such further relief or remedy in the premises as to this Court may seem proper, that said judgment of said Circuit Court of Appeals may be reversed by this Honorable Court, and that pending its consideration thereof supercedeas may issue withholding further proceedings in this case.

JAMES N. SHARP,

Attorney for Petitioner.

STATE OF TENNESSEE, }
COUNTY OF KNOX. }

J. N. Sharp, having been duly sworn, says he is attorney for the Stearns Coal & Lumber Company, Petitioner herein; that as such he is familiar with the facts in the Petition and such allegations therein, and that such allegations are true as he verily believes.

J. N. SHARP.

Sworn and subscribed to before me this..... day of March, 1916.

APPENDIX

Section No. 561. TERMINATION OF EXISTENCE OF CORPORATION—HOW EFFECTED.—Any corporation organized under this chapter may, by the consent in writing of the owner of the majority of its shares of stock, unless otherwise provided in the articles of incorporations or amendments thereto, close its business and wind up its affairs; and when any corporation expires by the terms of the articles of incorporation, or by the voluntary act of its stockholders, it may thereafter continue to act for the purpose of closing up its business, but for no other purpose; and it shall be the duty of the officers to settle up its affairs and business as speedily as possible; and they shall cause notice to be published, for at least once a week for four consecutive weeks, in some newspaper printed and published in the County, if any, of the fact that it is closing up its business; and all debts and demands against the corporation shall be paid in full before the officers receive anything.—*Kentucky Statutes.*

Section No. 25. NUMEROUS PARTIES—ONE OR MORE MAY SUE OR DEFEND FOR ALL. If the question involve a common or general interest of many persons, or if the parties be numerous and it is impracticable to bring all of them before the court within a reasonable time, one or more may sue or defend for the benefit of all.—*Kentucky Code.*

protest, claiming it would be only to preserve his rights. The court, after stating the general rule above quoted, held that he had ratified the plan of reorganization and was estopped, saying:

> This doctrine applies to the present case, and is conclusive against the maintenance of this action by the plaintiff. He has sold the privilege attaching to 885 of his Metropolitan Railway Company shares to subscribe to the stock of the Metropolitan Securities Company for between $5,000 and $6,000. *His privilege would have been absolutely nonexistent, except for the plan and lease which he attacks in this suit.* He was well aware of this, and he cannot *avail himself of the privilege* and at the same time *prosecute the suit.* The officers of a corporation who are sued by stockholders for damages due to carrying on business not authorized by its charter may defend by showing the stockholders' acquiescence in or assent to the business, express or implied. *Holmes* v. *Willard,* 125 N. Y. 75, 82, 25 N. E., 1083, 11 L. R. A., 170.
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> As was said by the Supreme Court of Alabama in *Robinson* v. *Pebworth,* 71 Ala., 240, estoppel in a case of this character "simply means that *you shall not take the fruits of an illegal transaction and afterwards set the transaction aside as illegal.*" In holding that the plaintiff here is precluded from attacking the plan and lease in question by reason of his sale of the provileges acquired by him thereunder as a stockholder in the Metropolitan Railway Company, we do not pass upon the legality of the scheme, either to condemn or approve it; we simply decide that, even *assuming it to be as unlawful* as he alleges, *he is in no position to assail it.* This defense is available to the respondents notwithstanding the fact that the plaintiff did not sell his privileges until after the beginning of the suit. Matters which arise between the bill and plea may be pleaded in equity.

In *Post* v. *Beacon Vacuum Pump & Electrical Co.,* 84 Fed., 371, 28 C. C. A., 431, the United States Circuit Court of Appeals in the First Circuit considered the sufficiency of a bill in equity filed by stockholders of the Beacon Vacuum Pump & Electrical Company to rescind a transfer of its property to the Beacon Lamp Company; and it was held that the complainants being minority stockholders who opposed the transfer were *estopped* from maintaining a suit for rescission on the ground of *ultra vires, because they had subscribed for their proportion of the stock of the new*

corporation, although under protest, and had permitted such company to conduct the business for 18 months. The court said:

> It is clear that the complainants have not maintained that consistent position necessary to relieve them against an equitable estoppel. They admit that they have subscribed for their proportion of the 32,000 shares of stock in the new corporation. They do not state the date when they made the subscription. The transfer of the assets to this corporation was made in July, 1895, and the bill was not filed until the 12th day of January, 1897, so that, although at the outset they protested against the reorganization, yet their subscriptions, in the absence of any proper allegation otherwise, must be presumed to have been made at such time as justified the respondents in assuming that the lamp company was authorized, so far as the complainants were concerned, to receive the transfer of the property of the old corporation, and to commence and carry on its manufacturing business, thus involving itself in the liabilities and other complications inevitably arising therefrom. *That this raised an estoppel in equity as against a bill praying rescission is too clear to need discussion.* It is true that complainants allege that this subscription was under protest, and only to preserve their rights; but the bill does not give the court any details which would enable it to perceive that, by any possibility, the effect of the subscription, which of itself would be an accomplished fact, could be overcome by any protest or other formal reservation which might accompany it.

In *Towers* v. *African Tug Company* (L. R. [1 Cr., 1904] 558), which was a suit by two shareholders of the defendant to compel the directors to repay to the company the amount of a dividend illegally, though honestly, declared and paid, the decision of the English Court of Appeal is accurately stated in the head note as follows:

> A shareholder in a limited company who has, with full notice or knowledge of the facts, *himself received part of the proceeds of an ultra vires act* committed by the directors—such as payment of a dividend out of capital—and who still *retains the money*, cannot, either individually or as suing on behalf of the general body of shareholders, maintain an action against those directors.

Lord Justice Vaughn-Williams, in the course of his opinion, says:

> If it be the fact, as I think it is, that these plaintiffs knew of all that had been done, *received their dividends* with knowledge of all the facts, and then brought this action *with the money still in their pockets,* ought they to be allowed to bring this action, which, as I have pointed out, is to my mind, an action such as they can bring in consequence of their personal interest in the matter? I think not. I think that an action cannot be brought by an individual shareholder complaining of an act which is *ultra vires if he himself has in his pocket at the time he brings the action some of the proceeds of that very ultra vires act.* Nor, in my opinion, does it alter matters that he represents himself as suing on behalf of himself and others. I think that the reason which requires us to say he ought not to bring such an action equally requires us to say that he ought not to be the peg upon which such an action is to be hung for the benefit of others.

In the case of *International Contracting Co.* v. *Lamont* (cited as *United States* v. *Lamont*) 155 U. S., 303, 15 Sup. Ct., 97, 39 L. Ed., 160, a contractor's bid for dredging for the government was accepted by the engineers in charge, but the matter was held up by the Secretary of War. The work was readvertised, and pending this bid the contractor commenced a mandamus suit to compel the Secretary of War to sign a contract with him under his first bid. Before this suit was disposed of the bids under the second advertisement were opened, and it was found that the same contractor was again the lowest bidder, at a price much lower than his first bid. Being again the lowest bidder, he obtained a contract for the work, and the mandamus proceeding was dismissed. The contractor then demanded of the Secretary of War that he should sign the contract awarding him the work under the first bid, which was refused. Thereupon the contractor again commenced a mandamus to compel the execution of a contract under the first bid. The court, after holding that mandamus would not lie in such a case, proceeded as follows:

> But, even if the writ of mandamus could be so perverted as to make it serve the purposes of an ordinary suit, the relator *is in no position to avail himself of such relief.* He en-

tered of his own accord into the second contract, and has acted under it and *has taken advantages which resulted from his action under it,* having received the compensation which was to be paid under its terms. Having done all this, he is *estopped* from denying the *validity* of the contract. *Oregonian Railway* v. *Oregon Railway,* 10 Sawy., 464, 22 Fed., 245. Nor does the fact that in making his second contract the relator protested that he had rights under the first better his position. If he had any such rights and desired to maintain them he should have abstained from putting himself in a position where he voluntarily took advantage of the second opportunity to secure the work. A party cannot avoid the legal consequences of his acts by protesting at the time he does them that he does not intend to subject himself to such consequences.

In *North Chicago St. R. Co.* v. *Chicago Union Traction Co.,* 150 Fed., 612, 626, it is said:

> It seems, also, that the rule of inconsistent positions or quasi-estoppel applies as between the North and West and Union Companies. This subject is considered by Prof. Bigelow in his recent article on estoppel in 16 Cyc. 782. It seems from an examination of many of the cases cited by him that, if a person avails himself of the benefit of a transaction, he cannot be heard to deny its validity. The same rule is held in *International Contracting Co.* v. *Lamont,* 155 U. S., 303, 15 Sup. Ct., 97, 39 L. Ed., 160 (cited as *United States* v. *Lamont*),, and *Wormser* v. *Metropolitan St. R. Co.,* 184 N. Y., 83, 90, 76 N. E., 1036, Id., 98 App. Div., 29, 90 N. Y. Supp., 714. See, also, *Brazee* v. *Schofield,* 124 U. S., 495, 8 Sup. Ct., 604, 31 L. Ed., 484, above referred to.

In *Farmers Bank* v. *Groves,* 12 Howard 51, the bank sought to avoid an agreement upon the ground of fraud on the part of one of the parties, the court saying:

> Assuming that there was (fraud by Collier in the transaction), the bank could not *avail themselves of it* for the purpose of avoiding their part of the arrangement and at the same time *hold on* to the mortgage as a security for Collier's indebtedness. There has been no offer to *surrender* the mortgage and vacate the agreement. On the contrary, it is claimed by them as an available security, held and relied on against Collier.

In *Compton* v. *Jessup*, 167 U. S., 1, it was held:

> Persons who procure or acquiesce in a decree of foreclosure reserving the rights of a lien claimant, and who participate in the *benefits of an early sale* thus secured, cannot *object* to the enforcement of the lien in the manner pointed out by the decree.

In *U. S.* v. *Hodson*, 10 Wall. 395, the court held:

> If a bond is liable to the objection taken in this case and the parties are dissasisfied, the objection should be made when the bond is presented for execution. If executed under constraint, the constraint will destroy it. But where it is voluntarily entered into and the principal *enjoyed the benefits* which it is intended to secure and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense.

In *Daniels* v. *Tearney*, 12 Otto 415, the estoppel was applied in respect of a stay bond executed under a void act of the legislature. It was held:

> When a bond is voluntarily entered into and the principal *enjoys the benefits* it was intended to secure, and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense.

The court, referring to a similar case, said:

> In disposing of the case the court well said, "Upon what principal of exalted equity shall a man be permitted to *receive a valuable consideration* through a statute, procured by his own consent or subsequently sanctioned by him, or from which he derived an interest and consideration, and then keep the consideration and *repudiate* the statute?
>
> Not to apply the principal of estoppel to the bond in this case would, it seems to us, involve a mockery in judicial administration and a violation of the plainest principals of reason and justice.

In *Winslow* v. *Railroad*, 208 U. S., 59, it was held:

> By *accepting* the sum awarded in condemnation proceedings as the value of that portion of their lands actually taken, the owners are *estopped* to insist that the petition was not maintainable.

The Circuit Court of Appeals of the Eighth Circuit, in the case of *Loy* v. *Alston*, 172 Fed., 90 (Court of Appeals, Eighth Circuit) held:

> One who has *recovered damages* on the ground that he has been induced by fraud to make himself liable to pay a promissory note is *estopped* from successfully invoking the maximum, "He who comes into equity must come with clean hands" to defeat the subsequent collection of the note in equity.

The Court of Appeals of the Ninth Circuit, in the case of *Shackleton* v. *Baggaley*, 170 Fed., 57, 59, says:

> How can the appellants enforce a mechanic's lien for work and services performed under a contract and under a notice of lien which was filed *under the contract*, and at the same time allege that the *contract was void?* They deny that it is the purpose of the suit to rescind the contract. They admit that they entered into an agreement to waive a mechanic's lien. The evident purpose of alleging that the contract is void is to obviate the effect of that agreement. The argument is that the *fraud* practiced by the appellees, no matter when it was discovered, absolves the appellants from their obligation to file no lien, but leaves the contract *intact* in other respects. The proposition cannot be sustained. If the allegations of fraud are true, the appellants were thereby defrauded in the sum of $1,250. For this they had their remedy by an action for damages. They cannot, in a suit brought in equity to foreclose a mechanic's lien under a contract and a notice of lien *affirming the contract*, allege that, by reason of *fraud* discovered, we know not when, the contract or any part of it was rendered *null and void*. *Long* v. *Caffrey*, 93 Pa., 526; *Brezenski* v. *Neeves*, 93 Wis., 567, 67 N. W., 1125; *Pressed Brick Co.* v. *Barr*, 76 Mo. App., 380; *Pinning* v. *Skipper*, 71 Md., 347, 18 Atl., 659. In the case last cited, the court said:
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> "If a party expressly contracts that he will not do a certain thing, or will not set up a certain claim against the other contracting party or his property, by resort to a certain process, it seems to us a legal anomaly to say that he can go on and do the thing, or avail himself of the forbidden process because he has a grievance against such other party on some other ground, or a claim which he can enforce against him by a different suit or process."

In *United States* v. *Morse*, 218 U. S., 493, it is held:

> The validity of a decree for the sale of an infant's real estate for purposes of reinvestment, and of the order appointing a trustee to make the sale, and of the bond reciting the due appointment of such trustee, executed to secure the faithful discharge by him of his duties, is not open to question by one who voluntarily became a surety upon the bond, *thereby enabling his principal to obtain the proceeds of the sale.*

In *State* v. *Bank*, 95 N. W., 1116 (Sup. Ct. of Minn.), it is held:

> The Germania Bank, organized under the state law, having a capital of $400,000, par value $100 per share, became insolvent, and made an assignment for the benefit of its creditors. Pending such proceedings, the bank was reorganized by the judgment of the district court under the provisions of chapter 89, p. 109, Laws 1897; the capital being reduced to $200,000. As a part of the reorganization scheme, those stockholders who paid up an assessment of $75 per share received stock to the amount paid, at par, in the reorganized bank, the other 25 per cent of stock held by them being canceled. All stock upon which the assessment was not paid was forfeited and canceled.
>
> Held, an original depositor, who, in consideration of his claim against the insolvent bank, received, as part payment, time certificates of deposit, and a certificate of stock in the bank as reorganized, and who, without objection, permitted the bank to reopen and transact business for the period of two years, is *estopped*, against a receiver of insolvency of the reorganized bank, from repudiating the transaction upon the ground that the same was invalid or irregular.

In *Seminole Securities Co.* v. *Southern Life Ins. Co.*, 182 Fed., 85, it is held:

> A stockholder of a corporation brought a suit in equity on behalf of himself and all other stockholders to have the affairs of the corporation wound up, alleging that fraudulent mismanagement by its officers had rendered it insolvent. Receivers were appointed who brought a suit in another state for the cancellation of a contract made by such officers on behalf of the corporation, which suit was compromised and settled with the approval of the court; the receivers being paid a considerable sum. Thereupon notice was sent to all stockholders

to come in and prove their holdings, and from the proceeds of the settlement of the receivers' suit a dividend of 20 per cent was paid to all stockholders. *Held,* that stockholders, who came in pursuant to such notice, proved their claims, and received their dividends, were *estopped* to afterward maintain suits to rescind their contracts of subscription for fraud and claim as creditors of the corporation the amounts paid for the stock or *to attack the validity of the settlement in the proceeds of which they had shared.*

In *Gaddes* v. *Pawtucket Institution for Savings,* 80 Atl., 415 (Sup. Ct. of Rhode Island), it is said (p. 420):

> Where a stranger to the title, or one having only a limited interest in a tract of land, conveys the property to another by deed or mortgage, *and the owner receives the benefit of any part of the proceeds, knowing the facts, he is estopped to deny that the deed or mortgage conveys a good title.* And likewise, if the owner, though ignorant of the facts when he receives the proceeds, *afterwards* learns the truth, *his retention of the proceeds* thereafter *estops him* from disputing the validity and effect of the conveyance. *Brewster* v. *Baker,* 16 Barb. (N. Y.), 613, 618; *Kahn* v. *Peter,* 104 Ala., 523, 16 South., 524; *Ansonia* v. *Cooper,* 66 Conn., 184, 33 Atl., 905; 16 Cyc., 787-791. See, also, *Brewer* v. *Nash,* 16 R. I., 458, 17 Atl., 857, 27 Am. St. Rep., 749; *Robinson* v. *Bailey,* 19 R. I., 464, 36 Atl., 1126; *East Greenwich Inst. for Savings* v. *Kenyon,* 20 R. I., 110, 37 Atl., 632.

In the case of *Sage* v. *Finney,* 135 S. W., 996 (Mo. App.), Finney had paid the dues on a policy of insurance on an agreement that he, Finney, should receive $1,000 of the insurance, the total of the policy being $2,000; when the policy became payable, Finney's payments, with interest at 6%, had amounted to about $1800; Finney, in accordance with a stipulation, was paid $1,000 and brought suit for the balance of the amount which had been paid by him, claiming that an agreement, by the terms of which one who did not have an insurable interest in the life of another should receive all or any precise amount of the insurance beyond such premiums and interest as the beneficiary may have invested therein, was invalid; Finney therefore claimed that he was equitably entitled to reimbursement for the total amount advanced by him.

The court held that Finney could not claim the benefits of the contract to the extent of accepting the $1,000, relying on it as the basis of his suit, and *at the same time attack the contract as invalid.* The court says:

> Though it be that an invalid contract affords no grounds for an estoppel unless it has been fully executed by the parties, it is true as well that *one may not both claim under and against the same deed.* One may not appropriate to himself rights such as the equities asserted here which accrue alone *from the contract,* and at the same time *deny* the efficacy of the undertaking with respect to the rights of an adversary. If a person predicate his cause, as does Finney here, on a right accruing to him under a contract, he is estopped from denying such portions thereof as are against his interest, and this is true, though such portion be invalid, for he must take it *cum oncre* or not at all. He is estopped from assuming such *inconsistent positions.* For an application of the principle where one has accepted the benefits of an invalid contract, see *Morris* v. *Hall,* 41 Ala., 510, 536, 537. In *Robinson* v. *Pebworth,* 71 Ala., 240, 247, the doctrine is stated to be that, *though the transaction is illegal, one may not claim both under and against the same title.* So, where one accepts the benefits of an invalid mortgage, it is determined that he is estopped to thereafter assert its invalidity. *Horton* v. *Davis,* 26 N. Y., 495. The identical principle finds application too, and is illustrated, in numerous instances where it appears persons have accepted benefits under invalid judicial proceedings, for it is said they may not thus *accept the benefits* of the judgment and *dispute its validity.* One must not be inconsistent in the positions he assumes, and, if he *claims the benefits* of such invalid proceedings, he is thereafter estopped to *assert their invalidity. Hoffmire* v. *Holcomb,* 17 Kan., 378; *Babbitt* v. *Corby,* 13 Kan., 612; *Pursley* v. *Hays,* 17 Iowa, 310; *Lee* v. *Gardiner,* 26 Miss., 521. For applications of the general principle to one claiming both under and against the same deed, see *Jacobs* v. *Miller,* 50 Mich., 119, 15 N. W., 42; *Swanson* v. *Tarkington,* 7 Heisk. (Tenn.) 612, 614, 615. To the same effect, see Bigelow on Estoppel, (5th Ed) 684; Herman on Estoppel, 1040, 1039. See, also, *Board Supervisors* v. *Allen,* 99 N. Y., 532, 2 N. E., 459. As above stated, Finney has already received $1,000 of the fund; for, upon the Supreme Council paying the $2,000, $1,000 thereof was awarded to him under a stipulation, and plaintiff made no claim whatever thereto.

> Besides accepting benefits to that extent under the contract after suit was instituted, plaintiff predicates his entire right with respect to the greater portion of the $1,000 now in court *on equities accruing out of the contract,* and, so doing, he is *estopped to assert the invalidity of the limitation* therein prescribed fixing his interest at $1,000.

(d) *The doctrine of equitable election is a complete bar to a recovery by the Trust Company.*

We are not invoking a technical estoppel *in pais,* but the broad equitable rule, whether called estoppel or equitable election, or whether comprehended within the maxim that "he who seeks equity must do equity," which effectively prohibits a party to litigation from claiming *under* and *against* the same instrument,—a rule thus stated by this court in *Peters* v. *Bain,* 133 U. S. 670, which was a case involving a voluntary assignment alleged to be in fraud of creditors:

> The doctrine of election rests upon the principle that he who seeks equity must do it, and means, as the term is ordinarily used, that where two inconsistent or alternative rights or claims are presented to the choice of a party, by a person who manifests the clear intention that he should not enjoy both, then he must *accept* or *reject* one or the other; *and so, in other words, that one cannot take a benefit under an instrument and then repudiate it.*

In the recent case of *Merchants National Bank* v. *Sexton,* 228 U. S. 634, this court holds that one claiming the benefit of a contract will not be permitted to *approbate* and *reprobate* at the same time. It is there held:

> Creditors of a bankrupt seeking to enforce a contract between the bankrupt and its debtor, and the lien arising therefrom, so far as the avails of certain collateral are concerned, may not *enforce* rights given under one provision of such contract and *repudiate* another provision where the two are under the contract indissolubly associated, the one being the complement of the other.

The doctrine of equitable election, originally applicable to deeds and wills, has been extended to "contracts for a valuable consideration resting in articles" and to "contracts for value com-

pleted executed by conveyance and assignment" (*Codrington* v. *Lindsay*, 8 L. R. Ch. App., 578, 587), and is defined as follows:

> An election, in equity, is a choice which a party is compelled to make between the acceptance of a benefit under an instrument and the retention of some property, already his own, which is attempted to be disposed of in favor of a third party by virtue of the same instrument. The doctrine rests upon the principal that a person claiming under an instrument shall not interfere by title paramount, to prevent another part of the same instrument from having effect according to its construction; he cannot accept and reject the same instrument. (Bispham Prince Eq., Sec. 295, Story's Eq. Jur., Sec. 1076, and Pomeroy's Eq. Jur. (37 Ed.), Sec. 295; Vol. 11 Am. & Eng. Enc. Law (2nd Ed.), p. 59.

Does not the reason of the rule apply with compelling force to the Trust Company, even under the theory of liability adopted by the Court of Appeals?

The Trust Company, as a *creditor*, had an equity, let us say, in the property of the Belt Company. As a *stockholder* it had *no* equity until *after* the claims of creditors were paid in full. The reorganization plan operated to give to the Trust Company as *stockholder* a benefit, a portion of which, (and perhaps all), was already its own as a *creditor* of the Belt Company. Why was the Trust Company not compelled to make an election between the acceptance of a benefit (as stockholder), under the instrument. and the retention of its equity (as creditor), already its own, which was attempted to be disposed of in favor of third parties (stockholders) by virtue of the same instrument?

The Trust Company elected to accept the benefit under the plan and received one and one-half million dollars, par value, of the securities of the Southern Company, of which $407,474.00 par value (or $865,927.70 par value if we consider the Southern stock received by the Trust Company) was a trust fund which *belonged to creditors*, according to the Court of Appeals. Does it not shock the conscience to say that the Trust Company as a stockholder may wrongfully appropriate to itself a fund which *belongs to creditors possessing a higher equity*, and then, *as a creditor*, recover from the Southern Company because of that very wrongful ap-

propriation by itself and other stockholders? It is a sufficient answer to say that the four elements of a technial estoppel in *pais* are lacking?

The doctrine of election which prevents the assertion of repugnant rights is but an extension of the law of equitable estoppel. (*Fox* v. *Windes,* 127 Mo., 502, 512; 1 Herman on Estoppel and *Res Judicata,* page 11.)

The Trust Company is held in law to have *renounced* and *relinquished* every right *inconsistent* with the provisions of the reorganization plan and agreement. (2 Herman on Estoppel and *Res Judicata,* Sec. 1028, page 1156; *Fox* v. *Windes,* 127 Mo., 512; *Stone* v. *Cook,* 179 Mo., 534, 545.)

(e) *The doctrine of equitable estoppel is also a complete bar to a recovery by the Trust Company.*

In *Farmers Trust Company* v. *Railway Company,* 120 Fed., 1006, the intervener was both a creditor and stockholder in a company passing through reorganization. He exchanged his stock under the reorganization plan for the securities of the new company and then sought to hold the new company for a judgment against the old company. The court disposed of the contention briefly, and it is believed logically and concisely, by the use of the following language:

> The intervener here cannot be permitted *to blow hot and cold,* and having entered into the reorganization, he must be held to be bound by his action.

In *Matthews* v. *Murchison,* 15 Fed., 691, it was held:

> A bondholder of a former organization has no standing in chancery to dissolve the present organization of a railroad company, for which his agent had voted his bonds, it was alleged, in excess of authority, and to enforce a different plan, where it appears that he had known of what his agent was doing, but had not dissented, *and that he had accepted his share of the bonds of the new organization,* had offered to buy and sell, and had brought suit for them. *Such conduct ratified the act; or, inducing others to believe he had acquiesced in the organization, worked estoppel.*

In *Symmes* v. *Union Trust Co. of N. Y.,* 60 Fed., 830, it is stated in the syllabus:

Stockholders who have had full knowledge of a plan of reorganization, and have given it their approval, and subscribed to its provisions in respect of part of the stock owned by them, *are estopped*, after the reorganization is complete, to maintain a suit, as owners of the stock on which they did not subscribe to overthrow the same on the ground of fraud and conspiracy.

In *Vose* v. *Cowdrey*, 49 N. Y., 336, 343, the court said:

> He cannot be permitted to assert that the agreement of October 3, 1861, was fraudulent as to creditors and that he is entitled to pursue the property on that ground, for he admits in his complaint that he was a party to and one of the trustees under that agreement, and that in pursuance of it he surrendered a large amount of bonds of the La Crosse & Milwaukee Railroad Company, thus entitling himself to the benefits of the agreement. *Being such party, he also necessarily assented to the issue of the new stock to the old stockholders*

To the same effect are:

Reagan v. *First National Bank*, 61 N. E., 575;
Jessup v. *Hulse*, 21 N. Y., 168;
Bank v. *Heckman*, 148 Ind., 490, 47 N. E., 953;
Jacobs v. *Lumber Co.*, (Tex.) 15 S. W., 236;
Mitchell v. *Mitchell*, 61 Atl., 570;
Kahn v. *Peter*, (Ala.) 16 So., 524;
Ollivet v. *King*, 8 De. G., M. & G., 110, 114 Rev. Rep., 48;
Perisho v. *Perisho*, 71 Ill. App., 222;
Rapalee v. *Stewart*, 27 N. Y., 310;
Canton, etc. v. *Rolling Mill Co.*, 155 Fed., 321;
Thompson v. *Cohen*, 127 Mo., 215;
Gutzweiler v. *Lackman*, 23 Mo., 168;
Smith v. *Espy*, 9 N. J. Eq., 160;
Richards v. *White*, 7 Minn., 345;
Fiske v. *Carr*, 20 Me., 301.

III.

Under the rule of the Boyd case the Trust Company is not entitled to recover.

The equitable doctrine of election and estoppel, for which we contend, finds a distinct and express recognition in the majority opinion in the Boyd case. It is there said that a reorganization may be had in pursuance of a private contract between bondholders and stockholders, and that *"the transaction would be binding between the parties,"* but that such a transfer by stockholders from themselves to themselves cannot defeat the claim of a *"non-assenting creditor."* In other words, a reorganization agreement is binding upon all who *assent* to it and, *a fortiori,* is binding upon those who, like the Trust Company, derive and retain a large pecuniary *benefit* from it. The court is careful, in speaking of those who are entitled to attack such a reorganization, to use the expression "non-assenting creditors," the obvious meaning being that no such attack, as was made by Boyd upon the reorganization plan of the Northern Pacific Railway Company, can be made by one who has *assented* to the reorganization or *benefited* by it.

Not only is it true that one who has *participated* in a plan of reorganization will not be permitted to attack it, but one to whom fair terms have been *"offered"* cannot thereafter be heard in a court of equity to attack it. It matters not whether the tender be accepted or not. If accepted, the creditor becomes a *party* to the reorganization, and it is *binding* upon him. If he declines to accept, then a court of equity will not aid him, because he is unwilling to do equity himself.

If the tender is not made and kept good "he retains the right to *subject the interest of the old stockholders in the property to the payment of his debt.*" This is the measure of the rights of a "non-assenting creditor." Conversely, it clearly defines what a *consenting* creditor or a *participating* creditor may ***not*** do; he may *not* "subject the interest of the old stockholders in the property to the payment of his debt," as the Trust Company is seeking to do in this case.

IV.

The Trust Company is barred from a recovery in this action by its covenant that it would not hold the new company for the debts of any of the old ones.

The Court of Appeals says (Opinion, p. 17), that "it may be" that the Trust Company would have been estopped if the reorganization agreement had disclosed a purpose to divert the equity of the creditors of the Belt Company to its stockholders, but they say that the law which requires creditors to be paid before stockholders must be read into the agreement, and that the legal presumption (notwithstanding the covenant) was that the committee would pay the creditors, and that the Trust Company had a right to reply upon this presumption when it signed the agreement until notified to the contrary. The covenant in question, it is said (Opinion, p. 19), barred the Trust Company from asserting only such rights, trusts, liabilities, and obligations "as arose out of the lawful and equitable execution of its contract," and furthermore, (Opinion, p. 20), that the obligation and liability of the Southern Company in this case "was not created by the agreement," but by the Southern Company's "subsequent transfer of the equity of the creditors of the Belt Company to itself, its stockholder and the trustee for its creditors without securing and paying to them the value of that equity," or as elsewhere stated "by the inequitable and fraudulent appropriation of the Trust Company's equity in the property to the benefit of its stockholders or bondholders."

The Court of Appeals proceeds upon the assumption that the plan carried the presumption that some fair offer would be made to creditors, and that the plan, therefore, was a valid and lawful plan until after the Trust Company had received its securities in July, 1900, and *then it became fraudulent and voidable only when the Trust Company's debt was not paid.* It is said (Opinion, p. 30), that "the *fraud* and breach of trust, which made the transfer voidable as to creditors, were not committed or disclosed until *after* the Trust Company's acts in the formation and execution of the plan had been done."

(a) It is confidently asserted that if the reorganization plan was *ever* fraudulent and voidable as to creditors, it was so at the time of its execution by the Trust Company. It is a new doctrine that the plan must *affirmatively* show upon its face that creditors will *not* be paid in order to be subject to criticism. On the contrary, in the reorganization agreement in the Boyd case, which the majority opinion holds to be fraudulent as to "non-assenting creditors," it is said:

> The agreement contained *no provision* as to the payment of unsecured creditors.

And also:

> The invalidity of the sale flowed from the *reorganization agreement.*

The same is true of the plan in the *Monon* case, 174 U. S., 674, and in the Howard case, 7 Wall., 392.

The *covenant* in the twelfth paragraph, to which the Trust Company assented, was a distinct and unequivocal *caveat* that no claims against the old company could be enforced against the new company. How can the *covenant* and the *presumption* co-exist in the same instrument, since the covenant *excludes* any such presumption?

No presumption could arise to contradict the plain meaning of the plan, which was that $475,000, and no more, was set aside to pay the floating debt, which meant such debt as it was necessary to pay in order to make the mortgage of the new company a first lien (Rec., 999, 1000). How can this provision be said to raise a presumption that *all* the floating debt of *all* the companies was assumed by the Committee or the Southern Company?

(b) There could be no presumption that the floating debt would be paid, on which the Trust Company could rely, for the Trust Company must have known that no such thing was possible, and certainly that no such thing was contemplated by the plan. The reorganization agreement disclosed on its face the specific appropriation to be made of *all* the securities and of *all* of the funds of the new company. Its bonds and stocks were to be used (1) in exchange for old securities, (2) for future requirements

of the company which included future additions, betterments, and new equipment (Rec., 950) and (3) for the cash requirements of the company which are specifically stated (Rec., 951). The available assets of the new company are all accounted for, the sum of $475,000 being set aside for the payment of the floating debts of *all* of the constituent companies (Rec., 951). The floating indebtedness of the Belt Company *alone* was $900,000 (Rec., 873).

The Trust Company knew this because it knew the financial condition of the Belt Company. All of the officers and directors of the Belt Company, except one, were officers, directors, or employes of the Trust Company (Rec., 874). "The inter-relations of the Belt Company and Trust Company were exceedingly intimate" (Rec., 879), and the Trust Company kept some of the books of the Belt Company (Rec., 689).

It is a violent and wholly unwarranted presumption to assume that the plan contemplated the payment of the floating debt of *all* of the companies when but $475,000 was set aside for that purpose, and the floating debt of *one* company alone was *twice* that amount, as the Trust Company must have known.

(c) Whether the reorganization plan was fraudulent and void *at the time* the Trust Company became a party to it, or only became so *afterwards* when the Trust Company's debt against the Belt Company was not paid, cannot be a decisive feature of the case. Whenever the plan, or action taken under the plan became fraudulent as to creditors, the duty *immediately* devolved upon the Trust Company to *elect* whether to accept the benefits of the fraudulent scheme, or to *retain* them if they had already been received. The duty to tender back the fruits of an illegal and fraudulent transaction upon a discovery of the fraud is an imperative duty, and is an indispensable condition to the maintenance of any action based upon the fraud. The equitable rule of estoppel, or election, or ratification, becomes at once applicable. *A retention of the fruits of the fraud is a conclusive election to hold under the plan and is an insurmountable barrier to any attack upon the plan.* (*Stone* v. *Cook*, 179 Mo., 534; Vol. 11 Am. Eng. Enc. of L. [2nd Ed.] p. 98; *Young* v. *Young*, 27 Atl. Rep., 627; *Medill* v. *Snyder*, 58 Pac. Rep., 962).

(d) It is respectfully submitted that if any liability could, under any circumstances, exist against the Southern Company, it must necessarily be a liability *created by the reorganization plan or agreement* and as such barred by the covenant since, as said in the Boyd case, "the invalidity of the sale flowed from the *agreement.*" The bar of the covenant cannot be escaped by the assertion that the liability was created, not by the agreement, but by the transfer of the Belt property. The foreclosure cannot be divorced from the *agreement* since they are part and parcel of the same transaction. The Court of Appeals itself recognizes this fact when it says (Opinion, p. 819):

> For what purpose then was the foreclosure? Evidently to *carry out* the reorganization agreement.
> * * * * * * *
> Was not the *scheme of reorganization* the *primary cause*, the *vesting of the fee* of the Belt property in the Southern Company by the foreclosure the *object and effect* of that scheme, and the exchange of the stock and the foreclosure of the Belt mortgage the *means* contemplated and authorized by that scheme to attain that end? To the minds of the members of this court the record in this case leaves no alternative but to answer these questions in the affirmative.
> * * * * * * * *
> By virtue of the *plan of reorganization*, the Trust Company (this is obviously an error, it was intended to read Southern Company) had become such trustee (for unsecured creditors.)
> * * * * * * * *
> They (the acquisition of the property of the Gulf Company and later of the Belt Company) appear to this court to constitute a single transaction instituted, conducted, and consummated *pursuant to the preconceived plan to vest the fee of the properties of the Belt Company in the Southern Company* and to bring them directly under the lien of its mortgage.

It will not do to say that the Southern Company's liability "was not created by that agreement but by the Southern Company's subsequent transfer of the equity of the creditors of the Belt Company to itself, its stockholders, and trustee for its creditors, without securing and paying to them the value of that equity."

A transfer of the equity of the creditors of the Belt Company was solely in pursuance of the reorganization agreement and would not and could not have occurred *but for the agreement*. The Trust Company, as a party to the agreement, cannot deny this fact. The agreement, as the court says in the excerpt above quoted, was the "primary cause," the foreclosure sale the "object and effect" of the scheme, and the exchange of stock the "means" employed. Therefore, it seems plain and clear that if any liability was created on the part of the Southern Company by the exchange of stocks (which was the "transfer of the equity of creditors of the Belt Company"), such liability was *created* by the reorganization agreement; and it necessarily follows that the assertion of such liability is effectively barred by the covenant.

(e) Furthermore, the Court of Appeals says (p. 19), that if any equity or trust were created or conferred by or under the reorganization agreement, they were conferred, not by the just and lawful execution of the agreement, but "by an inequitable and fraudulent appropriation of the Trust Company's equity in the property to the benefit of its stockholder or stockholder." But it was the *exchange of stocks*, to which the Trust Company was a party, which created the so-called "inequitable and fraudulent appropriation of the Trust Company's equity in the property" and the exchange of stocks was only a *means*, as the Court of Appeals itself says in the above quoted excerpt, of carrying out the reorganization plan. The exchange of stocks could not have taken place but for the plan, and was directly caused by the plan. If the exchange of stocks resulted in the fraudulent diversion of assets to stockholders, then the covenant obviously operated to bar the assertion or enforcement of such right.

The obvious and clear meaning of the covenant, without the necessity of resorting to any refinement of reasoning, was to make it clear to all depositing security holders that if they took the benefits of the plan they thereby waived the assertion of any and all rights, liabilities, trusts, or obligations against the new company arising out of any dealings with the old companies or any of them.

V.

The mortgage indebtedness of the Belt Company was $1,000,000. It was sold at foreclosure sale for $1,000,000, which the Master found was the fair market value at that time. Under these circumstances, the Trust Company, as a creditor of the Belt Company, has not been injured and has no right to complain.

(a) The findings of the master in respect to the value of the Belt property at the time of the foreclosure sale, which was more than a year after the exchange of stocks had taken place, will be found in the record (pp. 990-991). In substance, the master found that there was no *direct* testimony showing the value of the properties involved in the reorganization plan at the time of or prior to the foreclosure of the mortgage liens thereon; that there had been introduced considerable testimony tending to show that all the roads forming the Belt system were extravagantly built and were bonded largely in excess of their actual cost; that the considerations paid at the foreclosure sales were large and sufficient, being approximately the full amount of the bonded indebtedness upon the railroads foreclosed; that there was no proof in the record to show that the Belt properties sold under the mortgage foreclosure were worth anything *in excess* of what they brought at the sale, and, in the absence of such proof, the master specifically found that the amount for which they were respectively sold was their *fair market value at that time;* and that there was nothing in the record to show that the reorganization scheme in any way deprived the unsecured creditors of any rights they would otherwise have had, in case such scheme had never been consummated.

It is conceded that the mortgage indebtedness of the Belt Company was $1,000,000, and that it was sold at foreclosure sale for that amount.

There was no *direct* testimony of the value of the Belt property. No witness, qualified as an expert, gave his opinion as to the value of the property as an entirety. Such testimony would have been of little value, since railroad property is ordinarily valued (*Smythe* v. *Ames*, 169 U. S., 466, 547) by ascertaining (a) the cost of construction; (b) the cost of reproduction; (c) the

market value of outstanding stocks and bonds, and (d) the value reached by capitalizing the net earnings.

It is apparent from the record that the master had before him ample evidence upon *all* of these questions, although such evidence is not here to be reviewed. At page 990, the master says:

> There has been produced in this cause considerable testimony tending to show that all the roads forming the Belt system were extravagantly built and were bonded in excess of the actual cost.

Here was evidence as to the *cost of the road*, which, in view of its newness, would be approximately the cost of its reproduction.

It is apparent that the master had before him a very large amount of testimony as to the *market value of the stocks and bonds* of the Belt Company since that question was involved in the accounting feature of the case. (Rec. 800-833.)

There was also ample testimony before the master as to the financial operation of the Belt Company and its *net earnings*, if any, since one of the issues in the accounting case was whether the Trust Company did not, while insolvent, pay dividends in 1893, 1894 and 1897. (Rec. 834.)

It is submitted, therefore, that the record affirmatively shows that there was testimony before the master as to *all* the bases for fixing the value of railroad property, and with this evidence before him, the master finds (Rec. 990), in speaking of the amount bid at the foreclosure sales, that:

> The considerations paid for such properties were *large and sufficient*, being approximately the *full amount of the bonded indebtedness* upon each railroad foreclosed.

It is evident that the master's finding that the prices paid at the foreclosure sales were ample was not merely based on the amount for which the properties were sold, *but upon the testimony in the record directed to the recognized elements for valuing railroad property.*

The master finds (Rec. 991):

> 5. If respondent's contention is correct to the effect that there was a consolidation, *de facto*, by which the intervenor became liable for the Belt indebtedness, still there is no proof in the record to show that the Belt properties, sold under the mortgage foreclosures, were worth anything in excess of what they brought at the sale; and in the absence of such proofs, *the master finds that the amounts, for which they were respectively sold, was and is their fair market value at that time.*

The master was doubtful whether the properties were worth as *much* as the amount of the bonded indebtedness. There was considerable testimony, as he states, that they were worth *less* than their bonded indebtedness. There was no testimony that they were worth *more*. In order to be on the safe side, and *giving to the Trust Company the benefit of any doubt*, he finds that the fair market value of the Belt property was the amount for which it sold at foreclosure sale, to-wit,—$1,000,000.

The master undoubtedly had in mind the rule that the stockholders should not preserve an interest in the property to which the creditors had a prior right, *and it was therefore, his purpose to ascertain, as a question of fact, if any value of Belt property was being derived from its unsecured creditors.*

This is apparent because he says (Rec. 991):

> It was competent for the bondholders, in furtherance of their own business interests, to use the stocks and bonds of the new company as they saw fit, *provided that it is not shown that in so doing it was a part of their scheme to give something of value to the stockholders that should have gone to the creditors.*

The master was also obviously anxious to ascertain if a reorganization plan had operated to the detriment or disadvantage of any of the unsecured creditors of the Belt Company, and his conclusion was that it had *not*. This is apparent from his finding (Rec. 991):

> It is not shown in the record that the reorganization scheme *in any way* deprived the unsecured creditors of any rights they would otherwise have had *in case such scheme had never been consummated.*

It should be constantly borne in mind that *no exceptions* were taken by the Trust Company to these findings of the master, and that such findings were based upon testimony which was not brought to the Court of Appeals. It is also to be borne in mind that the valuation made by the master in this "adversary proceeding," as that expression is used in the Boyd case, was *at the time of the foreclosure sale of the Belt properties*, which was nearly *two years* after the foreclosure of the Gulf property and more than *one year* after the distribution of the securities of the Southern had taken place. Whatever increased value could arise from the *reorganized system*, as distinguished from the aggregate value of all the roads as separate units, had already taken place. The Trust Company had had an opportunity to litigate, and had litigated in this action, the value of the Belt property at the time of the foreclosure sale, and the master's finding, to which no exception was taken, should, therefore, be taken as coming within the rule stated in the *Boyd* case as follows:

> In saying that there was nothing for unsecured creditors, the argument assumes the very fact which the law contemplated was to be tested by *adversary proceeding*, in which it would have been to the interest of the stockholders to interpose every valid defense.

(b) If mortgaged property is sold for the amount of the mortgage, which is its *fair market value*, how can creditors be injured, and what ground is there for complaint, whether the sale be the result of a reorganization plan or not? In such a case, what difference does it make whether the former stockholders of the company, whose stock is practically valueless because the property is mortgaged to its full value, receive stock in the new company which represents practically no value or interest in the mortgaged property for the same reason? If the Belt Company had conveyed its property to the Southern Company in consideration of the cancellation of its mortgage and without foreclosure, the result would have been the same.

The enforcement of the mortgage of the Belt Company left nothing available to general creditors. It is true that the stockholders of the Belt Company received stock of the Southern Com-

pany which had a value, but that value arose from the fact that it represented property of *other companies than the Belt Company* and the right to participate in the prospective earnings of such other companies.

Surely a reorganization cannot be said to *create* rights in favor of creditors which did not exist before, or to give value to a creditor's claim which was *valueless* before. The claim of the Trust Company, even after the consummation of the reorganization plan and at the time of the foreclosure sale of the Belt property, was *without commercial value* for the reason that it was against a company whose assets were charged with a lien to secure an indebtedness which exactly equalled the fair market value of the property.

After the foreclosure a startling transformation has taken place since, according to the Court of Appeals, the claim is then worth dollar for dollar, simply because the mortgagee has foreclosed his lien, which is conceded to be a valid one, and the property has been sold for its fair market value, which is the exact amount of the mortgage indebtedness.

The purpose of the law against fraudulent conveyances is to *preserve* the rights of a creditor against the debtor's property, but the effect of the decision of the Court of Appeals in this case is not to preserve a right which existed, but to *create* a right where none existed before.

Where is the *equity* in the Belt property which warrants the Court of Appeals in imposing upon the Southern Company a judgment for $700,000? This judgment, to be valid, must represent an equity in the Belt property which the old stockholders of the Belt Company preserved for themselves, but the record demonstrates that no such equity existed.

(c) It is respectfully submitted that the Court of Appeals is in error when it says (Opinion, p. 12):

> But the crucial issue here was not what the fair market value of the property was, nor was it how much more the mortgaged property was worth than the amount of the mortgage.

It is our contention that this is not only the crucial issue, but the *whole issue*. If it be once established in an adversary proceeding that the fair market value of a property, which has already become a part and parcel of a reorganized system against which stocks and bonds have already been issued, does not exceed the amount of its valid mortgage indebtedness, then no equity to which creditors are entitled to resort has been diverted to stockholders, *and it makes no difference what stocks or bonds have been previously issued by the reorganized system.* As a stream cannot rise higher than its source, so the mere issue of securities cannot add to the *actual value* of property.

The Court of Appeals says (Opinion, p. 12) that the real issue was:

> What was the equitable interest of the creditors in the mortgaged property of the Belt Company worth during the execution of the scheme and immediately after the foreclosure sale?

What equitable interest available to creditors could there have been, if it be conceded that the fair market value of the Belt property at the time of the foreclosure sale did not exceed the mortgage indebtedness? The Court of Appeals quotes from the Boyd case to the effect that:

> If the *value* of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value whether it was present or prospective, for dividends or only for purposes of control.

Concede this and yet the question reverts to "the value of the road." The issuance of stock cannot *create* value. The value of the stock depends upon the *value of the road*. The value of the road is not dependent upon the amount or par value of stock issued.

(d) We submit that the real issue is tersely and accurately stated by the Court of Appeals for the Sixth Circuit in *Wenger* v. *Railroad Company*, 114 Fed., 34, as follows:

> To the extent that the property is worth something more than the mortgages the general creditors are interested in

any subsequent distribution, but beyond that their interest does not extend.

The sole question is: had the railway property, as it existed at the time of foreclosure, a greater value than the mortgage indebtedness? And that such value existed is not averred.

The court in the Monon case, 103 Fed., 130, in speaking of the rights of creditors, said:

What are their rights? Manifestly to have any surplus of value in the property or in its proceeds over and above the mortgage debts applied to the payment of their demands.

The *Boyd* case is not in conflict with this contention. In that case, there had been no "adversary proceeding" to determine the value of the property as there has been in this case. There, there was a "distinct recital" in the plan itself that the property to be purchased was agreed to be "of the full value of $345,000,000." This was an admission by the company itself and *prima facie* established the value. The strong intimation in the opinion is that if there had been an adjudication, binding upon the claimant, that the fair value of the property did not exceed its mortgage indebtedness, and that it had been sold at forced sale for the full value, there would have been no equity on which the claims of creditors could operate, and hence there could be no recovery by an unsecured creditor. In fact, the court says:

If their (the old stockholders') stock is worthless, he (the creditor) gets nothing.

(e) But the Court of Appeals points to the fact that the old stockholders of the Belt Company received $1,187,500 of the preferred stock and $3,562,500 par value of the common stock of the *Southern Company* in exchange for the stock of the Belt Company, and by a process of reasoning reaches the conclusion that the *Southern Company*, therefore, paid in value at least $475,000 for the equitable interest of the stockholders of the Belt Company. (Opinion, p. 15.)

But it must be remembered that the stock of the Southern Company represented *six* companies having a total bonded in-

debtedness of $29,685,000, of which the Belt Company with its bonded indebtedness of $1,000,000 was three and one-third per cent. It is quite possible, and, in the light of the finding of the master as to the value of the Belt property, practically conclusive that whatever value attached to the stock of the Southern Company which was received by the Belt stockholders was derived from the five companies other than the Belt Company. At the time of the issue of this Southern stock, the Southern Company was the owner of the stocks and bonds of the Belt Company, but not of its physical property. As the value of the physical property of the Belt Company did not exceed its mortgage indebtedness, its stocks and bonds held by the Southern Company could not have exceeded that value.

It is not a question of the *par value* of the stocks and bonds. (*Knoxville Water Company* v. *Knoxville*, 202 U. S. 1; *Smythe* v. *Ames*, 169 U. S., 466, 547; *Missouri, K & T. Railway Company* v. *Love*, 177 Fed., 493.) The market value of stocks and bonds is sometimes used as a *means* of arriving at the actual value of railroad property, but once the actual value is established, *such value is controlling*. It is submitted, therefore, that the finding of the master in respect to the value of the Belt property is conclusive against the assertion of any claim by the Trust Company in this case.

(f) Furthermore, the Court of Appeals (Opinion, p. 13), as before stated, reaches the conclusion from a consideration of the stocks and bonds of the Southern Company issued in exchange for the stock of the Belt Company that there was an equity in the Belt property over and above its mortgage indebtedness of "at least $475,000." It is *conceded* (Opinion, p. 19), that the reorganization committee *actually expended* $1,164,172.50 in the payment of floating debts of the companies involved in the reorganization. Nowhere in the master's report (Rec. 999) is it stated *what part of the floating indebtedness so paid were debts of the Belt Company*. When the committee had paid the debts of the Belt Company to an amount in excess of $475,000, then upon the court's own theory, what equity was there from which the Trust Company's claim may be satisfied?

VI.

A resulting trust was created in favor of the railway companies paying for the properties deeded to the Central Company, and this equitable interest passed under the after-acquired property clauses of their mortgages. The Central Company acquired the properties subject to this trust, and the interest of its stockholders was likewise subject thereto. The Trust Company acquired the stock of the Central Company with a knowledge of these facts, and its equities, therefore, are subordinate to those of the Southern Company.

The decision of the Court of Appeals, on this proposition, it is submitted, is in conflict with decisions of courts of appeal of other circuits and with decisions of this court.

An implied or resulting trust arises from the circumstance of payment alone. It results in this case because the Gulf Company, the Belt Company and the Air Line paid the consideration for the properties, the legal title being taken in the name of the Central Company. (*Osborn* v. *Perkins,* 122 Fed., 127, 131; *Lauter* v. *Trust Co.,* 85 Fed., 894-903; *Condit* v. *Maxwell,* 142 Mo., 266; *Sanford* v. *Loan Society,* 80 Fed., 54; *Wade* v. *Sewell,* 56 Fed., 129; *Ducie* v. *Ford,* 138 U. S., 587; *Albright* v. *Oyster,* 140 U. S., 493.) The payments were presumably made from the proceeds of bonds, since the properties were constructed from money realized from the sale of their bonds (Rec., 851).

It is conceded by the Court of Appeals in its opinion (201 Fed., 827), that a trust resulted in favor of the railway companies, and that the lands were appurtenant to the railroads, and that the terms of the after-acquired clauses of their mortgages were broad enough to include them. The court says:

> Conceding that the property was appurtenant to the railroad and that the terms of the after-acquired clauses were broad enough to include it, how can this claim of the Southern Company be sustained?

The court then proceeds to state the well-recognized and conceded principle that the mortgagee, by virtue of an after-acquired property clause, takes the property subject to junior liens, encum-

brances and equities under which the property comes to the mortgagor. Then follows a statement of the circumstances which, in the opinion of the Court of Appeals, operates to defeat the equity of the Southern Company as follows:

> In the case in hand, the Central Company acquired the property here in dispute for its liability to pay its stockholders the par value of its stock and *it held the property in trust to secure the payment to its stockholders of that liability.* The mortgagees under the railroad mortgages and the Southern Company, the purchaser thereunder, knew these facts. They parted with no value on account of this property and a court of conscience may not permit them to deprive the stockholders of the Central Company, who have really paid for it, of the trust property which the Central Company holds to reimburse them unless the court first requires them to pay to the holders of the stock its actual value.

The court adds, page 828 of the opinion:

> The equity of the stockholders as against the Southern Company which took whatever it has with full notice of all the facts in this case, is the same that it would have been if the liability of the Central Company, now represented by its stock for the purchase price of the property, *had been represented by its promissory notes and a mortgage upon this land to secure them* and they had been pledged by their owners to secure their debt to the Trust Company.

If the properties of the Central Company had been taken in the name of an *individual*, instead of a corporation, the consideration therefor being paid by the railway companies, no one would deny that the after-acquired property clauses of the mortgages would immediately attach to them, subject to any liens or claims for unpaid purchase money. Why does the same result not follow when the titles were taken in the name of the Central Company, the purposes of the transaction remaining the same, the only difference being in the one case the legal titles are vested in an *individual*, and in the other case in a *corporation?* What is the magic surrounding the employment of a corporation for holding the legal title which so alters the situation that after-acquired property clauses of the mortgages become inoperative?

It is submitted that the courts have never before made such

a distinction. Where the properties are bought with the funds of the mortgagor for its purposes, it is universally held that the after-acquired property clauses attach immediately, *regardless of the circumstance that the legal title may be vested in an individual or in a corporation.*

The decision of the Court of Appeals is in *direct conflict* with the case of *Guaranty Trust Co.* v. *Atlantic, etc. R. Co.*, 138 Fed. 517, United States Circuit Court of Appeals, Third Circuit, which sustains our position to the fullest extent.

The facts are as follows: The Atlantic Company had given a mortgage upon all its property existing and to be acquired to the Guaranty Trust Company to secure an issue of 500 bonds of $1,000 each. It afterwards used a portion of the proceeds from these bonds to purchase the property of the Asbury Park & Belmar Street Railway Company from a bondholders' committee which had purchased it at foreclosure sale. *Instead of taking the property of this company in its own name, it determined to organize a new corporation to take it over.* Accordingly, the Asbury Park & Seagirt Railroad Company was organized, which took over the property, *issuing all its capital stock to the Atlantic Company,* and immediately executing a lease of all the property to the Atlantic Company for 99 years. Later, *the Atlantic Company pledged this stock to the Guaranty Trust Company* to secure a loan of $100,000. In a sale under foreclosure of the mortgage mentioned above given to the Guaranty Trust Company as trustee, it was contended by the Trust Company, and held by the lower court, that its individual lien upon the property of the Asbury Park & Seagirt Railroad Company acquired through the pledge of the capital stock was superior to the lien of the mortgage to secure bondholders of which it was trustee. Upon this point, the lower court was *reversed* upon appeal by intervening bondholders. Gray, Circuit Judge, writing the opinion, said, p. 526:

> As shown in the opinion of the court below, all beneficial interest and ownership in the franchises and property of the Belmar Company, were purchased by and resided in the defendant company, the bare legal title being held by the Asbury Park & Seagirt Railroad Company, as trustee, for the benefit and purposes of the defendant company, which had

paid the entire purchase price, and which remained the real equitable owner. The mortgage of July 1, 1896, both expressly and impliedly, covered equitable interests in after-acquired property appurtenant to or connected with the line of railroad controlled or operated by it. As soon as this equitable interest and ownership in the Belmar property was acquired, as hereinbefore described, by the defendant company, the lien of its mortgage attached itself thereto and remained upon it, both before and after the legal title had been placed in the Asbury Park & Seagirt Company. *Toledo, Delphos, etc. Railroad* v. *Hamilton*, 134 U. S., 296; *Central Trust Co.* v. *Kneeland*, 138 U. S., 414; *Bear Lake Irrigation Co.* v. *Garland*, 164 U. S., 1, 15. To hold that this were not so, *would be to work a fraud upon the holders of these bonds*, who were notified in the bonds themselves, and the declaration is recited in the mortgage, that they were secured by a mortgage conveying to the trustee (the complainant company) "all the certain railroad and other property, real and personal, and franchises of said railroad company, whether now owned or hereafter acquired by it."

The court further says, p. 527:

As we have seen, the court below, although holding that the real beneficial ownership of and in the franchises and property of the Belmar Company, had been acquired in the manner hereinbefore stated, as an addition to and extension of the line of the said defendant company, and that in consequence, this equitable right and ownership, as well as the legal title in the capital stock of the said Seagirt Company, came under the lien of the mortgage in suit, yet held *that the complainant company, by its holding the pledge of all of said stock, under the circumstances as disclosed in this record, had, in its individual capacity, a superior equity to that of the mortgage given to it and held in trust for the bondholders.*
* * *

In this, we cannot agree. *We do not think that the only way by which the lien of the mortgage upon this equitable ownership of the defendant company "can be enforced is by substituting for the railroad property itself that which fully represents it, namely, the capital stock of and the lease made by the new corporation." This ignores altogether the lien of the mortgage upon the equitable ownership itself. The capital stock held by the defendant company and thus pledged, represented the bare legal title of the property, whose full*

and entire beneficial ownership prior to the conveyance of the legal title to the Seagirt Company, was in the defendant company, and came, as we have seen, under the lien of the mortgage. On the transfer of the bare legal title to the Seagirt Company, this equitable interest in the property *remained subject to the lien of the mortgage,* and those who held certificates for any or all of the capital stock held subject to such lien. * * *

In the case before us, the defendant company, as the owner of all the capital stock of the Seagirt Company, may be estopped to assert a legal or equitable right in itself, as against its pledgee of said stock. *The controversy here, however, is not, in this respect, between the defendant company and the pledgee of this stock. It is between the pledgee of this stock and the creditors of the defendant company, who hold, by reason of the mortgage in suit, a lien upon the whole beneficial and equitable ownership of the defendant company in the line of railway acquired by it in the manner above described.* If the defendant company had sold a portion of this stock, surely the lien of this mortgage so held in trust for the bondholders, would not have been measurably misplaced by reason of lack of notice to the transferee of the stock, and it is difficult to understand how a pledgee of such stock can be in any different or better position than such a purchaser.

This equitable ownership, being the real and beneficial ownership, and subject to the lien of the mortgage in suit, may be sold under the foreclosure decree, and inasmuch as the Seagirt Company holds the mere naked legal title in trust for the equitable owner, it may be a question whether, as a passive trust, it will not be considered as executed, and the legal title thus pass with the equitable; or it may be a matter for consideration, as to whether any, or what, further proceedings may be necessary to perfect and protect the title of the purchaser. *However this may be, no rights were conferred by the pledge of the stock of the Seagirt Company, which were superior to, or could interfere with, the mortgage lien subsisting upon this plenary equitable title for the benefit of the bondholders under the mortgage.*

The decision of the Court of Appeals is also in conflict with the case of *New England Water Works Company* v. *Farmers' Loan & Trust Company*, 136 Fed. 521, Court of Appeals, Seventh Circuit (petition for writ of *certiorari* denied, 197 U. S. 622).

The Water Works Company executed a mortgage upon its plant containing an after-acquired property clause. The title to the property which it was claimed came within the scope of this clause was taken in the name of the *Boston Company*, which executed a mortgage upon the property. It was held that the property standing in the name of the Boston Company came under the after-acquired property clause of the mortgage of the Water Works Company notwithstanding the mortgage of the Boston Company. The court held that the after-acquired property clause attached *regardless of the form which the* transaction might take, saying:

> Here, then, in a sentence is the whole case: A mortgage on a necessarily expanding water works system—looking forward as well as to the present, and contemplating that the new property, as fast as created, shall be drawn under the mortgage; a requirement that new property be created, constituting, in connection with the old property removed, the mouth and throat of the whole enterprise; and, finally, the actual creation of such new property, having no function other than to act as mouth and throat for the old. Can anyone doubt, that under such circumstances the new property, *whatever may be the legal form given to it*, is equitably but after-acquired property within the meaning of the mortgage? Does not such a case, on its physical aspects alone, constitute a case of after-acquired property?

In *Farmers' Loan & Trust Company* v. *Denver Railroad Company*, 126 Fed. 46, Court of Appeals, Eighth Circuit, it was held that the after-acquired property clause of the mortgage attached to the real estate taken in the name of the Jefferson Investment Company, a corporation formed for the purpose of holding the title to the property. It may be assumed that the capital stock of the company was owned by the mortgagor or in its interest, although that circumstance was not deemed by the court to be of sufficient importance to require any statement concerning it whatsoever. Why was it not true that the Jefferson Investment Company acquired the property held by it "for its liability to pay its stockholders the par value of its stock," and why did it not hold "the property in trust to secure the payment to its stockholders of that liability," so as to defeat the after-acquired property

clause of the mortgage, as is said by the court in its opinion in this case? Why was not the situation the same as it would have been if the liability of the Jefferson Company to its stockholders "had been represented by its promissory notes and a mortgage upon this land," so as to create an equity superior to the mortgage?

The same may be said of the facts presented in *Wade* v. *Chicago Railroad Company,* 149 U. S. 327-341. There the title to the property, which was held to be subject to the after-acquired property clause of the mortgage, was taken in the name of the *Empire Construction Company* and the court said:

> The after-acquired clause of the mortgage of the Chicago, Springfield & St. Louis Railroad Company under the decisions of this court covers all acquisitions made to the property either *by the construction company or others acquiring rights under it.*

The Empire Construction Company had conveyed its rights, including the real estate in question, to Cooley & Co. and that firm in turn had conveyed them to certain newly organized companies, but it was held that even these conveyances did not defeat the operation of the after-acquired property clause of the mortgage.

If the Central Company had made a conveyance of its physical property to the Trust Company, would that have defeated the lien of the after-acquired property clause of the mortgage? Certainly not, since the Trust Company would have taken the conveyance with notice of the rights of the trustee in the mortgage.

In *Central Trust Company* v. *Kneeland,* 138 U. S. 414-424 property which was taken in the name of the *Toledo & Grand Rapids Railroad Company* passed under the after-acquired property clause of the Toledo-Delphos & Burlington Railroad Company.

In *Augusta Railroad Company,* v. *Kittel,* 52 Fed. 63, it was held that the after-acquired property clause of a mortgage of a railroad company covered the equitable title to certain lands, although the legal title was in the United States and also in the State of Florida.

The views entertained by the Court of Appeals in this case of the relationship between the corporation and its stockholders are most extraordinary. Broadly stated, the court holds, as we read the opinion, that a corporation holds its property in trust for its stockholders, and that this trust relation is sufficient to defeat the operation of the after-acquired property clause of a mortgage; and that the obligation of a corporation to its stockholders in respect to its property is substantially the same as it would be if the stockholders, in lieu of the stock, held the notes of the corporation secured by a mortgage on its property.

But stockholders possess no such rights. They possess a right to participate, according to the amount of their stock, in the surplus profits of the corporation on a division, and ultimately on its dissolution in the assets remaining after payment of its debts. (Cook on Corporations, Sec. 12.)

Stockholders have no lien or claim against property of the company until all of the obligations, liens, claims, and equities against the company and its property have first been discharged in full.

In the case under consideration, the Central Company took the title to the properties *subject to the resulting trust in favor of the mortgagor companies.* The stock of the Central Company only represented a right to participate in the profits of the concern and in the distribution of its property *subject to this trust.*

What was the situation in its entirety? The Belt Company, taking it for illustration, needed certain terminal properties in Kansas City *for its own use.* It proceeded to purchase such properties indirectly through the Central Company, paying the consideration therefor and taking possession of the property and using it as though it were its own. It employed the device of placing the title to the property in the Central Company under the mistaken idea (*McGourkey* v. *Toledo Railroad Company*, 146 U. S. 536-566), that the lien of the mortgage would not attach to it, and that the property could be sold, if need be, free from its lien.

If the title had been placed in the name of an individual instead of a corporation, no question would have arisen. But it

was thought a corporation would be more convenient. The Central Company issued capital stock to the Belt Company in an amount corresponding more or less accurately with the purchase price of each piece of property as each sale consummated. This stock was a mere memorandum or evidence of the amount which each company from time to time had invested in the properties held by the Central Company. The Trust Company knew all about the transactions, as its officers were the officers of the Central Company, as well as of the Belt Company, and the books of the Central Company were kept in the office of the Trust Company. The railroad of the Belt Company was built with the proceeds of its bonds (Rec. 851). The bondholders were advised of this through the terms of the mortgage and they had a right to assume that as the mortgaged property grew it would come under the after-acquired property clause. We think the Court of Appeals is mistaken in saying (201 Fed. 827) that the mortgagee "parted with no value on account of this property," since it is reasonably certain that it was the proceeds of the bonds of the Belt Company, the Gulf Company and the Air Line, respectively, which furnished the consideration for the properties purchased for them in the name of the Central Company.

It is the particular province of a court of equity to look through a transaction to the substance of it, and to disregard the form or appearance it may take, as was done in the McGourkey case, *supra,* where the court said, in speaking of a complicated arrangement for the leasing of equipment to a railway company through the issue of car trust certificates:

> In fine, we are of the opinion that this transaction should be adjudged to be in law what it appears to be in fact, a purchase by the railroad of the rolling stock in question, and that the device of car trust certificates was inoperative either to vest the legal title in McGourkey *or to prevent the lien of the mortgage from attaching to it upon its delivery to the road.*
>
> *Smith* v. *Moore,* 199 Fed,. 690;
> *Linn Timber Co.* v. *United States,* 196 Fed., 593.

Let us take, for illustration, the case of the Belt Company with respect to any one of the pieces of property purchased for

it with its funds, the title being taken in the name of the Central Company and the capital stock of the Central Company issued to the Belt Company in an amount corresponding to the consideration paid. Is there any question that while the *legal title* was in the name of the Central Company the *equitable title* was in the Belt Company? We think not. Did the fact that the Belt Company accepted the stock of the Central Company operate to defeat the trust? On the contrary, the position of the bondholders was *strengthened. The Belt Company then possessed every interest in the property which it is possible for it to possess* in a court of equity. It was fortified with both the equitable title to the property itself and the stock of the company representing the property. It was so understood by the parties at the time and in the correspondence, record and books of the companies it is referred to as the property of the Belt Company, which the Central Company holds in trust for it.

Under these circumstances there can be no question that *the Belt Company's interest in this property passed to the trustee under its mortgage by virtue of the after-acquired property clause.* It was appurtenant to the railroad as the master found and as the Court of Appeals assumes. It was presumably paid for with the proceeds of the bonds and bondholders had a right to expect that the security of their mortgage would be augmented correspondingly.

The lien of the mortgage having attached to it, it was obviously impossibe to *defeat* or *dislodge* that lien by any transfer of stock of the Belt Company of by any act of the Belt Company whatsoever. The equitable title had passed beyond its reach and was securely vested in the trustee for the bondholders. Particularly is this so where the Trust Company cannot claim to be in the attitude of a *bona fide* holder of the stock. Not only was it conversant with all the transactions as above stated, but it was a trustee in the mortgages of the Belt Company, Gulf Company and Air Line. It controlled the affairs of the Belt Company to such an extent that it was able to strip it of all of its portable property when the insolvency of the Belt Company made it apparent that its control over the Belt Company would shortly cease. Moreover,

the Trust Company cannot claim that any of its money went into the purchase of these properties. The Trust Company in its answer (Rec. 137) states that the Gulf Company and the Belt Company "are in equity the *beneficial owners* of all of the property of the Central Improvement Company." They knew this at all times and cannot be heard to say that this beneficial interest did not pass to the trustee under the mortgages. The case of *Watson* v. *Bonfils,* 116 Fed. 157, is not controlling. Had there been involved in that case an after-acquired property mortgage, the equitable title would undoubtedly have passed under it. There is not in this case any express trust which conflicts with the resulting trust arising from the payment by the mortgagor companies of the purchase price of the properties involved.

Our views are strengthened by the language of the Court of Appeals itself, page 826, where it states that the Trust Company as the holder of the stock of the Central Company acquired an equitable interest in the *property* itself, saying:

> The Trust Company had such an equitable interest in the *property* of the Central Company by virtue of the pledge to it of 1,120 out of 1,407 shares of the stock of that company issued, that the Trust Company's appeal completely challenges the decree of the court with reference to *that property*.

If the possession of the Trust Company of this stock *as pledgee* gave to it *an equitable interest in the property itself,* why did not the *ownership* of the stock by the Belt Company give to it an equitable interest in the property itself which passed under the after-acquired property clause of its mortgage? And if this equitable interest did pass to the trustee, how could it ever have been afterwards divested from the trustee and reinvested in the Trust Company?

VII.

Even if it should be held that the Trust Company has a right of recovery, it should be limited to such equitable terms as in the opinion of the court should have been offered it at the time of the reorganization.

At the time of the reorganization there was a disputed claim as to the indebtedness of the Belt Company to the Trust Company. There was involved a very long accounting between the two companies covering a period of years. The Trust Company had controlled the Belt Company and its allied terminal companies during these years, and it was thought that its charges had been excessive, and that on a true accounting it would appear that instead of the Belt Company being indebted to the Trust Company the contrary was the fact. *Both* parties regarded such accounting as necessary. It appears from the stipulation dated November 12th, 1901, (R. 1034), that prior to that time the receivers of the Belt Company had filed a crossbill against the Trust Company demanding an accounting, and it was agreed in the stipulation that *an accounting should be had* upon an amended crossbill or ancillary bill, and that the accounting should be expedited, and that when it was concluded, a judgment should be entered in favor of the Trust Company if it should be successful, or in favor of the Belt Company if that company should be successful.

The Trust Company in the stipulation was represented by Judge Francis M. Black, formerly Judge of the Supreme Court of Missouri and one of the ablest lawyers our county has produced. The ancillary bill was filed according to the stipulation, and the Trust Company answered setting up various defenses, including the statute of limitations. The proceeding thus begun did not reach a termination until June 25th, 1910, and then *for the first time* the state of accounts between the Belt Company and the Trust Company was judicially determined.

At the time of the reorganization it was not possible to have offered to the Trust Company equitable terms in income bonds or preferred stock *since no one knew whether the Trust Company was in fact a creditor or not.* Its debt was honestly disputed, and

neither the parties nor any court, in advance of an adjudication, could have prescribed fair or equitable terms.

Under these circumstances, should the Southern Company be *penalized* for failing to do what was obviously an impossibility? The Southern Company should not be penalized for its failure to make to the Trust Company a fair offer either at the time of the reorganization or at the time that its debt was first established in June, 1910. The same court which, for the first time adjudicated the state of accounts between the two companies, also adjudicated that there was no equity in the Belt property available to creditors, and hence there was no obligation to offer terms. In fact, the doctrine that an interest to stockholders can be preserved by the issuance to creditors on equitable terms of income bonds or preferred stock was first announced in the *Boyd* case in April, 1913.

It is respectfully submitted, therefore, in view of the circumstances, that if the Southern Company should be held liable in this action, it ought not in equity to be required to pay to the Trust Company the full amount of its debt with the accumulated interest. Should not the court under such circumstances prescribe such equitable terms as should have been offered at the time of the reorganization if the Trust Company's debt had been then liquidated? Does it not appeal to the conscience of the Chancellor to adjust the Trust Company's claim, in the event that its claim is deemed valid, to the position which it would occupy now, if such equitable terms had been offered then? As stated in our application, if the Trust Company had been given par in the preferred stock of the Southern Company at the time of the reorganization, it would have received $360,000 par value, the average price of which during the year 1913 was $33.75, aggregating $124,000. If you add to this sum the dividends that would have been paid on the stock, together with interest on the dividends, the aggregate amount would be approximately $225,000. Or if you take the present market value of the stock together with the dividends paid and interest on dividends, the amount would be approximately $300,000. The judgment sought to be enforced against the Southern Company is over $700,000, or $400,000 more than the Trust

Company would have realized if the rule of equitable terms in the *Boyd* case had been anticipated, and could have been carried out at the time of the reorganization.

The Southern Company has done nothing to forfeit its right to such equitable consideration. The Belt Company and its receiver not only had the legal right to have the account between the two companies sifted by the process of an accounting to ascertain if the Trust Company had abused its power in imposing unrighteous debts and obligations upon the Belt Company, but it was considered a duty so to do, and the court appointing the receiver approved. The situation was such that Judge Black believed there should be an accounting, and he stipulated to that effect. Not until October 22nd, 1912, was there any judicial determination that the Southern Company was in any way liable for the debt of the Belt Company, nor until December 2nd, 1913, was that decision reaffirmed by the Court of Appeals.

We think it would be a most unjust result if the Trust Company should be permitted to retain the enormous benefits which it received under the reorganization plan, and at the same time hold the Southern Company liable for its debt against the Belt Company. And the harshness and, as we think, the injustice of such a result would be greatly intensified if this court should hold, as did the Court of Appeals, that the doctrine of offering equitable terms to creditors, announced in the *Boyd* case should be disregarded, and the Trust Company should be permitted to recover a personal judgment in an amount exceeding by at least $400,000 what such equitable terms would have amounted to.

VIII.

There was no exception to the Master's report in the court below challenging the correctness of his finding that the Southern Company was not liable for the floating indebtedness of the Belt Company. The decision of the Court of Appeals that such finding can be reviewed in an appellate court in the absence of exceptions is in conflict with the decisions of the courts of appeal of other circuits and with the rulings of this court.

The Trust Company excepted to the *report* of the master (Rec. 1038), for the reason that,

> The master has in his report stated as follows: "That the Southern Company is not in any way liable for the floating indebtedness of the Belt Company;" whereas, the master in his report should have omitted reference to or recommendation concerning the question of the liability of the Southern Company for said floating indebtedness of the Belt Company for the following reasons:

The grounds specifically assigned were that that issue was not properly in the case for various reasons, but it was nowhere stated that the issue had been decided incorrectly.

The assignment of error in the Court of Appeals (201 Fed. 817) was that the court erred in *including* in said decree the finding that the Southern Company did not assume or agree to pay or become liable for the indebtedness owing by the Belt Company to the Trust Company.

It is not a case where the Trust Company "intended to present the question of the liability," but it is a case where the Trust Company intended *not* to present that question for decision. Its whole attitude was the strongest evidence of a desire to *escape* a determination of that question, and it framed its exceptions to the master's report and its assignment of error for that specific purpose. The Trust Company itself in its "Reply to Brief of Appellees Other than Cambria Steel Company," filed in the Court of Appeals, says, on page 4:

> The Trust Company regarded that question (the liability of the Southern Company) as out of the case.

It was the deliberate purpose of the Trust Company to avoid any exceptions to the master's report which would challenge the correctness of the master's findings on the liability issue.

It cannot be plausibly claimed that the exceptions filed in the court below by the Trust Company met the well established rule requiring definiteness and certainty so as to challenge the correctness of the ruling of the master on the liability issue. Aside from the fact that they were not *intended* to do so, they utterly failed to appraise the opposite party that it was called upon to meet this issue, nor did they advise either the master or the court that the Trust Company sought to controvert the master's finding in that regard. In *Sheffield Railway Company* v. *Gordon*, 151 U. S. 285, 290, this court points out that this degree of definiteness and certainty is required:

> Proper practice in equity requires that exceptions to the report of a master should point out specifically the errors upon which the party relies, not only that the opposite party may be apprised of what he has to meet but that the master may know in what particular his report is objectionable and may have an opportunity of correcting his errors or reconsidering his opinions.

To the same effect are:

Columbus Railroad Company, Appeals, 109 Fed. 117, 219;
Sanford v. *Embry*, 151 Fed. 977, 982;
Vol. II, Street on Federal Equity Practice, Sec. 1486;
Vol. II, Foster's Federal Practice, Sec. 315.

Under this state of the record it was not a question of the assignment of errors, or specifications of errors, or the power of the court to notice a plain error. *There would be nothing here to review even if the appellant at the time of taking its appeal has specifically assigned as error the ruling of the court upon the liability issue.*

Assignments of errors are directed to the action of the *lower court* and are not directed to the action of the master in his findings of fact or conclusions of law, which are not excepted to.

It is true, as this court says in its opinion (201 Fed., p. 818),

that an appeal in a suit in equity involves a trial *de novo* in the appellate court and entitles the appellant to a just decree, and it is also true, as the court says on the same page, that this court may consider a plain error not assigned when a failure to do so would result in a great injustice.

But a hearing in an appellate court in an equity case is a trial *de novo* of the *case before the court*, as it was presented to that court, and as that court passed upon it, but not of the case *before the master*, and the power of this court to notice a plain error means that it may consider and correct an error of the *lower court*, but not an error which may have been committed by the *master*. The power of the court to notice a plain error merely *supplies the omission of an assignment of error.*

What is before the lower court upon the coming in of the master's report in an equity case? The answer is plain, that the master's report is to be taken as correct by the court, as assented to by the parties, except in so far as matters of law and fact are properly excepted to by the parties.

In *Medsker* v. *Bonebrake*, 108 U. S., 66, 72, this court says, in speaking of the functions and duties of the lower court under these circumstances:

> The findings of the master are *prima facie* correct. Only such matters of law and of fact as are *brought before the court by exceptions* are to be considered, and the burden of sustaining the exceptions is on the objecting party.

If the only matters before the lower court are those portions of the master's report to which exceptions are filed, as this court says, and the court accepts and incorporates in its decree the unchallenged portions of the master's report, how can the lower court be convicted of error for so doing?

The Trust Company had its election to except to the correctness of the master's conclusions on the liability issue, and it concluded that it would not challenge that portion of the report, contenting itself with saying that that issue was not properly in the case. We contend that the conduct of the Trust Company in omitting to except to the report of the master precludes it from raising that question upon appeal, *and this would be true even if it had*

assigned this question as error in the most formal and solemn manner in taking its appeal.

The decision of the Court of Appeals is in conflict with the case of *Burns* v. *Rosenstein,* 135 U. S. 449. There it was duly assigned as error that the court below erred in acting upon the master's interpretation of certain articles of the partnership contract as a valid part of his report; in construing the partnership contract as requiring losses of capital to be borne by the partners in the same proportion in which the contract provided for the distribution of net profits, etc. It is to be noted here that the error complained of was *duly assigned,* which would at least have as great an effect as if the court on its own motion should undertake to notice a plain error. It was held, however, that these questions could not be raised by the appellant, for the reason that no exception had been taken to the report of the master in the court below, and the lower court could not be convicted of an error in basing the decree upon those portions of the master's report to which no exception had been taken. The court said:

> These questions are not open to appellants in this court. The decree below followed the report of the special master. And that report was based, in part, upon statements drawn from the books of the parties by the accountants selected by them respectively. Those statements contained the undisputed and disputed items in separate columns. The defendants did not file with the master or in court any exceptions to the report. If the statements by the accountants, or the report of the special master, were based upon any particular interpretation of the articles of partnership that was prejudicial to the defendants, it was their right to file exceptions to the report. The master was directed to report all issues of fact made by the pleadings, and take an account of the dealings and transactions between the parties, and all claims for damages arising out of said transactions. He could not intelligently discharge that duty without adopting some theory as to the scope and effect of the partnership agreement. If he went beyond the order of the reference, or if the account taken by him involved a misconception of the provisions of that agreement, the defendants should have brought those matters to the attention of the court by exceptions to the report. *Having failed to do this, they cannot in this court for the first time object that the master proceeded upon erroneous views as to the contract be-*

tween the parties. (Equity Rule 83; *Brockett* v. *Brockett,* 3 How. 692; *McMicken* v. *Perrin,* 18 How. 504, 506; *Story* v. *Livingston,* 13 Pet. 359, 366; *Medsker* v. *Bonebrake,* 108 U. S. 66, 71).

It is to be noted that the case just cited was an appeal in a suit of equity, and that it invoked a trial *de novo* in the appellate court, which, as the Court of Appeals well says, entitles the appellant to a just decree, and that this court, instead of being called upon to notice a plain error, had before it a proper assignment of error made at the time the appeal was taken as required by law.

In *Coghlan* v. *South Carolina Railroad Co.,* 142 U. S. 101, 115, with which we think the decision of the Court of Appeals is in conflict, error was *duly assigned* that the lower court did not include interest for three periods of six months each. The court refused to consider the question, saying:

> Having failed to except to the report upon the ground that it did not include them, we do not think that the appellant should be now heard to urge this as an objection to the final decree.

The decision of the Court of Appeals is also in conflict with the case of *Topliff* v. *Topliff,* 145 U. S. 156. There an assignment of error properly raised the question of the inadequacy of damages awarded, but as no exceptions upon this ground were made in the court below to the master's report, this court declined to consider the question, saying, page 173:

> Proper practice requires that objections to a master's report shall be taken in that court, that any errors discovered therein may be rectified by the court itself or by a reference to the master for a correction of his report without putting the parties to the delay and expense of an appeal to this court. *It would be manifestly unjust if this court after having affirmed the action of the court below in every other particular, should take up an error in a master's report which was not called to its attention and reverse the case upon that ground, when if exception had been duly taken the error could have been at once corrected.* There is nothing in this case to indicate that this point was ever made before the master, nor is it noticed in the eight exceptions taken to this first

report, which was set aside upon other grounds, or as already observed in the exceptions to his final report.

The decision of the Court of Appeals is also in conflict with two following decisions of courts of appeal of other circuits.

In *Provident Life & Trust Company* v. *Camden Railway Company*, Circuit Court of Appeals, Third Circuit, 177 Fed. 854, 859, the assignment of error properly made alleged that the principal sums evidenced by the bonds in question were not due and payable. It was held that although the error in the Court of Appeals was *properly assigned* (which would be at least equivalent to the action of the court in noticing a plain error), yet inasmuch as the particular complaint had not been presented to the lower court by the way of exceptions to the report of the master, the appellant could not be heard upon appeal. The court said:

> This was one of the matters specifically referred to the master to ascertain. The language of the order of reference in that respect has already been given. It will be recalled that he was "to ascertain and report what is now due and payable to the complainant, trustee, for principal and interest upon the two mortgages made to it by the defendant." Killion, although not entitled to be present and heard in view of the interlocutory decree standing against him, nevertheless attended before the master, was heard by him, and later was permitted to, and did, file exceptions to his report; but he did not except to the master's explicit finding that the principal and interest of the bonds were due. *Having failed to raise the question below, although given the opportunity, he ought not to be permitted to raise it for the first time on appeal,* and this irrespective of the fact of the decree *pro confesso* standing against him.

In *The City of New Orleans* v. *Fisher*, 91 Fed., 574, Circuit Court of Appeals, Fifth Circuit, it is held that questions concerning the correctness of the master's findings, which were not raised by proper exceptions to his report, could not be made the ground of assignments of error on the appeal. The court said, page 581, after setting out the *assignment of error*:

> The grounds stated in this assignment form no part of the exceptions filed to the master's report and it can hardly

be said that the judge below erred in this respect when his attention does not appear to have been called to it.

In *McMicken* v. *Perrin,* 18 How., 587, the court said:

> This court will *not* review a master's report upon objections taken here for the first time.

In Volume II, Street on Federal Equity Practice, Sec. 1476, it is said:

> As exceptions furnish an appropriate procedure for reviewing the master's report, so they supply the only means whereby defects of the kind now under consideration can be reached. Findings of the master on questions of fact are always binding where no exceptions are taken, or where they are improperly taken. Only such matters of *law* and of fact as are brought before the court by exceptions will be reviewed and the burden of sustaining the exceptions is on the objecting party.

Perhaps the best statement of the rule is contained in 17 Enc. Pl. & Prac., 1047, as follows:

> Upon the coming in of the master's report it will be received as true when no exception is taken thereto, and, if some exceptions are filed, the portions of the report not excepted to will be taken as correct, not only as regards the *principles* but as relates to the evidence upon which they are based. And of course exceptions to the report which are not presented upon the coming in of the report cannot be made on appeal.

The case under consideration furnishes an apt illustration of the necessity of the rule requiring exceptions to the findings of the master upon matters of *law* as well as upon matters of fact. The master's report comprised some five hundred pages, and contained a digest of thousands of pages of testimony and a consideration and determination of a multitude of legal propositions involved in this most complex and confusing litigation. Is the trial court expected to grope through this bewildering maze with a search warrant to find errors of which one or the other of the contending parties may complain? Should not the party dissatisfied with any particular finding of fact or conclusion of law be called upon to point it out to the court, and should not the court

be justified in assuming that such portions of the report as are not excepted to are acquiesced in by the contending parties. If one of the parties undertakes to file exceptions and to point out to the lower court his specific objections to the report and the court passes upon the exceptions filed. assuming, as he has a right to assume, that other portions of the report are acquiesced in, should not the parties upon appeal be confined to their exceptions thus taken in the lower court? If a party *purposely* and *intentionally* omits to except to a conclusion or finding of the master, should the lower court be required to grope through the master's report in order to pass upon the finding or conclusion against the *implied protest* of the interested party, and should an appellate court be at liberty to reverse the lower court if it fails so to do?

We do not believe that the case of *Sheffield Railway Company* v. *Gordon,* 151 U. S., 285, 293, was intended to modify the rule of the foregoing decisions of this court. There exceptions to the master's report had been filed. The court stated that there were *two difficulties in the way of considering the case upon these exceptions, first,* because the exceptions were too broad, and, *secondly,* because the master did not send up the entire evidence with his report, so that it was impossible to impeach his conclusions. It is true the Court says:

> It is true that if the report of the master is clearly erroneous in any particular, it is within the descretion of the court to correct the error, but we see no reason for exercising such discretion in this case.

The court had been speaking of the proper proceeding before the *master* and before the *lower court,* and it is quite probable that in the quotation above referred to the Court is speaking of the rule which should control the *lower court,* and not a rule which would be applicable in an appellate court. Particularly would this appear so in view of the fact that there is no reference to the line of authorities above referred to, holding in no uncertain terms, that no issue in a case heard before a master is presented in an appellate court, in the absence of an exception to the report pointing out the particular matter complained of, so that the master, the lower

court and opposing counsel may be advised in what particular the report is objectionable.

The ruling of the Court of Appeals works a great hardship in this case. The Belt Company and its receivers filed exceptions to the report of the master upon the issue of debt or no debt between the Belt Company and the Trust Company. The Southern Company and the Cambria Company also filed their exceptions (Rec. 1061). These exceptions were overruled by the lower court and the question of taking an appeal was then presented. The Trust Company's exceptions had only asserted that the master had erred in incorporating in his report any "reference to or recommendation concerning" the liability issue. Its assignment of error filed at the time of taking its appeal followed its exceptions to the master's report.

Under these circumstances the result of the Trust Company's appeal would necessarily be (a) either that the decree of the lower court holding that the Southern Company was not liable for the debt would be affirmed or (b) that that issue would be eliminated from the case. Under these circumstances, the Belt Company and its receiver, as well as the Southern Company and the Cambria Company, believing that the Trust Company, upon appeal, would be confined to the scope of its exceptions to the master's report and to its assignments of error, took no appeal upon the question of the existence or amount of indebtedness between the Belt Company and the Trust Company, or upon the other issues where the decision of the lower court was adverse to them. It was not until after the time for an appeal had elapsed that the Court of Appeals, in October, 1912, not only held that the liability issue could be considered by it, notwithstanding the state of the record, but also proceeded to decide that issue adversely to the petitioner. If it could have been anticipated that the liability issue would come before the Court of Appeals and be decided by it notwithstanding the condition of the record, the Belt Company and its receiver could then have taken their appeal from the accounting feature of the case, and could have had reviewed the findings of the master and the decree

of the lower court in that regard, with the possible result that the judgment involved herein might have been materially reduced, if not entirely eliminated, and the Southern Company and the Cambria Company could also have had reviewed the action of the lower court in overruling their exceptions.

Respectfully submitted,

SAMUEL UNTERMYER,

SAMUEL W. MOORE,

Solicitors for Petitioner.

No. [redacted].

2

Office Supreme Court, U. S.
FILED
APR 25 1914
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
PETITIONER,

VS.

GUARDIAN TRUST COMPANY, RESPONDENT.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
PETITIONER,

VS.

CENTRAL IMPROVEMENT COMPANY,
RESPONDENT.

BRIEF AND ARGUMENT OF GUARDIAN TRUST COMPANY IN OPPOSITION TO PETITION OF KANSAS CITY SOUTHERN RAILWAY COMPANY FOR CERTIORARI.

EDWARD P. GATES,
WALTER C. CLEPHANE,
Solicitors for Respondent.

GEO. H. ENGLISH, JR.,
Of Counsel.

IN THE

Supreme Court of the United States.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
PETITIONER,

VS.

GUARDIAN TRUST COMPANY, RESPONDENT.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
PETITIONER,

VS.

CENTRAL IMPROVEMENT COMPANY,
RESPONDENT.

BRIEF AND ARGUMENT OF GUARDIAN TRUST COMPANY IN OPPOSITION TO PETITION OF KANSAS CITY SOUTHERN RAILWAY COMPANY FOR CERTIORARI.

One single question is presented by the present petition, namely, the correctness of the decision of t' e Circuit Court of Appeals of the Eighth Circuit upon the point that the Southern Company is liable for the debt of the Belt Company to the Trust Company. The validity of the Belt debt and the extent of the relief awarded the Trust Company are not drawn in question.

The facts upon which rest the liability of the Southern Company for the debts of the Belt Company are so admirably stated in the two opinions of the Court of Appeals, that to repeat them would be a waste of the time of this Court. The accuracy of the statement of the facts by the Court of Appeals is not challenged by the petitioner.

In order, however, to put into contrast with the actual situation the elaborate argument of petitioner which suppresses or ignores the facts upon which the opinion turns, it is deemed proper to describe briefly and without detail the essential outline of the controlling issue.

The Southern Company was organized pursuant to a reorganization plan which included the Belt Company, the Gulf Company and the Dock Company. The Belt Company owned or controlled the Kansas City terminals; the Dock Company owned or controlled the terminals at the Gulf of Mexico; and the Gulf Company owned or controlled the main line.

The Trust Company owned stock and bonds of all these companies and also held a large amount of the floating debt of all three companies. The present controversy relates solely to the floating debt of the Belt held by the Trust Company.

The Gulf became insolvent in 1899 and that year the reorganization was undertaken.

The scheme of reorganization was intended to accomplish the result of bringing all three railroad properties into one successor corporation, which corporation was to be named the Kansas City Southern Railway Company, which should own the fee title to all the properties and have but one class of incumbrance secured upon them all. This result was to be effectuated primarily by the exchange of stocks and bonds of the constituent companies for the stocks and bonds of the new company upon ratios prescribed in the plan, with an additional amount of new securities to be sold to provide for cash requirements of the new company. And after the acquirement of the stocks and bonds, the fee title to the properties was to be acquired by foreclosure of the mortgages or otherwise. In the case of the Belt Company the old bonds were to be exchanged for new bonds of the successor company, so that for each Belt bond the bondholder was to receive one and one-third bonds of the new company and also 25% in par value of shares of the preferred stock in the new company. The Belt stockholders were to receive share for share in the stock of the new company, one-fourth of the new shares to be preferred stock and three-fourths common stock.

Provision was also made for the unsecured creditors of the three companies. THE PLAN CONTAINED THE PROVISION THAT ONE OF THE OBJECTS TO BE ATTAINED BY

ITS EXECUTION WAS THE PAYMENT OF THE FLOATING DEBT. It is by ignoring and suppressing this fact that any semblance of plausibility is given to the petitioner's argument.

The plan was carried out in its entirety, the new securities were exchanged for the old, and the fee title from the Gulf and Belt Companies was acquired by the Southern Company, by foreclosure of the mortgages which foreclosures were, of course, purely formal and nominal since substantially all the bonds and stocks had been deposited under the plan, *and the entire floating debt of all the constituent companies was paid by the Reorganization Committee or by the Southern Company with the exception of the Trust Company's debt of substantially* $360,000 *which was not paid and is now repudiated by the Southern Company.* (Rec. 798, 799, 1183)

The present litigation was begun in 1900 by a creditor's bill by the Cambria Company, which sought to enjoin the Trust Company's sale of the collateral which it held as security for its debt upon the plea that a true accounting between the Trust Company and the Belt Company would wipe out the Trust Company's debt and leave a balance in favor of the Belt Company to which together with the collateral the Cambria Company asserted it was entitled; the accounting sought was obtained and in various ways was protracted until the final decree of the Circuit Court in the summer of 1910. The result of the accounting was the establishment of the validity of the *Belt* Company's debt to the Trust Company and the correctness of that decree is not now and has never been challenged.

It will thus be seen that the plan of reorganization was a just, honest and proper one in that it made adequate and fair provision for bondholder, creditor and stockholder and contained an express assurance to the creditors that their debts would be paid. When the validity of the Belt Company's debt to the Trust Company was finally established and payment was repudiated by the Southern Company, the Circuit Court of Appeals held that the Trust Company was entitled to equitable relief against the Southern Company, and for the cogent reasons set forth in the two opinions it held that the measure of that relief was the same and the equitable rights of the Trust Company were identical with those of a creditor whose rights had been ignored by a reorganization scheme which protected the interests of the stockholder at the expense of the creditor.

Since the decision of the Boyd case by this court (228 U. S. 482), and in the line of uniform holdings of this court from its origin to the present time, there can be no doubt of the correctness of the decision of the Court of Appeals.

For the convenience of the Court we file herewith printed copies of the two opinions of the Circuit Court of Appeals bound together. These opinions must, of course, be read together. It is submitted that they answer conclusively the arguments advanced by counsel for the petitioner which were put forth fully and completely in the court below.

COMMENT UPON THE PROPRIETY OF THE ISSUE OF THE WRIT OF CERTIORARI.

This protracted litigation has received the most careful attention of the Circuit Court of Appeals, and has been the occasion for rendering four separate and carefully considered opinions of that court. Two injunctions have been issued by the Circuit Court enjoining the prosecution by the Trust Company of suits in the state courts wherein the Trust Company sought to obtain personal judgment against the Southern Company for the Belt debts. One of these was upon dependent bill in the present litigation and one was upon dependent bill in a proceeding connected therewith—the Belt foreclosure suit. Both of these injunctions came before the Court of Appeals and both of them involved the consideration of the general subject of the litigation. They are reported in 171 Fed. 43 and 146 Fed. 337 respectively. The appeal from the final decree of the Circuit Court was the subject of a carefully considered opinion by the Court of Appeals (201 Fed. 826), but with due regard to the possibility of its own error, and at the earnest insistence of counsel for the Southern Company, the court permitted an extended and complete re-argument of the case covering every point now raised in the present petition, and rendered its final opinion in the litigation on December 2nd, 1913.

The petitioner has thus had the fullest and fairest of hearings upon every possible feature of the case by one of the ablest of the Circuit Courts of Appeal.

In respect to the reasons put forth for granting the petition, comment may be made as follows:

I.

No grave and serious questions affecting the rights of the petitioner are involved.

The court will not grant the certiorari merely because the judgment is for a large amount of money, especially since it has not denied that if the petitioner owes anything it owes the full amount.

There is no assertion either by counsel for the respondent or by the Court of Appeals, in its opinion, that the reorganization plan was fraudulent; on the contrary, the plan is conceded to be honest and fair upon its face, and the Trust Company is held to be entitled to the relief of one defrauded because in the *execution* of the plan its debt was not paid. There is nothing either grave, serious or novel in this view, nor is the comment of counsel for petitioner justified where it is stated that the Trust Company is permitted to claim under and against the same instrument.

The position of counsel for the petitioner that the Trust Company by becoming a party to the plan consented to the diversion, ignores the plain provisions of the plan and the settled principles of the law. The plan entitled the Trust Company to receive new securities in exchange for its old, and both the plan itself and the general law required that the Trust Company's debt be also paid. It is not conceived how the Trust Company's right to demand payment of its debt is at all impaired by its receipt of the securities of the new company.

II.

There was no solemn covenant by the trust company that it would not hold the Southern Company for the debt of the Belt Company.

The clause of the reorganization plan set forth in counsel's brief, as is so clearly pointed out by the Court of Appeals, cannot apply to the barring of the equities of the Trust Company. The construction sought to be placed upon this clause by counsel would

lead to a preposterous conclusion; for its effect would be to subject the Trust Company to a different ruling and more onerous conditions than those which would cover every other stockholder and bondholder of the consolidated companies. Such a construction would require the Trust Company to renounce and waive a just claim of $370,000 against the Belt Company as a right to its being permitted as a stockholder and bondholder of all the companies to becoming a party to such a plan and agreement. No other stockholder or bondholder was required to undergo such a penalty which would have required it to contribute not only from its share of the corporate assets as a stockholder but from its private and independent property to the payment of the creditors of the corporation. Such a construction would be nothing but absurd.

III.

The decision of the Circuit Court of Appeals does not lead to alarming and disastrous consequences.

(a) The Master did not find that the value of the Belt properties did not exceed the amount received at foreclosure sale. The Master found there was no evidence whatever of the fair market value (Record, page 991) but the Circuit Court of Appeals found convincing evidence, which is not even criticised, that the value of such properties received by the Belt stockholders far exceeded the amount of the Trust Company's debt.

(b) The assumption of counsel for the petitioner that a fair offer to the Trust Company would have meant dollar for dollar in stock for its debt, and the appeal to this Court to permit it to make such an offer at the present time, is ridiculous in view of the fact that the reorganization plan made express provision for creditors, not that they should receive stock *but that they should be paid, and the Reorganization Committee and the Southern Company acknowledged their obligation under this plan and under the law to pay the creditors by paying all of them in full except the Trust Company.*

IV.

The rulings of the Court of Appeals are in no wise in conflict with the rulings either of the Circuit Court of Appeals in other circuits or with the rulings of this court; on the contrary such rulings are completely in accord with the decision of this court.

(a) As respects the rulings of the Circuit Court of Appeals in regard to the properties of the Central Company, it will be found that they are amply supported by reason and authority. But even if the decision of the Court of Appeals was erroneous on this point still this court would not review the case for such error for the reason that the error would be wholly immaterial in view of the other conclusions reached by the court. If it be conceded that the Southern Company is liable for the debt for which the stock of the Central Company was pledged, it would clearly be entitled to no relief until it paid the debt, and hence the question of the Central Company lands are not in issue.

The technical point that this court should review the case because of the form of the exception to the Master's report, ignores the broad grounds upon which the Court of Appeals put its decision,—that an appeal in equity entitles the appellant to a trial *de novo* and to a just decree; that as this court said in *Sheffield* v. *Gordon*, 151 U. S. 285, if the report of the Master is clearly erroneous in any particular, it is within the discretion of the court to correct the error. But this court will not, under the great power herein invoked, which it exercises sparingly and reluctantly, review a mere matter of practice.

V.

No grave and serious questions affecting generally the reorganization of insolvent quasi public corporations are involved.

Of all the eight questions propounded by counsel for the petitioner upon pages 14 and 15 of their petition, scarcely one is necessarily involved in the present issues; scarcely one is in anywise affected by the decision of the Court of Appeals. Substantially all of them relate to what are properly matters of private contract between the parties interested. The decision of this Court in this case could not authoritatively answer any of these questions. For this court to attempt to answer these questions in the form in which they are put, would require it to go far beyond the mere decision of this case and perhaps to determine what contracts

people should or should not make, and necessitate its passing upon questions not in issue in this case at all.

It is true, as counsel state, that a number of *quasi* public corporations are in receivership in the Eighth Circuit. It is not true, however, that the questions involved in the present case are of such a character that this court can point out and provide for the details of reorganizations of them. The questions decided by the Circuit Court of Appeals are not novel. The decision consists merely in the application of the well established doctrine that any scheme or device whereby the interests of the stockholders are preserved at the expense of the creditors comes within judicial denunciation.

Courts of equity, in the exercise of their powers to relieve against fraud, have universally declined to define specifically that which is forbidden; to do so is to put a premium upon the ingenuity of those who seek to evade the law. And yet solicitors for the petitioner seek to move this court to do that very thing, and under the plea that the case is of grave public importance, propose a host of detailed questions, which, they say, should be answered authoritatively by this court in this case for a precedent to their proposed proceedings in other cases.

To grant the writ for this cause would, it seems to us, put bonds upon the free exercise of the powers of equity, which courts of conscience have always refused to submit to.

The public interest would be better conserved by the refusal than the granting of the writ. The wholesome and salutary general rules of conduct of reorganizations laid down by this court in the Boyd case and by the Court of Appeals in this case can harm no one if faithfully followed. There need be no sailing too close to the law.

Furthermore, as a practical consideration, it may be suggested that the issue of the writ would cause greater unsettling of conditions than its denial. Several of the receiverships mentioned by counsel, have already endured for a number of years, —notably the Wabash, The Metropolitan Company and the Mexico and Orient have been in the hands of the court for more than a year. Efforts towards reorganization have already been made in nearly all of them. Now, if this writ is granted, even with the magnificent progress that this court has made and will make in the dispatch of its business, it is unlikely that a final decision will be reached in less than two years. In the meanwhile, the reorganizations will be delayed, waiting upon the decision of this

court, the receiverships will be prolonged and the public, so far as it is dependent upon these corporations, will be for a long time disturbed.

Objections to the granting of the writ.

There are many reasons why this court should not grant the writ prayed for, aside from the reluctance with which this court exercises its power. As is obvious from the most cursory inspection of the record, the case discloses an almost unprecedented effort to avoid the plain requirements of the law and the payment of an honest debt.

Begun in the year 1900, the case has been pending during the fourteen years of the present century. Over 34,000 pages of testimony were taken in a long and complex accounting involving the validity of the debt of the Belt Company to the Trust Company. The most persistent efforts have been made by the Southern Company to escape liability for this debt, which is now conceded to be a just one. And the most ample opportunity has been sought and obtained by it for a complete hearing upon every possible phase of the case that could be imagined. A further hearing by this court and further delay for that purpose ought not, upon this record, be granted.

In reality the Southern Company has had its day in this Court. Counsel for the Southern, Mr. S. W. Moore, intervened in the hearing of the Boyd case and was permitted to and did file a brief therein as *amicus curiae*, presenting such questions as he deemed necessary in order to establish a precedent for the Circuit Court of Appeals in the present case. The re-argument of the present case in the Circuit Court of Appeals was granted in part upon counsel's representations that the Boyd case was pending before and would soon be decided by this court.

Therefore for the general considerations above mentioned, we urge most strongly upon this court its refusal to grant the petition and enter upon the review of the question so carefully considered by the Circuit Court of Appeals for the Eighth circuit.

Respectfully submitted,

Edward P. Gates,
Walter C. Clephane,
Solicitors for Respondent.

Geo. H. English, Jr.,
Of Counsel.

No. [redacted].

FILED
APR 27 1914
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1913.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

GUARDIAN TRUST COMPANY,
Respondent.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

CENTRAL IMPROVEMENT COMPANY,
Respondent.

SUGGESTIONS OF GARDINER LATHROP AND ROBERT DUNLAP, AMICI CURIAE, UPON THE PETITION FOR CERTIORARI IN THE ABOVE CASES.

GARDINER LATHROP,
ROBERT DUNLAP,
Attorneys for The Atchison, Topeka and Santa Fe Railway Company.

BLAKELY-WARREN PRINTING COMPANY, CHICAGO.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1913.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Petitioner,

vs.

GUARDIAN TRUST COMPANY,

Respondent.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Petitioner,

vs.

CENTRAL IMPROVEMENT COMPANY,

Respondent.

SUGGESTIONS OF GARDINER LATHROP AND ROBERT DUNLAP, AMICI CURIAE, UPON THE PETITION FOR CERTIORARI IN THE ABOVE CASES.

The undersigned practitioners in this Court, Gardiner Lathrop and Robert Dunlap of Chicago, present these suggestions, *amici curiae*, and thereupon they respectfully say:

1. The Atchison, Topeka and Santa Fe Railway Company, a corporation duly organized under the laws of Kansas, by a committee purchasing under a foreclosure

decree the railroad and other property of the Atchison, Topeka and Santa Fe Rail*road* Company, acquired its said railroad and other property under such foreclosure proceedings under a plan of reorganization between the bondholders whose mortgage was foreclosed and stockholders of the old corporation, the latter who participated therein paying a fixed assessment or sum to acquire stock in the new company, and thereupon the new company issued a large amount of its mortgage bonds and capital stock to the old bondholders, and to such stockholders of the old company as paid the required assessment. This took place in December, 1895, and the plan of reorganization was had in reliance upon the rulings of the federal courts then in force and its stocks and bonds have since been largely dealt with in the markets of the world and transferred to a vast number of purchasers in good faith.

2. Since the decision of this court in *Northern Pacific Railroad Company* v. *Boyd,* 228 U. S., 482, a number of suits have been instituted in various courts attacking the validity of reorganizations had a number of years ago and seeking to extend the principles of that case and the effect of that decision. Thus quite recently a suit has been instituted in the District Court of the United States for the Southern District of New York against the Atchison, Topeka and Santa Fe Railway Company for a large amount of money by a recent assignee of a holder of income bonds of the Atlantic & Pacific Railroad Company in which it is claimed, among other things, that in 1893 the Atchison, Topeka and Santa Fe Railroad Company controlling nearly all of the stock of the Atlantic and Pacific Railroad Company was placed in the hands of

receivers, and at the same time receivers were also appointed for the Atlantic and Pacific Railroad Company, and that proceedings were instituted to foreclose the first mortgage upon the Atlantic and Pacific Railroad Company, and a decree of foreclosure and sale was entered therein some time in 1896 when the new Atchison Company acquired all of the outstanding first mortgage bonds through the issuance of its own securities in payment therefor and then utilized such bonds to acquire all of the railroad and property of the Atlantic & Pacific Railroad Company at such foreclosure sale, and such income bondholder now seeks to hold the new Atchison Company liable for the face value of the income bonds and interest thereon since 1893 on account of some alleged misdoings or failures of the old Atchison Company in respect to its alleged dealings with the Atlantic and Pacific Railroad Company prior to the receivership.

3. That during said receivership from 1893 to 1896 the income bonds of the Atlantic and Pacific Railroad Company were only quoted in the market at about 2% of their face value, and after the foreclosure and sale of the Atlantic and Pacific Railroad they were only quoted at about a fraction of 1% of the face value. The principal of the income bonds matured but a few years ago and it is now sought to hold the new Atchison Company for the full face value of these bonds with all past interest.

4. We refrain from discussing or going into the merits of the controversy as that would not be now appropriate. Indeed we do not regard the decision of the Circuit Court of Appeals in the above entitled cases as at all appli-

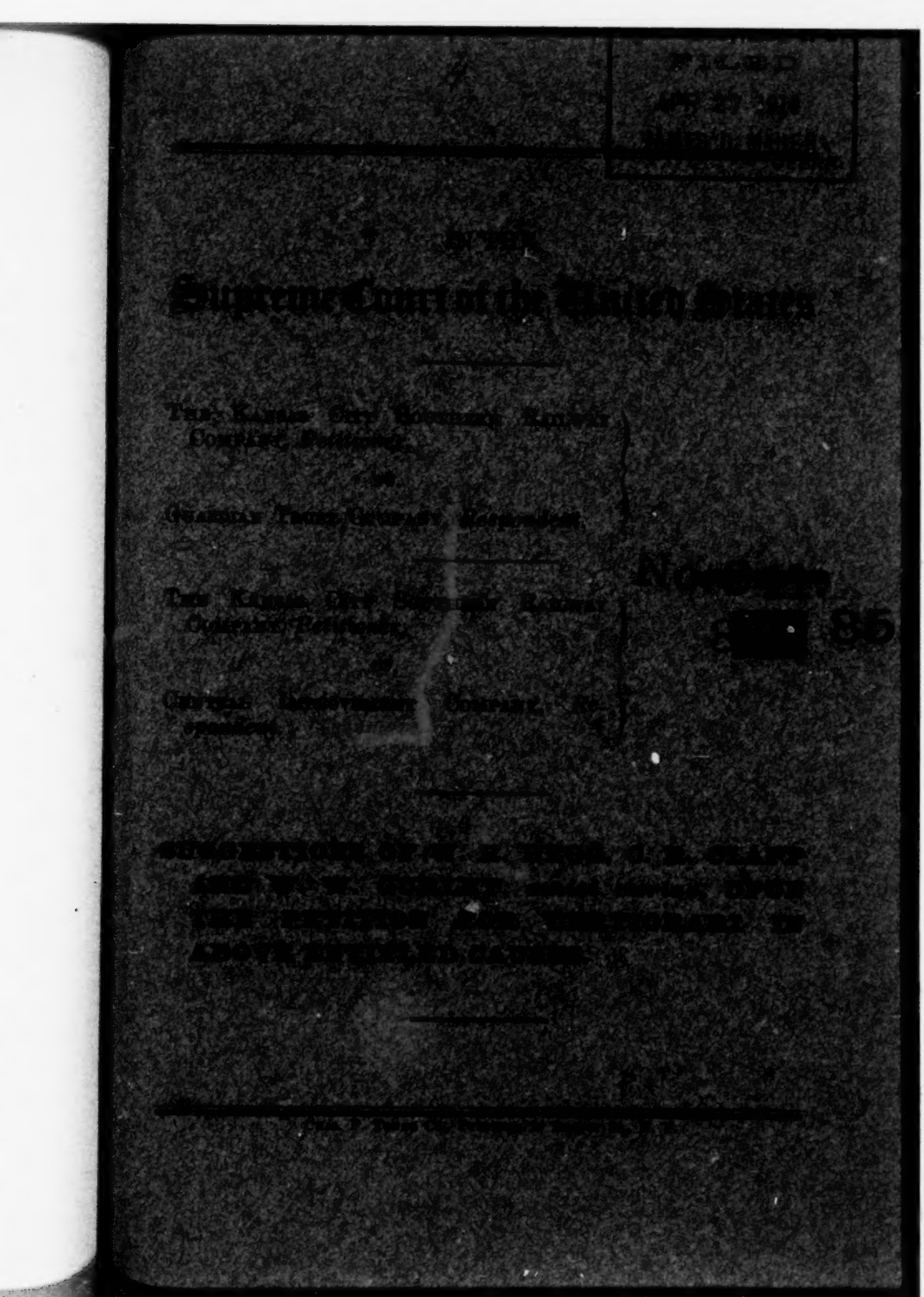
cable or pertinent to the merits of this controversy; nor do we believe that the Atchison reorganization can be successfully attacked, as was done in respect to the Northern Pacific reorganization, which was held to be invalid as to creditors in the Boyd case. We merely mention these matters for the sole purpose of calling attention to the fact that the disposition and opportunity exist to take the utmost advantage of any uncertainties as to the state of the law on these subjects. Therefore, we wish to impress upon the court that on account of such litigation, and that of a similar character, which is quite likely to increase within a very short time, the ruling of the Circuit Court of Appeals in the Guardian Trust Company case, which materially extends the force and effect of the judgment of this court in the Boyd case, should be now reviewed by this court in order that lower courts may fully understand the limits of the decision in the Boyd case. Unless that be done we may expect a flood of litigation over claims which for many years the holders thereof, as well as those who have acquired the securities of reorganized railways, believed to be utterly worthless and many of which claims are no longer in the hands of the original holders. We may also expect an application and extension by lower courts of the principles of the Boyd case not dreamed of by this court.

5. Should this court assume jurisdiction upon *certiorari* and review the ruling of the Circuit Court of Appeals in the Guardian Trust Company case we sincerely believe that much of the misunderstanding in respect to the scope and effect of the ruling of this court will be removed and that it is to the great interest of the public at large and for the protection of those purchasing

railroad securities that jurisdiction ought to be taken by this court so that many of the questions involved in the Guardian Trust Company litigation may be definitely settled.

Respectfully submitted,

GARDINER LATHROP,
ROBERT DUNLAP,
Attorneys for The Atchison, Topeka and Santa Fe Railway Company.



FILED
APR 27 [illegible]
[illegible]

IN THE

Supreme Court of the United States

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Petitioner*,

vs.

GUARDIAN TRUST COMPANY, *Respondent*.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Petitioner*,

vs.

CENTRAL IMPROVEMENT COMPANY, *Respondent*.

No. [illegible]
[illegible] 85

SUGGESTIONS OF W. R. [illegible], C. R. CLAPP AND W. W. [illegible], [illegible], UPON THE PETITION FOR CERTIORARI IN ABOVE ENTITLED CAUSES.

[illegible]

IN THE

Supreme Court of the United States

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

GUARDIAN TRUST COMPANY,
Respondent.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

CENTRAL IMPROVEMENT COMPANY,
Respondent.

Suggestions of W. R. Begg, C. R. Clapp and W. W. Gurley, *amici curiae*, upon the petition for certiorari in above-entitled causes.

The undersigned, practitioners in this Court, Wm. R. Begg of New York, C. R. Clapp of Boston and W. W. Gurley of Chicago, present these suggestions, *amici curiae*, and thereupon they respectfully say:

1.—The Metropolitan Street Railway Company system at Kansas City, Missouri, is now in the hands of receivers in three consolidated causes pending in the District Court of the United States, for the Western Division of the Western District of Missouri, and the First Division of the District of Kansas. These consolidated causes consist of a creditors' and stockholders' bill and two bills to foreclose mortgages.

2.—The street railways have outstanding $12,752,000 in mortgage bonds held by the investing public, of which $7,492,000 are past due. They also have outstanding $14,221,043.00 mortgage bonds and notes which, with bonds and notes of the Kansas City Electric Light Company, aggregating $2,000,000, are deposited as collateral to the notes and bonds, aggregating $15,678,000 of a holding company known as the Kansas City Railway and Light Company, which are held by the investing public. The property of the latter company consists of the stocks and bonds of the street railway and electric light companies, against which it has issued its own bonds and notes, now past due, aggregating $15,678,000, and its own stock, aggregating $25,000,000.

3.—Three bondholders' committees have for some time been acting under the advice of their counsel, Byrne & Cutcheon, of New York, of which firm petitioner, W. R. Begg, is a member, and Ropes, Gray & Gorham, of Boston, of which firm petitioner, C. R. Clapp, is a member. These committees consist of:

(a) James J. Storrow and Daniel M. Wing, of Boston, and Frederick W. Stevens, of New York, being a committee for the issue of $7,242,000 of bonds of the Metropolitan Street Railway Company.

(b) James J. Storrow, of Boston, and Paul M. Warburg, John B. Dennis and Acosta Nichols, of New York, being a committee for $10,200,000 of bonds of the Kansas City Railway and Light Company, secured as hereinbefore stated.

(c) James J. Storrow, of Boston, Paul M. Warburg, John B. Dennis and Samuel L. Fuller, of New York, being a committee of the remainder of the bond or noteholders of said Railway & Light Company.

4.—There is also a stockholders' committee, consisting of George M. Reynolds, of Chicago, Oscar Fenley, of Louisville, George W. Bacon, of New York, and H. T. Abernathy, of Kansas City. Of this committee, petitioner W. W. Gurley is counsel.

5.—The opinion of this Court in *Northern Pacific R. Co.* v. *Boyd*, 228 U. S., 482, has been the subject of much discussion at the bar. It is essential that the street railway properties at Kansas City be reorganized and placed upon a sound financial basis. It is important that there be no doubt as to the legality of such reorganization. The question here involved seems to be such that a final decision thereof is essential to guide those engaged in such work. Petitioners therefore deem it proper to join, *amici curiae*, in this application for a certiorari, to the end that this court may de-

termine whether the doctrine laid down in its opinion in *Northern Pacific R. Co. v. Boyd*, 228 U. S., 482, applies to the extent decreed below.

WM. R. BEGG,
C. R. CLAPP,
W. W. GURLEY,
Petitioners.

No. [redacted].

Office Supreme Court, U. S.
FILED
APR 22 1914
JAMES D. MAHER
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Supreme Court of the United States

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

against

GUARDIAN TRUST COMPANY,
Respondent

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner

against

CENTRAL IMPROVEMENT COMPANY,
Respondent

Suggestions of Henry D. Estabrook, as amicus curiae, upon the petition for certiorari in the above cases.

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Supreme Court of the United States.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
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Respondent.

Suggestions of Henry D. Estabrook, as amicus curiae, upon the petition for certiorari in the above cases.

The undersigned presents the following suggestions, as *amicus curiae*, and states:—

(1) The Kansas City, Mexico & Orient Railway Company is incorporated under the laws of the

State of Kansas, and on March 7, 1912, the Company was placed in the hands of Receivers, appointed in a cause instituted in and for the District of Kansas, Second Division. Ancillary proceedings are also pending in the United States District Court for the Western District of Oklahoma and the United States District Court for the Western District of Missouri, Western Division.

(2) The said Railway Company owns all the stock and bonds of The Kansas City, Mexico & Orient Railway Company, of Texas, a corporation organized under the laws of the State of Texas; and also all the bonds secured by the mortgage of The Kansas City, Mexico & Orient Railway Company upon the railway property in the Republic of Mexico.

The property of said Texas Company and the property in the Republic of Mexico are also in the hands of Receivers.

The capital stock of The Kansas City, Mexico & Orient Railway Company, of Kansas, consists of approximately $12,500,000 of Preferred Stock and $12,500,000 of Common Stock; and the bonded debt of the Company consists of approximately $24,000,000 of First Mortgage Bonds; and the Company has outstanding equipment trust obligations and a substantial amount of unsecured debts and claims. The secured and unsecured obligations of the Company are held by many different parties in the United States and foreign countries.

(3) The International Construction Company and Union Construction Company were heretofore engaged in constructing portions of the rail-

way constituting the line of The Kansas City, Mexico & Orient Railway Company in the United States and in the Republic of Mexico; and those Companies are now in the hands of Receivers; and it is claimed that The Kansas City, Mexico & Orient Railway Company (the Kansas corporation) is largely indebted to them.

(4) A Committee, representing the holders of the First Mortgage Bonds of The Kansas City, Mexico & Orient Railway Company, has been formed, for the purpose of protecting the interests of the bondholders in the proposed reorganization of the Company, for which Mr. Samuel Untermyer is counsel; and this Committee consists of:—

Lord Monson, Chairman,
Cecil Braithwaite,
Harry Bronner,
Granville Farquhar,
Frederick Hurdle,
William T. Kemper,
Willard V. King,
Leonor F. Loree,
Theodore P. Shonts,
E. D. Stair,
George A. Touche,
S. Davies Warfield.

A Committee of reorganization, representing the stockholders of the International Construction Company and of the Union Construction Company, has been constituted, for which Mr. B. S. Harmon is counsel, consisting of:—

John W. Platten, Chairman,
Alfred C. Bird,

Lewis L. Clark,
Carl Derenburg,
Frederick J. Lisman,
Jabez T. Odell,
J. Herndon Smith,
Philip D. Tuckett.

For some years past the undersigned has represented The Kansas City, Mexico & Orient Railway Company, and now represents the Company in the pending foreclosure proceedings.

(5) The Circuit Court of Appeals, for the Eighth Circuit, in its decision in the Guardian Trust case, has, it is respectfully submitted, announced rules of law and principles of equity governing the reorganization of insolvent corporations which not only constitute a wide departure from the decisions of this Court, but which involve the whole subject-matter in additional doubt and uncertainty.

Upwards of $24,000,000 of First Mortgage Bonds must be dealt with in the reorganization. There are also secured and unsecured debts and upwards of $25,000,000 of stock. Unless the stockholders can be invited to participate in a reorganization, based on the purchase of new securities for additional money, without having the reorganized company thereby assume payment of the debts of the old company, the reorganization will necessarily result in eliminating the stockholders. It is of the utmost importance to the interests of the stockholders that, before any such plan is promulgated, the law on this subject shall be definitely settled. In the event of the continuance of the present state of uncertainty, the

stockholders will in all probability lose all opportunity of participating in the reorganized company and the reorganization would have to take on the aspect of a strictly bondholders' reorganization.

(6) The decision of the Court of Appeals in the Guardian Trust case, it is respectfully submitted, is so in conflict with the ruling of this Court in the Northern Pacific Railway Company *v.* Boyd, 228 U. S. 482, as to fully justify the Court in bringing the case here for determination.

In the Boyd case this Court held that:—

> "Contracts for reorganization made between bondholders and stockholders of corporations, insolvent or financially embarrassed, involving the transfer of the corporate property to a new corporation, *while proper and binding as between the parties,* cannot, even when made in good faith, defeat the claim of *non-assenting creditors.*"

In that case the contract for the reorganization of the debtor corporation was held to be invalid as against Boyd, a "non-assenting creditor", who, as found by both the Circuit Court (170 Fed. 802) and the Circuit Court of Appeals (177 Fed. 824), was ignorant of the fact that stockholders were allowed to retain an interest in the reorganized company.

In the Guardian Trust case the reorganization of the debtor company is held to be invalid as against one who sustained to that company the dual relation of stockholder *and* creditor, and who not only was fully aware of the plan of reorganization but gave formal assent to it and participated in it, receiving, *and still holding,* his

proportion of the securities of the new company distributed under it.

The Circuit Court of Appeals rests its conclusion very largely upon the authority of this Court's decision in the Boyd case. We think it an unwarranted extension of the doctrine of that case, and that it should not be allowed by this Court to stand as sanctioned by it.

We believe that the questions involved in this application are grave and serious and of great public importance and present an appropriate occasion for the issue by this Court of its writ of certiorari.

HENRY D. ESTABROOK,
Solicitor, The Kansas City, Mexico & Orient Ry. Co.,
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IN THE

Supreme Court of the United States

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

vs.

GUARDIAN TRUST COMPANY, RESPONDENT.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

vs.

CENTRAL IMPROVEMENT COMPANY, RESPONDENT.

Response of Guardian Trust Company to the Suggestions of Various Amici Curiæ.

There have been presented to this court suggestions by no less than five firms, committees, or associates, all urging the court to grant the writ of certiorari prayed for by the Southern Company. The ostensible ground for these suggestions is that the question presented by this petition is one of grave public importance.

There is ground for the belief that these suggestions emanate from counsel for the Southern Company, and hence do not, as they purport, evince a widespread and genuine public interest in the controversy. For instance, in respect to the suggestions of Gardiner Lathrop and

Robert Dunlap in behalf of the Atchison, Topeka and Santa Fe Railway Company, it may be noted that Mr. Lathrop is the partner of Mr. S. W. Moore, the attorney for the petitioner, under the firm name of Lathrop, Morrow, Fox & Moore. In respect to the suggestions of Henry D. Estabrook, in behalf of the Kansas City, Mexico and Orient Railway Company, that Messrs. S. W. Moore and Samuel Untermeyer, attorneys for the petitioner, are also attorneys for the receivers of the Orient; in respect to the suggestions of W. R. Begg, et al., in behalf of the Metropolitan Street Railway Company, that the same was furnished us and filed here by Mr. Frank Hagerman, general solicitor for the Metropolitan and also the solicitor of record for the Cambria Steel Company, the original complainant herein; that Mr. Samuel Untermeyer, one of the attorneys for the petitioner herein, is stated in the suggestions of Messrs. Joline, Larkins and Rathbone in behalf of the Wabash Pittsburgh Terminal Railway Company to be counsel for the committee representing the holders of the first mortgage bonds.

If the court should view these suggestions as the attempt of the Southern Company through the various relations which its solicitors bear to other railways, to emphasize its statement that the case is one presenting a question of grave public importance, nothing further need be said than that said by us in response to the argument made by the Southern Company through its solicitors. But, nevertheless, we venture the following in detailed response to them:

1. *The suggestions of Gardiner Lathrop and Robert Dunlap in behalf of the Atchison, Topeka and Santa Fe Railroad Company.* After mentioning a suit instituted against the Santa Fe Company, in respect to which it is stated that the *amici curiæ* do not regard the present decision of the Court of Appeals as at all applicable or

pertinent, the *amici curiæ* express the expectation of a flood of litigation over claims believed to be utterly worthless and an application and extension of the principles of the Boyd case "not dreamed of by this court." The fallacy so far as can be gathered from vague generalities, lies in two assumptions, namely, that the principles of the Boyd case are novel and that a decision of this case by this court could or would settle any misunderstandings of the scope and effect of the rulings of this court. As to the first, it is candidly submitted that there is nothing new in the Boyd case or in this case. The principles upon which the decision of both turned are older than this court, growing as they do out of the fundamental conception of a corporation. They have been applied by the court uniformly since its origin—witness the Howard case, the Monon case, the Louisville Trust Company case, and a host of cases cited by the Circuit Court of Appeals. Secondly, nowhere is there pointed out how the assumption of jurisdiction in this case will prevent misconception of the Boyd case. This case is stronger for the creditor than Boyd's case, for here there was the express assurance in the reorganization plan that the floating debts would be paid, while in Boyd's case there was none. Anything the court might say must be limited by this consideration and hence could not afford a precedent to other cases in which this element did not exist.

2. *The suggestions of Henry D. Estabrook in behalf of the Kansas City, Mexico and Orient.* The complaint seems to be that in the Orient reorganization it is desired to deal with the stockholders but to make no provision for creditors. Surely there is no need for making any other ruling on this question than that which this court has so often made. It would seem to the ordinary mind that this court and all the courts before whom the question has come, have declared the law with sufficient

simplicity. No scheme of reorganization by which the stockholders are permitted to retain an interest paramount to that of the creditors will receive judicial sanction. With this simple rule of honesty in mind the reorganizers of the Orient will have no difficulty in perfecting a valid reorganization. If they seek to swerve from it, they should seek in vain the aid of this court.

3. The suggestions of Henry S. Priest et al. in behalf of the St. Louis and San Francisco Railroad Company are not sufficiently definite to enable us to discern wherein their complaints lie. The statement is made generally that the decision of the Court of Appeals in this case gives the Boyd case a construction "which materially enlarges and extends the force and effect of the judgment of this court in the latter case." How the review of the present case can in anywise serve the reorganizers of the Frisco road is nowhere pointed out.

4. The same comment is justified in respect to the petition of Wm. R. Begg et al. in behalf of the Metropolitan Street Railway Company and of Kansas City. The suggestions do not embrace any discussion of any concrete question in anywise connected with the proposed reorganization of that company, and like those of the Frisco, amount to nothing more than the expression of dissatisfaction, in that the Court of Appeals has reiterated the simple rule that stockholders must not be preferred to creditors.

5. The suggestions of Joline, Larkin, and Rathbone in behalf of the Wabash Pittsburgh Terminal Railway Company assert that it is essential for those interested in the reorganization (which it seems has been in contemplation for at least six years), to know "whether creditors and security holders are entitled to participate in the reorganization as to a part of their claims and still hereafter assail its validity as to claims with respect to which they do not participate." We submit that the

answer to this query could not be announced in the instant case. **The trust company has not sought to nor has it been permitted to assail the reorganization.**

Without reiterating the points made in our response to the application of the Kansas City Southern Railway Company, we submit generally that every definite suggestion made by these numerous intervenors is either based upon a misconception of the plain and lucid opinions of the Court of Appeals and of this court or is fully answered by those opinions.

In conclusion and, we trust, with deference and due respect to the distinguished lawyers who have made the suggestions filed herein, we most earnestly protest against the practice resorted to in this case. To us it seems either a particularly determined attempt to induce this court to decide questions which are not in issue in this case so as to make precedents for other cases, or else an effort to make it appear that an extended demand exists for a review of the Boyd case.

When we consider that this litigation has been pending for fourteen years and that the Southern Company has so persistently delayed the final judgment as to call for the pointed statements of the undisputed facts made by the Court of Appeals (Second Opinion, pp. 25 and 26), we feel that the present suggestions should not be permitted to contribute to gaining for the Southern Company the further delay of a payment, so long withheld. Nor should the Trust Company's case, which so strongly appeals to a court of conscience, be made a moot case for the settling of various details of railway reorganizations.

Respectfully submitted.

EDWARD P. GATES,
WALTER C. CLEPHANE,
Attorneys for Guardian Trust Company.

GEORGE H. ENGLISH, JR.,
Counsel.

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No. ~~941~~.

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Supreme Court of the United States

No 941

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

against

GUARDIAN TRUST COMPANY,
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THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
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against

CENTRAL IMPROVEMENT COMPANY,
Respondent.

Suggestions ~~of Joline, Larkin & Rathbone~~, amici curiae, upon the petition for certiorari in the above cases.

Edward H. Larkin
Albert Rathbone

JOLINE, LARKIN & RATHBONE,
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Supreme Court of the United States.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

against

GUARDIAN TRUST COMPANY,
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THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

against

CENTRAL IMPROVEMENT COMPANY,
Respondent.

Suggestions of Joline, Larkin & Rathbone, amici curiae, upon the petition for certiorari in the above cases.

The undersigned, as *amici curiae*, present their suggestions and respectfully state:

(1) The Wabash Pittsburgh Terminal Railway Company is a consolidated corporation, organized

under the laws of Pensylvania, Ohio and West Virginia. Since May 29, 1908, this Company has been in the hands of Receivers, appointed in a suit instituted in the United States Circuit Court at Pittsburgh.

(2) The Wabash Pittsburgh Terminal Railway Company owns 51.7% of the capital stock of the Wheeling & Lake Erie Railroad Company, which is a corporation organized under the laws of Ohio. This Company since June 8, 1908, has been in the hands of a Receiver appointed by the United States District Court at Toledo.

(3) The capital stock of the Wabash Pittsburgh Terminal Railway Company amounts to $10,000,000; and its bonded debt consists of $30,236,000 First Mortgage Bonds and $20,000,000 Second Mortgage Bonds; and the Company has a considerable amount of outstanding unsecured indebtedness.

The capital stock of the Wheeling & Lake Erie Railroad Company consists of $20,000,000 of Common Stock, $4,986,900 of Four Per Cent. Non-cumulative First Preferred Stock, and $11,993,500 of Four Per Cent. Non-cumulative Second Preferred Stock; the bonded debt consists of $2,000,000 Lake Erie Division First Gold 5s, $894,000 Wheeling Division First Gold 5s, $409,000 Extension and Improvement Gold 5s, $11,697,000 First Consolidated Gold 4s, $8,000,000 Three-Year Five Per Cent. Gold Notes; said Gold Notes being secured by $12,000,000 face value of General Mortgage Bonds, constituting part of an authorized issue of $35,000,000.

The Company also has several equipment trust obligations for a substantial amount and a considerable amount of outstanding unsecured in-

debtedness. Several million dollars of Receiver's Certificates have been issued.

The secured and unsecured obligations of both the Terminal Company and the Wheeling Company are held by many parties in various parts of the United States and foreign countries.

(4) Various Committees, representing Bondholders of the Wabash Pittsburgh Terminal Railway Company, have been formed, and for some time have been endeavoring, under the advice of their counsel, to protect the interests represented by them in the proposed reorganization. These Committees are made up as follows:

(a) A Committee, consisting of:

James N. Wallace, Chairman,
Haley Fiske,
Gordon Abbott,
George P. Butler,
Harry Bronner,
D. Crawford Clark,
Charles C. Jackson,
Asa S. Wing,

representing holders of First Mortgage Bonds of the Wabash Pittsburgh Terminal Railway Company. The undersigned are counsel for the above Committee.

(b) A Committee, consisting of:

James C. Chaplin, Chairman,
William R. Nicholson,
Clarence L. Harper,
Meigs H. Whaples,
Richard Sutro,

representing holders of First Mortgage Bonds of the Wabash Pittsburgh Terminal Railway Company, for which Mr. Samuel Untermyer is counsel; and

(c) A Committee, consisting of:

Alexander J. Hemphill, Chairman,
H. S. Redmond,
A. J. Miller,
A. H. Wiggin,

representing the holders of Second Mortgage Bonds of the Wabash Pittsburgh Terminal Railway Company, for which Messrs. Hornblower, Miller & Potter are counsel.

(5) These properties have been in the hands of the Court for the past six years. It is essential that they be speedily reorganized and that the reorganization shall be accomplished in a lawful manner. It is important that there be no doubt as to the legality of the reorganization or as to the validity of the securities which the reorganized company will issue, and that the creditors of the present companies shall not be permitted to assert their claims against the new company.

The decision of the Circuit Court of Appeals in the Guardian Trust case has greatly increased the difficulties of the situation. It is, we believe, an unwarranted extension of the rule of the Northern Pacific Railway *v.* Boyd, 228 U. S., 482. It is of the highest importance that these questions be settled by this Court. They are grave and serious questions. A vast number of persons are interested in their correct solution. Those interested in the reorganization are anxious to ascertain, and it is necessary for them to know, among other things,

whether creditors and securityholders are entitled to participate in the reorganization as to a part of their claims and still hereafter assail its validity as to claims with respect to which they do not participate.

Respectfully submitted,

JOLINE, LARKIN & RATHBONE,

54 Wall St.,
New York City.

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Office Supreme Court, U. S.
FILED
APR 8 1914
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Opinions

OF THE

Circuit Court of Appeals of the Eighth Circuit

IN

KANSAS CITY SOUTHERN RAILWAY COMPANY,

VS.

GUARDIAN TRUST COMPANY.

RENDERED

October 22, 1912, *and December* 2, 1913.

United States Circuit Court of Appeals.

EIGHTH CIRCUIT.

SEPTEMBER TERM, A. D. 1912.

NUMBER 3489.

Central Improvement Company, et al., Appellants,

vs.

Cambria Steel Company, et al., Appellees.

NUMBER 3490.

Guardian Trust Company, Appellant,

vs.

Cambria Steel Company, et al., Appellees.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

Mr. George H. English, Jr., and Mr. Edward P. Gates (Mr. D. J. Haff and Mr. E. C. Meservey on brief), for appellants.

Mr. Frank Hagerman, for Cambria Steel Company.

Mr. Samuel Untermyer and Mr. Samuel W. Moore, for Kansas City Southern Railway Company.

Before SANBORN, Circuit Judge, and MARSHALL and WM. H. MUNGER, District Judges.

WM. H. MUNGER, District Judge, delivered the opinion of the court.

While the parties to these controversies are numerous, the questions involved upon the appeal require consideration only of acts of the following named companies, to-wit: The Cambria Steel Company, which, for convenience, will herein be designated Cambria Company; Kansas City, Pittsburg & Gulf Railroad Company, herein called Gulf Company; Port

Arthur Channel & Dock Company, herein called the Dock Company; Kansas City Suburban Belt Railroad Company, herein called the Belt Company; Kansas City Southern Railway Company, herein called the Southern Company; Guardian Trust Company, herein called the Trust Company; The Provident Life & Trust Company, herein called Provident Company.

The Gulf Company was a railroad extending from Kansas City to Port Arthur on the Gulf of Mexico; the Dock Company was a local company having terminal facilities at Port Arthur; the Belt Company was a belt line railroad having terminal facilities at Kansas City, Missouri. Each of these companies had outstanding bonds secured by mortgages upon its properties. The Cambria Company was a judgment creditor of the Belt Company. The Trust Company owned a large amount of the stock and bonds of both the Gulf Company and the Belt Company and was also a creditor of the Belt Company. The Gulf Company, having defaulted in the payment of interest upon its mortgage, a suit for foreclosure was instituted, and a committee of bondholders was selected to originate and propose a reorganization plan. This committee proposed a plan of reorganization by which the properties of the Gulf Company, the Dock Company and the Belt Company should be acquired and organized into or operated as a single new company. This committee formulated a plan of reorganization, by the terms of which it was proposed that a new company be organized to acquire the properties of the three mentioned companies. Their plan was published and submitted to the bond and stockholders of each of the companies, the committee declaring that it had formulated and adopted said plan as the basis of the reorganization of the railroad system, having for its ultimate purpose the unification of the main line and terminals into one ownership and under one management; that such object was sought to be accom-

plished by having the Gulf Company, when reorganized, acquire the capital stock of the two other companies, namely, the Dock Company and the Belt Company, and, having thus acquired the control and possession, to thereafter adjust the bonded indebtedness standing against the properties of the Belt Company and Dock Company by retiring the existing bonds, and issuing therefor new bonds, the basis of the plan being that the property of the existing Gulf Company should be sold in the foreclosure proceeding, purchased by the committee, and a successor company organized, to which the property so purchased should be conveyed, together with the stock and bonds of the Dock Company and the Belt Company. If sufficient of the stock and bonds of those companies should be deposited with the committee, in exchange for bonds and stock of the new company to be organized, then those properties to be acquired. By that plan it was said the following results would be obtained; the new company to be organized would own the property of the Gulf Company and also the bonds and capital stock of the Belt and Dock Companies, and thereby all three properties would be under one corporate ownership, management and control. Said stock and bonds so purchased of the Belt and Dock Companies to be pledged under the mortgage to be given by the company to be organized for the payment of (1) floating debts and existing car trust obligations; (2) adequate provision for working capital for future acquirements. It was also stated that it was contemplated that said reorganized or new company should issue $30,000,000 fifty-year three per cent gold bonds, $18,000,000 of the bonds to be used for the conversion of the bonds of the Gulf Company, $1,330,000 for the conversion of the old or existing bonds of the Belt Company, $817,500 new bonds for the old or existing bonds of the Dock Company, $3,000,000 of the new bonds to be sold for the necessary cash requirements of the new company, $3,802,500 to be reserved

for the future requirements of the new company, $3,050,000 of new bonds to be used in acquiring existing outstanding bonds of some other companies that were subsidiary companies of the Belt Company.

It was proposed in the plan that the holders of securities of the Gulf Company were to receive for their bonds seventy-five per cent in new bonds and fifty per cent in new preferred stock; the stockholders of the Gulf Company, upon paying $10.00 per share, were to receive one share of new common stock for each share of the old stock.

The bondholders of the Belt Company, for their old bonds, were to receive 133 per cent of new bonds and 25 per cent in new preferred stock; the stockholders of the Belt Company were to receive for each share one-quarter of a share of new preferred stock and three-quarters of a share of new common stock.

The bondholders of the Dock Company were to receive for their old bonds fifty per cent in new bonds, fifty per cent in new preferred stock, and fifty per cent in new common stock; the stockholders of the Dock Company, for each share of their stock, were to receive three-quarters of one share of new common stock.

The stock and securities of the respective companies were largely deposited according to the committee's plan. A decree was entered in the foreclosure against the Gulf Company on February 5, 1900, sale had and the property thereunder acquired by the Southern Company on March 19, 1900, the date on which it was organized and incorporated.

The Southern Company issued a new mortgage and bonds, also its stock, according to the terms of the reorganization plan, and such bonds and stock were exchanged for the bonds and stock of the old companies, the holders of which had deposited their bonds and stock in accordance with the proposed plan. The Trust Company accepted the plan and de-

posited its stock and bonds which it held of the Belt Company and received in new bonds and stock its proportionate amount under the reorganization agreement.

Although the Southern Company had acquired practically all of the bonds and stock of the Belt Company in exchange for its new bonds and stock in accordance with the reorganization plan and agreement, and acquired possession and control of the property of the Belt Company, the Provident Company, Trustee in the Belt mortgage, filed its bill of foreclosure and asked for the appointment of receivers. The Master's finding in this regard was as follows: "On September 6, 1900, nearly six months after the incorporation of the Southern Company, the receivers were appointed for the Belt Company, at the instance of the Southern, and through the Provident Company, as Trustee, which filed the foreclosure bill; the foreclosure decree being made on November 6th, 1901, and the sale on December 31, 1901, to the Southern Company." The Trust Company was a party to that foreclosure suit and before the decree was entered asked leave to file an amended supplemental answer, stating in effect that the reorganization plan had been promulgated in the interests of creditors of the Belt Company as well as bondholders and stockholders, and that it had been intended to pay the Trust Company's debt, the reorganization committee having often promised to pay it until about the time of the institution of the foreclosure suit, and that the purpose of such suit was to vest in the Southern Company title to all the Belt Company property, free from the payment of that company's floating debt, which was a fraudulent purpose. It asked that the Southern Company be made a party to the cause, &c. The court denied the leave to file such answer but provided, however, as a condition of the denial that complainant (Provident Company) should, within five days thereafter, file a stipulation that the decree should be without prejudice to the claim of the Trust Com-

pany. The last paragraph of the foreclosure decree was as follows:

"This decree is entered on the express condition to which the complainant has assented, that it shall be without prejudice to and shall not bar the right of the Guardian Trust Company, or its receiver, to plead and insist in any litigation now pending or hereafter brought, that the Kansas City Southern Railway Company by virtue of the manner in which it was organized, or for any other reason, is legally or equitably liable for and bound to pay the unsecured debts of the Kansas City Suburban Belt Railroad Company, either in full or to pay them to the extent of the value of any property heretofore acquired by it from the Kansas City Suburban Belt Railroad Company, or that may hereafter be acquired by it from said company by virtue of these foreclosure proceedings, and without prejudice to the right of said Guardian Trust Company or its receiver, to plead and insist, in any pending litigation or litigation hereafter brought, that the members of the reorganization committee of the Kansas City, Pittsburg & Gulf Railroad Company assumed to pay and are liable to pay the unsecured debts of the Kansas City Suburban Belt Railroad Company existing at the time of the alleged reorganization was undertaken."

On September 6th, 1900, the Cambria Company filed a creditor's bill against the Belt Company, Trust Company and other companies, the object and purpose of which was to recover certain securities belonging to the Belt Company, which had been deposited with the Trust Company as security for the Belt Company's indebtedness to the Trust Company, claiming in its bill that the Belt Company was not in fact indebted to the Trust Company, and made an application for the appointment of a receiver, and on that day receivers were appointed for the Belt Company upon the joint application of the Cambria Company and the Provident Company complainant in the foreclosure suit against the Belt Company.

In the suit brought by the Cambria Company issues were

joined, the receivers appointed for the Belt Company filed a cross-bill against the Trust Company, denying indebtedness upon the part of the Belt Company to the Trust Company but claiming that the Trust Company was in fact a debtor of the Belt Company. The case was in November, 1900, referred to Hon. Shannon C. Douglass, as Special Master, to take the testimony &c. The hearing proceeded before the master and after much testimony had been taken an order was made by the court in February, 1905, pursuant to a stipulation of parties, admitting the Southern Company as a party and giving it leave to file a petition of intervention, and the Southern Company filed its petition of intervention on the 27th day of that month, claiming that the various securities held by the Trust Company to secure its indebtedness against the Belt Company were covered by the mortgage which was foreclosed against the Belt Company, and sought to recover such property by its bill of intervention.

The hearing before the Master extended over several years, upwards of 34,000 pages of testimony was taken, and the Master, on the 21st of May, 1910, filed his report, which comprises 381 pages of the printed record. The evidence has not been brought to this court; hence all questions of fact as found by the Master are conclusive upon the parties on this appeal.

The Master found that the evidence did not support the claim of the Cambria Company and recommended that its bill be dismissed for want of equity. The Master found upon the accounting that there was due from the Belt Company to the Trust Company the sum of $639,658.86.

The Master found fully the facts as to the reorganization plan, the acquiring by the Southern Company of the stock and bonds of the Gulf Company, Dock Company and Belt Company, the issuing of its new stock and bonds to the holders of the bonds and stock of those companies, in ex-

change for the bonds and stock of the respective companies held by them, as we have heretofore stated.

The Master found, as a matter of law, that the Southern Company was not liable for the debts of the Belt Company.

The Trust Company filed exceptions to the report of the Master, among other things to the finding that the Southern Company was not liable for the floating indebtedness of the Belt Company, giving as reasons therefor that that was not an issue in the case, and no finding thereon should have been made by the Master.

Various exceptions were also filed by the Central Improvement Company, one of the defendants in the action.

Subsequently, a hearing was had by the court upon the report of the Master and the exceptions thereto, the exceptions were overruled and the report of the special master was in all things approved and confirmed, and a decree entered in accordance with the findings and recommendations of the Master, from which the Trust Company and the Central Improvement Company have prosecuted their appeal.

The decree also provided that, it appearing that all costs incurred by the Cambria Company prior to November 20, 1901, had been paid by it, no further costs should be taxed against the Cambria Company, nor should any costs which had been paid by the Cambria Company be chargeable against any other parties to the action. The remaining costs were taxed by the court one-third against the Trust Company and two-thirds against the Belt Company, to be paid by the Belt Company and Southern Company.

The assignments of error relied upon in this court are:

1st. That the court erred in including in said decree the finding that the Southern Company did not assume or agree to pay or become liable for the indebtedness owing by the Belt Company to the Trust Company.

2nd. That the court erred in requiring the Central Improvement Company and its receivers to convey to the Southern Company the properties specified in the decree.

3rd. That the court erred in adjudging that one-third of the costs of this action be paid by the Trust Company.

The principal question, and the one which involves the merits of the controversy, rests upon the correctness of the finding of non-liability upon the part of the Southern Company for the debt found due from the Belt Company to the Trust Company, for, as stated by counsel for the Southern Company in their brief:

"The decision of the question of the Southern Company's liability for the debts of the Belt Company was necessary to a disposition of the case. The defense pleaded by the Trust Company to the effect that the Southern Company had assumed or become liable for the indebtedness of the Belt Company was, if true, a perfect answer to the intervening petition. It said in substance to the Southern Company—'Even though you may have the legal or equitable title to the collateral securities or to the properties represented by them, yet they were pledged by the Belt Company to secure its indebtedness, you assumed and agreed to pay that indebtedness, and a court of equity will not award you possession of the securities until you discharge your own obligation. Any relief to you must be conditioned upon your payment of the Belt Company's indebtedness.'"

This contention that if the Southern Company had become liable for the indebtedness of the Belt Company to the Trust Company that was a perfect defense to the intervening petition of the Southern Company is sound and unanswerable, and after a careful review of the record in this case this court holds, and it decides, that the issue whether or not the Southern Company was indebted to the Trust Company for the debt of the Belt Company to the Trust Company was a material and decisive issue between the Trust

Company and the Southern Company in this case which it was the duty of the master and the court below to consider and decide. The remarks of this court in *Guardian Trust Co.* v. *Kansas City Southern Ry. Co.*, 171 Fed. 43, 96 C. C. A. 285, that "The liability of the Southern Company to pay the debts which the Trust Company alleges in the actions at law it has promised to pay is not an issue and cannot be determined in this suit in equity," upon which counsel rely, must be construed, as must all opinions of the courts, in the light of the facts and the issue then in hand. The issue before the court in that case was whether the causes of action in the state court were so identical with the cause of action theretofore pending in the court below that an injunction should be issued to stay the prosecution of the actions in the state court. This court held that the suit in the Circuit Court was in equity, that it related to the title and ownership and the right to a conveyance of certain specific property, while the actions at law brought by the Trust Company against the Southern Company in the state court were purely *in personam* to recover the alleged debts of the Southern Company, that in the suit in equity the same relief was not sought as in the actions at law and that the prosecutions of the actions at law in the state court constituted no interference with the suit in the court below. There was nothing in the decision in that case in conflict with the conclusion which has not been reached.

The master and the court below decided that the Southern Company was not indebted to the Trust Company for the indebtedness of the Belt Company to the latter. The Trust Company requests this court to review that decision upon the report of the master and contends that as a matter of law the Southern Company is so indebted upon the facts which the master finds. The Southern Company objects to this review on the ground that the only exception to the master's conclusion here and the only assignment of error in the affirm-

ance thereof by the court below was placed upon the ground that that issue was not judicable in this suit. But an appeal in a suit in equity invokes a trial *de novo* in the appellate court and entitles the appellant to a just decree. *Dozagiac Mfg. Co.* v. *Lochren*, 143 Fed. 211; *Blease* v. *Garlington*, 92 U. S. 1, 8, and under Rule 11 of this court a plain error not assigned may be, and ought to be, considered where the failure to consider it would result in a great injustice. *United States* v. *Bernays*, 158 Fed. 792; *New York Life Ins. Co.* v. *Rankin*, 162 Fed. 103, 108; *United States* v. *Tennessee etc. R. R. Co.*, 176 U. S. 242, 256. And in view of the facts that the issue here has been long and persistently contested below, that exception was taken and assignment of error made regarding it though upon an erroneous ground, that both parties have prepared exhaustive briefs upon the question which the Trust Company asks us to review, that neither party can be taken by surprise and that a failure to review the legal conclusion below would result in an unjust final adjudication of the issue under consideration, we are constrained to consider and decide it.

It is claimed that the Southern Company is liable for the debt of the Belt Company to the Trust Company because it knowingly acquired the property of the Belt Company in the execution of a scheme to exclude the Trust Company's unsecured claim against the Belt Company for $639,685.86 from the benefit of the Belt Company's property and to apply that property by an exchange of stock and bonds and a mere formal and not actual foreclosure sale to the benefit of the stockholders of the Belt Company.

In *Louisville Trust Co.* v. *Louisville &c. Ry.*, 174 U. S. 674, which was an action brought by a creditor to set aside a sale under a foreclosure as being in fraud of its rights, for the reason that such foreclosure was had in the interests of the stockholders as well as the bondholders, Mr. Justice Brewer, rendering the opinion of the court, said:

"The questions of this case are novel and important. They arise on the foreclosure of certain railroad mortgages, and suggest to what extent the same rules and considerations obtain in them as in the foreclosure of ordinary mortgages upon real estate. It goes without saying that the proceeding in the foreclosure of an ordinary mortgage on real estate is simple and speedy. No one need be considered except the mortgagor and mortgagee, and if they concur in the disposition of the foreclosure it is sufficient, and the court may properly enter a decree in accordance therewith. * * *

"But this court long since recognized the fact that in the present condition of things (and all judicial proceedings must be adjusted to the facts as they are) other inquiries arise in railroad foreclosure proceedings accompanied by a receivership than the mere matter of the amount of the debt of the mortgagor to the mortgagee. We have held in a series of cases that the peculiar character and conditions of railroad property not only justify but compel a court entertaining foreclosure proceedings to give to certain limited unsecured claims a priority over the debts secured by the mortgage. It is needless to refer to the many cases in which this doctrine has been affirmed. It may be, and has often been said, that this ruling implies somewhat of a departure from the apparent priority of right secured by a contract obligation duly made and duly recorded, and yet this court, recognizing that a railroad is not simply private property, but also an instrument of public service, has ruled that the character of its business, and the public obligations which it assumes, justify a limited displacement of contract and recorded liens in behalf of temporary and unsecured creditors. * * *

"We notice, again, that railroad mortgages, or trust deeds, are ordinarily so large in amount that on foreclosure thereof only the mortgagees, or their representatives, can be considered as probable purchasers. * * *

"We must, therefore, recognize the fact, for it is a fact of common knowledge, that, whatever the legal rights of the parties may be, ordinarily foreclosures of railroad mortgages

mean not the destruction of all interest of the mortgagor and a transfer to the mortgagee alone of the full title but that such proceedings are carried on in the interests of all parties who have any rights in the mortgaged property, whether as mortgagee, creditor or mortgagor. * * * Assuming that foreclosure proceedings may be carried on to some extent at least in the interests and for the benefit of both mortgagee and mortgagor (that is, bondholder and stockholder), we observe that no such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interest, not merely of the mortgagee, but of every creditor of the corporation. In other words, if the bondholder wishes to foreclose and exclude inferior lienholders or general unsecured creditors and stockholders he may do so, but a foreclosure which attempts to preserve any interest or right of the mortgagor in the property after the sale must necessarily secure and preserve the prior rights of general creditors thereof. This is based upon the familiar rule that the stockholder's interest in the property is subordinate to the rights of creditors; first of secured and then of unsecured creditors. And any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation."

A "transfer of property by a debtor with a reservation of an interest therein to himself" is always voidable by his creditors as against a debtor and all claiming under him with notice of his act, and a transfer by stockholders of a corporation of its property with a preservation of an interest in themselves is equally voidable against all who take the property with notice of their act. In *Montgomery-Webb Co. v. Dienelt*, 133 Pa. St. 585, 596, 19 Atl. 430, a new corporation was formed and part of its stock was issued to the stockholders and a part of it was issued to the creditors of an old corporation for their holdings, and all the property of the old corporation was transferred to the new corporation. A single creditor of the old

corporation assailed the transaction. The Supreme Court of Pennsylvania said:

"Under such circumstances they (the stockholders) were bound to take notice of the nature of the transaction and to know that equity would still regard the property as a trust for the payment of existing debts, and would follow it on behalf of the creditors until it should get into the hands of innocent purchasers for value. Such purchasers they were not. The old stockholders were not purchasers for value at all and the new stockholders were not innocent, for they knew, or were bound to take notice of the taint in their co-adventurer's title. We are of the opinion that as to the stockholders in the Aronia Company, this was a transfer of property by a debtor with the retention of an interest in himself within the settled rule of law that makes such transfers void as against creditors, and that, as to the Aronia creditors who became new stockholders in the Montgomery Company, they took with such notice as prevents them from claiming now as innocent holders for value against the appellants as execution creditors of the old corporation. It is not worth while to cite authorities for these principles, they are settled and familiar."

In *Chicago, Rock Island & Pacific Ry. Co. v. Howard*, 74 U. S. 392, 409, the leading case upon this subject, where a foreclosure sale of the property of a corporation was made pursuant to an arrangement whereby 84 per cent of the purchase price was to go to its bondholders and 16 per cent to its stockholders, the Supreme Court said: "Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation and recognizes the rights of creditors to pursue it into whatsoever possession it may be transferred, unless it has passed into the hands of a *bona fide* purchaser, and the rule is well settled that stockholders are not entitled to any share of the capital stock, nor to any dividend of the properties until the debts of the corporation are paid." The facts and the ruling in that case are thus stated in the syllabus:

"A sale under foreclosure of mortgage of an insolvent railroad company, expedited and made advantageous by an arrangement between the mortgagees and the stockholders, under which arrangement the mortgagees, according to their order, got more or less of their debt (100 to 30 per cent), and the stockholders of the company the residue of the proceeds—a fraction (16 per cent.) of the part of their stock—held fraudulent as against general creditors not secured by the mortgage, and this although the road was mortgaged far above its value, and on sale in open market did not bring near enough to pay even the mortgage debts; so that in fact, if there had been an ordinary foreclosure, and one independent of all arrangement between the mortgagees and the stockholders, the whole proceeds of sale would have belonged to the mortgagees."

In *Central of Georgia Ry. Co. v. Paul*, 93 Fed. 878, 884, the Circuit Court of Appeals of the Fifth Circuit said:

"There is no substantial dispute that the appellee, Mary F. Paul, was and is a creditor of the Central Railroad & Banking Company of Georgia, and the question is whether the Central of Georgia Railway Company is liable for her demand. The case shows that the sale of the railway properties under the foreclosure at the suit of the Central Trust Company, the sale of the collateral securing the floating debt claims, and the sale of the 'overflow property,' all were in pursuance of a re-organization plan, which was carried out, and resulted in the transfer of all the property and assets of the Central Railroad & Banking Company of Georgia to the Central of Georgia Railway Company; and the active participating reorganizers were not only the creditors of the Central Railroad & Banking Company of Georgia, secured by mortgage and otherwise, but included as well the stockholders of said company; so that, for the purposes of the present case, it is an indisputable fact that, notwithstanding all the sales of property and other transactions in liquidation, the stockholders of the Central Railroad & Banking Company of Georgia retained their interest and rights, and by virtue thereof are now either stockholders of the new organization, Central of Georgia Rail-

way Company, or are otherwise provided for, and that the new company has acquired, and now holds, all the former property and assets of the old company. It would seem from this state of facts that the appellee has the right to look to the new company for the payment of her claim."

Indeed, it is settled law, that "A reorganization of an insolvent railroad company by which both its mortgage bondholders and its stockholders, in exchange for their bonds and stocks, are given an interest in the new company which purchases the property of the old company at a foreclosure sale made pursuant to such plan of reorganization, and by consent of the old company and its stockholders is fraudulent in law as to unsecured creditors of the old company whose claims are left unpaid and renders the new company liable for the claims of such creditors." *Northern Pacific Ry. Co. v. Boyd*, 177 Fed. 804; *Luedecke v. Des Moines Cabinet Co.*, 140 Ia. 223, 118 N. W. 456; *Hurd v. New York & Commercial Steam Laundry Co.*, 60 N. E. 327.

The case under consideration falls directly under this rule of law. A scheme was devised and proposed for the benefit of the stockholders and bondholders of the Belt Company, the Gulf Company, and the Dock Company, as the reorganization agreement reads: "For the reorganization of the Kansas City, Pittsburg & Gulf R. R. Co., and its property, and also, if necessary, for the reorganization of the Kansas City Suburban Belt Railroad Co. and the Port Arthur Channel & Dock Company and their properties, and for the consolidation of said corporations, if such consolidation can be lawfully made, and is found to be practicable *either with or without foreclosure of either or all of said properties, or by means of the acquisition of the stock or other securities of either or all of said corporations*, or in any other manner that may be deemed by said committee to be most practicable and feasible." That scheme was accepted, approved and executed by the stockholders and

bondholders of the Belt Company and by the Southern Company for their benefit to the exclusion of the Trust Company's unsecured claim from all benefit from the property of its debtor, the Belt Company. A new company, the Southern Company, was organized, the stockholders and bondholders of the old company, the Belt Company, in exchange for their stock and bonds were offered and took an interest in the new company, the stockholders took for their $4,700,000.00 of stock in the old company about $1,857,000.00 of the preferred stock and about $3,562,500.00 of the common stock of the Southern Company, in all about $5,419,500.00 in stock at its par value, and the bondholders took about $1,330,000.00 of the preferred stock and $250,000.00 of the bonds of the Southern Company, in all about $1,580,000.00 at their par value, for their $1,000,00.00 of bonds of the old Belt Company and after the new company had obtained in this way more than 89 per cent of the bonds and more than 97 per cent of the stock of the old company it purchased the property of the old company at a formal, but not an actual, foreclosure sale, made pursuant to this plan of reorganization at the instigation of the Southern Company as holder of 89 per cent of the bonds of the Belt Company and with its consent as holder of more than 97 per cent of the stock of the Belt Company. And what was the actual effect of this entire performance? The property of the Belt Company was transferred to a new company and its stockholders preserved for themselves an interest in that property. Before the transaction they had common stock of the Belt Company of the par value of $4,700,000.00 and the Belt Company owned its property, after the transaction the stockholders had preferred stock of the Southern Company of the par value of about $1,857,000.00 and common stock of that company of the par value of about $3,562,500.00 and the Southern Company owned the property of the Belt Company. But a sale or transfer by stockholders of the property of their corpora-

tion in which they preserve an interest, whether that sale or transfer be by deed, by mortgage, by judgment, by foreclosure sale, or by any other means, is fraudulent and voidable against the unsecured creditors of their old corporation and a purchaser who takes and converts such property to its own use with knowledge of the facts, becomes legally liable to pay the unsecured debts of the old corporation, at least to the extent of the value of the property so taken and converted. The value of the property of the Belt Company so taken and converted by the Southern Company was many times the amount of the Belt Company's debt to the Trust Company. The conclusion is irresistible and the judgment of this court is that the Southern Company which, pursuant to this scheme and in its execution, purchased the Belt Company's property at the formal foreclosure sale with full knowledge of the scheme and of the fact that by its execution the stockholders of the Belt Company were appropriating to themselves the benefits of the property of the Belt Company which in law and in equity belonged to the unsecured creditors of that company, become legally liable to pay and is indebted to the Trust Company to the amount of the debt of the Belt Company to the Trust Company in the sum of $639,658.86 and interest from June 22, 1910, on $473,723.59 at the rate of 6 per cent per annum, on $46,565.76 at the rate of 7 per cent per annum and on $119,369.51 at the rate of 8 per cent per annum.

The contention of the Southern Company that the Trust Company is estopped from enforcing and collecting this claim based on the unsecured debt of the Belt Company to it, because, for the bonds and stock of the Belt Company, which it owned, it received bonds and stock of the Southern Company under the plan of reorganization, is untenable. The collection of this claim is not an avoidance, it is an enforcement and execution of the scheme of reorganization and of the trust in favor of the creditors of the Belt Company, which that scheme

created. The published plan of reorganization was plenary notice under the law to the Southern Company, and to all who became interested under that plan, that purchasers of property of the companies foreclosed pursuant to it, took that property in trust for the unsecured creditors of those companies. That plan expressly set apart $475,000.00 to be applied to the payment of the floating debts of those companies, vested in the committee of reorganization discretionary power to pay such of those floating debts as it saw fit to discharge and that it actually expended $1,164,172.56 in paying such debts. The committee had full authority to pay this claim of the Trust Company. The Trust Company may well have supposed that its claim, as well as the claims of other creditors of these foreclosed companies, which were paid to the amount of over a million dollars, would be paid by the committee. The Trust Company never represented that it would not, but persistently asserted that it would enforce its demand, and the collection of it from the Southern Company is neither barred by estoppel nor inconsistent with the previous position and action of the Trust Company.

Another objection to the enforcement of this claim is that the Trust Company was guilty of laches. There is nothing in the record to indicate that the Southern Company did not intend to pay the debts of the Belt Company until the foreclosure proceeding was brought by the Provident Company. As stated, the Trust Company interposed its claim in that action and the decree provided that its rights respecting the enforcement of such claim should remain unaffected. When the Southern Company filed its petition of intervention in the case brought by the Cambria Company, the Trust Company promptly asserted in defense thereto the liability of the Southern Company. The Trust Company also brought an action in the state court against the Southern Company for a part of its claim, for the reasons which it had before asserted. The

Southern Company filed its supplemental bill and obtained an injunction against the prosecution of the action in the state court, which was reversed by this court. *Guardian Trust Co.* v. *Kansas City Southern Ry. Co.*, 146 Fed. 337. The Trust Company then brought a second action in the state court for another portion of its claim. The Southern Company moved the state court to stay the action, which motion was denied. It then filed another bill for an injunction against the Trust Company to prevent the prosecution of these actions, and the circuit court granted a preliminary injunction, which was reversed by this court. *Guardian Trust Co.* v. *Kansas City Southern Ry. Co.*, 171 Fed. 43. Under these circumstances, the plea of laches is unfounded.

Again, the issue of the liability of the Southern Company to the Trust Company for the debt of the Belt Company to it came into this case as an equitable defense to the intervening petition of the Southern Company of February 27, 1905, wherein it sought to appropriate to itself property of the Central Improvement Company, 1120/1407ths of the shares of the stock of which company had been pledged to the Trust Company by the Belt Company to secure $203,900.00 of the debt of the latter company to the former. The Southern Company endeavored to appropriate this property of the Central Company under the after-acquired clauses of the old foreclosed mortgages of the Belt Company, the Air Line Company and the Gulf Company. The Trust Company answered (1) that the Southern Company owed it this debt, that he who seeks equity must do equity, that the Southern Company was entitled to no relief until it paid this debt, and (2) that by virtue of the pledged stock of the Central Company to secure the payment of the debt of the Belt Company its equitable right to the property of that company was superior to that of the Southern Company. The Trust Company was guilty of no fatal laches here because it held the majority of the stock of

the Central Company and that company held the title to the property which the Southern Company sought to take, so that the Trust Company had a perfect legal right by virtue of its stock to appropriate the property to the payment of its debt and it needed no affirmative relief, and a court of chancery will, and it is its duty to, condition its grant of relief to a complainant with the enforcement of any just claim of the defendant which the latter ought in equity and good conscience to pay, although on account of the statute of limitations, or for some other reason, the defendant might not be able affirmatively to enforce it. *Farmers' Loan & Trust Co.* v. *Denver, L. & G. R. Co.*, 126 Fed. 46, 51, 60 C. C. A. 588, 593; *Pomeroy's Eq. Jur.* Secs. 386, 393, note 4; *Brent* v. *Bank of Washington*, 10 Pet. 596; *De Walsh* v. *Braman*, 160 Ill. 415, 43 N. E. 597, 600; *Farmers' Bank* v. *Eglehart*, 6 Gill., 50, 57; *Fiezel* v. *Zuber*, 67 Tex. 279, 280, 3 S. W. 273; *Booth* v. *Hoskins* 75 Cal. 271, 275, 276, 17 Pac. 225; *De Cazara* v. *Orena*, 80 Cal. 132, 134, 22 Pac. 74; *Hall* v. *Arnott*, 80 Cal. 348, 354, 22 Pac. 200; *Grant* v. *Burr*, 54 Cal. 298 301; *McKeen* v. *James* (Tex. Civ. App.) 23 S. W. 460, 464; *Rodriguez* v. *Haynes*, 76 Tex. 225, 232, 13 S. W. 296; *Hartranft's Estate*, 153 Pa. 530, 533, 26 Atl. 104; 19 *Am. & Eng. Enc. of Law* (2d Ed.) pp. 177, 178; *Dimick* v. *Grand Island Banking Co.*, 37 Neb. 394, 399, 55 N. W. 1066; *Gage* v. *Riverside Trust Co.*, (C. C.) 86 Fed. 984, 998; *Whitmore* v. *Savings Union*, 50 Cal. 145, 150; *Specf* v. *Specf*, 88 Cal. 437, 444, 26 Pac. 203, 13 L. R. A. 137.

It is insisted upon the part of the Southern Company that the reference to a Master was by consent of parties and hence, that the findings of the Master are not subject to review. We do not think the record supports the statement that the Master was appointed by consent of parties. As before stated, the Cambria Company filed its bill September 6, 1900, and the record shows that, on the 7th of November, defendant having

answered, the case was referred by the court upon its own motion to Shannon C. Douglass. On February 27, 1905, a stipulation was filed by the parties to the effect that the Southern Railway Company might become a party to the action either by joint complaint or by bill of intervention, as it might elect, and file its bill, asserting its claim, on or before February 25, 1905; that the adverse party should have ten days thereafter in which to plead and that the testimony theretofore taken should be applicable as evidence in support of and in resistance of the Southern Company's claim; "that such orders of court as may be necessary for the purpose may be entered carrying into effect this stipulation." In accordance with this stipulation, the court made an order, permitting the Southern Company to file its bill of intervention, and gave the adverse party ten days in which to plead to the same, referring the issues to Shannon C. Douglass to take the testimony thereon and report, &c. This stipulation was not a stipulation consenting to the appointment of a Master but was simply one which authorized the court to make the necessary orders relative to permitting the Southern Company to intervene, and fixing the time within which the parties should plead thereto and an order that the testimony theretofore taken should be treated and considered as testimony relative to the issues made by the Southern Company's bill of intervention. The reference to the Master was by the court upon its own motion. The court would naturally refer that issue to the Master who had theretofore been appointed by the court on its own motion to hear the case. Subsequently, on the 1st of May, 1905, the parties stipulated that the Southern Company might amend its intervening petition, setting up, in addition to the matters contained in its intervening petition on file, a claim against the Trust Company for an alleged breach of trust, and consented in the stipulation that such new issue should be referred to Shannon C. Douglass, the Special Master, and the court,

pursuant to the stipulation, made an order permitting the Southern Company to file its amended intervening petition in that respect, and referred it to Shannon C. Douglass. It is this last stipulation and this order of the court upon which the Southern Company bases its argument that the reference of the case to the Master was by consent of parties. As before stated, the main issues, and the issues involved on this appeal, had been referred to the Master by the court upon its own motion. The stipulation that the new issue made by the amended intervening petition should be referred to the Master was a stipulation with reference to that issue, that issue was decided by the Master in favor of the Trust Company, and is not before us for review. So the case is not one where the issues involved have been heard by a master appointed by consent of the parties. Even though the original appointment of the Master had been by consent of parties, a reference under those circumstances would not preclude the court from correcting manifest errors of law made by the Master. Rule 11 of this court. *United States* v. *Tennessee & Coosa R. R. Co.*, 176 U. S. 242-256; *Clyatt* v. *United States*, 197 U. S. 207, 222; *United States* v. *Bernays*, 158 Fed. 792; *New York Life Ins. Co.* v. *Rankin*, 162 Fed. 103, 108.

The Central Improvement Company has made application to dismiss its appeal. It is not very material to the disposition of this case and to the adjudication of all the rights of the parties to this suit whether the application is granted or denied because the Trust Company had such an equitable interest in the property of the Central Company by virtue of the pledge to it of 1120 out of the 1407 shares of the stock of that company issued that the Trust Company's appeal completely challenges the decree of the court with reference to that property and furnishes ample warrant for its review and reversal. The Central Company has no property of substantial value except that specified in the decree. It is a mere

holding company either for the Trust Company or for the Southern Company and the determination of their respective equities necessarily determines the rights of the Central Company and the ownership of the beneficial interest in its property, and the motion to dismiss its appeal is denied.

The result is that the Southern Company is entitled to no relief in this suit unless it first pays to the Trust Company the amount of the Belt Company's debt to it and the costs of this suit because it became indebted to the Trust Company in the amount of that debt by its acquisition of the property of the Belt Company under the reorganization scheme with full knowledge that the stockholders of the Belt Company thereby preserved for themselves an interest in that property to the exclusion of the Trust Company, a creditor of that corporation.

Moreover, if the Southern Company were not equitably estopped from recovering the property of the Central Company by its indebtedness to the Trust Company, nevertheless, equity would require it to pay to that company the value of the latter's 1120 pledged shares of the stock of the Central Company before it would permit it to take the property of the latter company and thus to destroy the value of its stock through its claim as a purchaser at foreclosure sales under the after-acquired clauses of the old mortgages of the Gulf Company, the Air Line Company and the Belt Company. The property in controversy is the remnant of numerous pieces of real estate to which the Central Company took title and for the purchase prices of which it issued its stock at par to the Gulf Company, the Belt Company and the Air Line Company respectively, which companies paid the par value of that stock either to it or to the vendors from whom the property was bought. The result was that the Central Company, a corporation, owned and held the property in trust to pay the stockholders the par value of its stock which was the purchase

price of the property. In this state of the case the Belt Company, which acquired 1120 of the 1407 shares of the stock thus issued by the Central Company, pledged this stock in the year 1899 to the Trust Company to secure the payment of $203,900.00 of its debt to that company and the title and rights of the parties stood thus unquestioned from 1899 until 1905, when the Southern Company filed its intervening petition in this case. It asserted that the Central Company held this property in trust for the mortgagor companies and that the after-acquired clauses of their mortgages carried it to itself, the purchaser at the foreclosure sales thereunder. Conceding that the property was appurtenant to the railroad and that the terms of the after-acquired clauses were broad enough to include it, how can this claim of the Southern Company be sustained. The after-acquired clause of a mortgage attaches to the interest acquired by the mortgagor only and it is always subject and inferior to junior liens, incumbrances and equities under which the property comes to the mortgagor. *Farmers' Loan & Trust Co.* v. *Denver L. & G. R. Co.*, 126 Fed. 46, 49, 60 C. C. A. 588, 591; *United States* v. *New Orleans R. R. Co.*, 12 Wall. 362; *Central Trust Co.* v. *Kneeland*, 138 U. S. 414, 423. In a simple case the justice and the application of this rule is plain. A railroad company makes a mortgage of its property with an after-acquired clause. It subsequently purchases a piece of property and gives its note and mortgage for the purchase price and the vendor sells or pledges the note to a third person to secure his debt. The mortgagee of the railroad may not deprive the pledgee of the note of the property which secures it under the after-acquired clause of his mortgage until he pays the junior note and mortgage and this because he has given nothing for this property which the junior mortgagee and his pledgee have parted with value for their security upon it. In the case in hand, the Central Company acquired the property here in dis-

pute for its liability to pay to its stockholders the par value of its stock and it held the property in trust to secure the payment to its stockholders of that liability. The mortgagees under the railroad mortgages and the Southern Company, the purchaser thereunder, knew these facts. They parted with no value on account of this property and a court of conscience may not permit them to deprive the stockholders of the Central Company, who have really paid for it, of the trust property which the Central Company holds to reimburse them unless the court first requires them to pay to the holders of the stock its actual value.

The fact that the mortgagor companies originally took and held the stock of the Central Company before the Belt Company pledged it to the Trust Company, has not been overlooked. That fact, however, only clearly fixes the legal rights and equities of the parties, fixes the title to the land in the Central Company and estops the mortgagor companies and all claiming under them from denying that the stock which they took and sold or pledged constituted the primary liability of the Central Company and the primary equity in the property it holds as against the mortgagees of the railroad companies and the purchaser thereunder. *Watson* v. *Bonfils*, 116 Fed. 157, 163, 166, 167, 53 C. C. A. 535, 541, 544, 545.

The stock of the Central Company was not the property of that company. It was a liability of that company. Conceding that the after-acquired clauses of the mortgages conveyed the Central Company's interest in this land subject to its primary trust to pay this liability they did not convey its liability, or the stock which represented it. *Humphreys* v. *McKissock*, 140 U. S. 304, 314. The equity of the stockholders as against the Southern Company which took whatever it has with full notice of all the facts in this case, is the same that it would have been if the liability of the Central Company, now represented by its stock for the purchase price

of the property, had been represented by its promissory notes and a mortgage upon this land to secure them and they had been pledged by their owners to secure their debt to the Trust Company. The Trust Company, which holds 1120 shares of the stock of the Central Company to secure a debt to it of more than $200,000.00, has an equitable interest in the land of the Central Company superior to that of the Southern Company and the latter is entitled to no relief with reference to this property until it pays to the Trust Company the value of that stock.

The controlling equities of this case require that the decree below should be so modified, among other things, that it will adjudge that the Southern Company is indebted to the Trust Company in the amount which the Belt Company owes it, that is to say, in the sum of $639,658.86 and interest thereon from the date of the original decree, and that no relief be granted to the Southern Company unless that debt is paid.

Three of the stockholders of the Trust Company, at whose instance the question of the liability of the Southern Company was pressed to a decision in this court by the Trust Company, and its counsel, have filed a petition for leave to present the suggestion, that, in case this court finds, as it has found, that the Southern Company owes this debt, a decree should be rendered against it in this suit to the effect that the Trust Company recover this amount from the Southern Company and have execution therefor. There is no prayer for this specific relief in any of the pleadings of the Trust Company but it is relief to which, under the law and upon the facts now found, the Trust Company is clearly entitled from this, or some other court, and in its answer to one of the numerous bills filed in this case it prayed for such other and further relief as should seem meet and just in the premises. The facts that the Southern Company voluntarily inter-

vened in this suit in 1905 and sought to take from the Trust Company the security for its claim furnished by the stock of the Central Company and by a large amount of other stocks, bonds and property, to which the Southern Company was not entitled, that this attempt of the Southern Company called into this suit the Trust Company's claim that the Southern Company owed it the amount of the debt of the Belt Company, that the Trust Company tendered that issue in actions at law which it brought as long ago as 1905 and 1906, against the Southern Company in a state court to recover from it this very indebtedness, that the Southern Company delayed and prevented the trial of that issue in those actions at law by means of two successive injunctions which it obtained from the court below, on the ground that this issue was pending in this suit, injunctions which on appeal this court promptly dissolved, *Guardian Trust Co. v. Kansas City Southern Ry. Co.*, 146 Fed. 337, 76 C. C. A. 615; *Guardian Trust Co. v. Kansas City Southern Ry. Co.*, 171 Fed. 43, 96 C. C. A. 285, that this suit has been thoroughly litigated by all parties interested in it for more than six years, that tens of thousands of pages of evidence have been taken in this litigation and that further litigation in the state court over this issue, although it becomes *res adjudicata* by this decision, may by appeal or otherwise result in further delay, cause this suggestion of these stockholders to challenge serious consideration. It seems that if by the amendment of any of the pleadings of the Trust Company, or by the filing by it of a cross-bill, or a supplemental bill, or without them, such a decree as suggested may be lawfully rendered, justice and equity would require that that course should be pursued. The three stockholders are accordingly permitted to file their suggestion and leave is granted to the Trust Company, the Southern Company, and to any other party to this suit, to make such motions and present such arguments and authorities, either orally or

in writing, to this court at St. Louis on January 10, 1913, regarding this suggestion, as to them shall seem meet. The issue presented by this suggestion is reserved for later consideration. But whatever may be the result of that consideration, the decree below must be reversed and this case must be remanded to the court below with instructions to render a decree which shall contain the first five paragraphs of the decree below, shall adjudge that the equitable claim of the Trust Company, by virtue of the pledge to it of 1120 shares of the stock of the Central Company, in the property of that company described in the sixth paragraph of that decree, is superior to the claim and equity of the Southern Company therein, that the Southern Company is indebted to the Trust Company in the amount of the indebtedness of the Belt Company to that company, that is to say, in the sum of $639,658.86 and interest from the date of the original decree below, on $473,723.59 at 6 per cent per annum, on $46,565.76 at 7 per cent per annum and on $119,369.51 at 8 per cent per annum, that the Southern Company must pay this debt as a condition of obtaining any relief in this suit, that the ninth, tenth, eleventh and thirteenth paragraphs of the original decree be again adjudged and that the Trust Company recover its entire costs of the Southern Company and the Cambria Company, and that the share of such costs as between themselves, but not as against the Trust Company, that shall be paid by the Cambria Company and the Southern Company shall be determined by the court below as to it may seem just and equitable.

Filed October 22, 1912.

A true copy.

Attest:

JOHN D. JORDAN,

Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

(Seal)

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 3489.—December Term, A. D. 1913.

Central Improvement Company, Appellant,
vs.
Cambria Steel Company, et al., Appellees.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

No. 3490.—December Term, A. D. 1913.

Guardian Trust Company, Appellant,
vs.
Cambria Steel Company, et al., Appellees.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

Mr. George H. English, Jr., and Mr. D. J. Haff (Mr. Edward P. Gates and Mr. E. C. Meservey, on the brief), for Guardian Trust Company.

Mr. Frank Hagerman, for Cambria Steel Company.

Mr. Samuel Untermyer and Mr. Samuel W. Moore, for Kansas City Southern Railway Company.

Mr. Newell H. Clapp, Mr. Enoch J. Price and Mr. Harry S. Mecartney, for Edward A. Shedd, and others.

Before Sanborn, Circuit Judge, and Marshall and William H. Munger, District Judges.

Per Curiam:

The paramount issue in these cases is, Did the Southern Company become liable to pay the unsecured debt of the Belt Company to the Trust Company by participating in the execution of a scheme whereby it acquired the title to the property of the Belt Company,

deprived its creditor, the Trust Company, of recourse thereto by execution to collect its claim and yet reserved to itself and other stockholders of the Belt Company an equity in its property and a benefit therefrom more valuable than the amount of the Trust Company's claim? After exhaustive arguments and briefs and a review of the master's report on which this case came to this court the conclusion was reached that this question should be answered in the affirmative. This question had been at issue between the Trust Company and the Southern Company in this suit and in actions at law in the state courts for many years. The prosecution of those actions had been repeatedly enjoined and delayed by orders of the court below and those orders had been as often reversed by this court. While the pleadings of the parties squarely presented the issue, while this issue had been litigated strenuously in this suit the Trust Company had not in any of its pleadings made a specific prayer for a decree for the payment of its claim by the Southern Company, nor for the seizure or sale to pay it of the property of the Belt Company which the Southern Company had taken. The question had been suggested by three of the stockholders of the Trust Company whether or not, in view of the long delay, this court could or should direct an entry of a decree for such relief in these cases rather than to leave that relief to be granted upon trials of the cases in the state court, and as this question had not been argued counsel for all the parties were permitted to be heard upon it. That hearing developed into a re-argument of all the salient issues in the cases and at the close of that hearing they were taken under advisement by the court. It is the purpose now to state the conclusions at which we have arrived after another consideration of the issues presented.

The history of this litigation, the issues and many of the facts found by the master are set forth in our former opinion. *Central Improvement Co.* v. *Cambria Steel Co.*, 201 Fed. 811, 120 C.C.A. 121.

(1) From all the facts pertinent to the issue which are set forth in many printed pages of his report, the master deduced this decisive conclusion, "That the Southern Company is not liable in any way for the floating indebtedness of the Belt Company." To this conclusion the Trust Company excepted on the ground that in view of other conclusions which the master reached adverse to it it was unnecessary for him to determine that issue. A consideration

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after argument of all the facts relating to this issue which the master found in his report convinced this court that the conclusion lawfully deducible from them was that the Southern Company was liable to pay to the Trust Company the debt which the Belt Company owed it. Counsel for the Southern Company now insist that this court was without power to consider or correct this conclusion of the master which the court below followed, and that the Trust Company must suffer the loss of this amount because its counsel did not state in its exception that the conclusion was wrong on the merits of the issue. They invoke the conceded general rule that where no exception is taken to the master's report it will be deemed to be true and where exceptions to parts of it are taken the parts to which no exception is taken will stand as correct and will not be open to review in an appellate court. *Burns* v. *Rosenstein*, 135 U. S. 449; *Provident Life & Trust Co.* v. *Railway Co.*, 177 Fed. 854, 859. But this rule, like most rules of law or practice, is not without its exceptions. In *Sheffield, etc. Ry. Co.* v. *Gordon*, 151 U. S. 285, 291, the Supreme Court, while holding the exceptions in that case insufficient to present the questions argued, said: "It is true that if the report of the master is clearly erroneous in any particular it is within the discretion of the court to correct the error, but we see no occasion for exercising such discretion in this case." In 2 Daniell's Chancery Pleading and Practice, at page 1314, it is said that it is entirely discretionary with the court to grant an opportunity to except to a report after it has been absolutely confirmed. Counsel also claim that by the Trust Company's exception they were induced to forego a review of the finding of the master that the Belt Company was indebted to the Trust Company and that thereby an equitable estoppel from reviewing the issue of the liability of the Southern Company was created. But suits in chancery are tried and reviewed in view of the fact that a court of equity has and frequently exercises the power where justice may thereby be done, to grant to litigants the right remedy although they have sought the wrong one. *Clark* v. *Clark*, 62 N. H. 267, 272; *Hardin* v. *Boyd*, 113 U. S. 756; *Wiggins Ferry Co.* v. *Ohio & Mississippi Ry. Co.*, 142 U. S. 396, 414, 415, 416; *Bradford* v. *Bank*, 13 How. 56, 69, 70; *Walden* v. *Bodley*, 14 Pet. 156, 164; *Moran* v. *Hagerman*, 64 Fed. 499, 503, 504. As an appeal in equity in the federal courts results in a trial *de novo* the appellate court is not, in our opinion, so powerless that it is compelled to affirm an unjust decree, nor is the appel-

lant so conclusively estopped that it may not attack such a decree by the fact that it gave a wrong reason for its exception to the erroneous conclusion of the master it assails.

Moreover, the conclusion here challenged was a mere deduction from the facts disclosed in the master's report and where it appears on the face of the report that the master has drawn an erroneous conclusion from the facts he found, the absence of an exception does not disable the court from correcting the error and entering a just final decree. 2 Daniell's Chancery Pleading and Practice, * page 1310; 17 Encyc. of Pleading and Practice, 1048; *Celluloid Mfg. Co.* v. *Cellonite Mfg. Co.*, 40 Fed. 476, 477; *Burke* v. *Davis*, 81 Fed. 907, 910, 26 C. C. A. 675, 678; *Haymond* v. *Murphy*, 64 S. E. (W. V.) 855, 857; *Hayes* v. *Hammond*, 44 N. E. (Ill.) 422, 423; *Hurd* v. *Goodrich*, 59 Ill. 450, 456; *Von Tobel* v. *Ostrander*, 42 N. E. (Ill.) 152, 153. The contention that the Trust Company was estopped from seeking a correction of this error and that this court was powerless to correct it does not seem to be well founded, and this court is unwilling to affirm what it deems an unjust decree on account of the defect in the exception.

(2) It is conceded that by the transaction described in the former opinion of this court and deemed by it violative of the rights of the Trust Company, a creditor of the Belt Company, if that transaction be valid, was deprived of legal recourse to the property of the Belt Company to obtain payment of that company's debt to the Trust Company of about $360,000. At that time the Southern Company, by an exchange of its stock and bonds for the stock and bonds of the Belt Company, and by a formal foreclosure by itself, as holder of about 89 per cent of its bonds, by means of its representative, the Provident Company, trustee for the bondholders, against and with the consent of itself as the holder of about 97 per cent of its stock, and by a foreclosure sale of the property of the Belt Company to itself obtained the title to the Belt Company's property to itself, the bondholders of the Belt Company secured about $1,330,000 par value of the bonds and $250,000 of the preferred stock of the Southern Company, aggregating at their par value $1,580,000 for their $1,000,000 par value of bonds of the Belt Company, and the stockholders of the Belt Company secured for their $4,750,000 par value of the stock of that company about

$1,187,500 par value of the preferred stock and about $3,562,500 par value of the common stock, in all about $4,750,000 par value of the stock of the Southern Company.

The following propositions of law are deemed incontestable: "A reorganization of an insolvent railroad company, by which both its mortgage bondholders and its stockholders, in exchange for their bonds and stocks, are given an interest in the new company, which purchases the property of the old company at a foreclosure sale made pursuant to such plan of reorganization and by the consent of the old company and its stockholders, is fraudulent in law as to unsecured creditors of the old company whose claims are left unpaid, and renders the new company liable for the claims of such creditors, at least to the extent of the value of the interest in the new company secured by the stockholders of the old company." *Northern Pacific Ry. Co.* v. *Boyd*, 177 Fed. 804, 101 C. C. A. 18; *Luedecke* v. *Des Moines Cabinet Co.*, 118 N. W. 456, 140 Ia. 223; *Hurd* v. *New York & Commercial Steam Laundry Co.*, 167 N. Y. 89, 60 N. E. 327.

Where such a transaction is consummated without offering to the unsecured creditor a fair share of the benefits to be derived from the vesting of the title in the purchaser at the foreclosure sale, the intent or purpose to deprive him of recourse to the property to collect his debt becomes immaterial and the fact that it has that effect charges the purchaser with liability. "As against him the sale is void in equity regardless of the motive with which it was made. For if such contract reorganization was consummated in good faith and in ignorance of the existence of the creditor, yet when he appeared and established his debt the subordinate interest of the old stockholders would still be subject to his claim in the hands of the reorganized company." *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482, 502. "For, if purposely or unintentionally a single creditor was not paid or provided for by the reorganization, he could assert his superior rights against the subordinate rights of the old stockholders in the property transferred to the new company. They (the stockholders of the old company) were in the position of insolvent debtors who could not reserve an interest as against creditors. Their original contribution to the capital stock was subject to the payment of debts. The property was a trust fund charged primarily with the payment of corporate liabilities. Any device whether by private contract or judicial sale under consent decree whereby stockholders were preferred before the

creditors was invalid. Being bound by the debts, the purchase of their property, by their new company, for their benefit, put the stockholders in the position of a mortgagor buying at his own sale. If they did so in good faith and in ignorance of Boyd's claim they were none the less bound to recognize his superior right in the property when years later his contingent claim was liquidated and established." *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 505. "No such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee but of every creditor of the corporation. * * * * Any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of prior rights of either class of creditors comes within judicial denunciation." *Louisville Trust Co.* v. *Louisville etc. Ry. Co.*, 174 U. S. 674, 683, 684.

The transaction in hand, if valid, had the effect to deprive the creditors of the Belt Company of and to secure to the stockholders of that company out of its property the value of $1,187,500 par value of the preferred stock and $3,562,500 par value of the common stock of the Southern Company, and upon its face it seems to fall within the denunciation of these rules of law.

But counsel for the Southern Company argue that although the completed transaction has the effect of an illegal proceeding it is not such because it is composed of two independent and valid transactions, to-wit: (1) the organization in March, 1900, of the Southern Company and the exchange of the bonds and stock of the Belt Company for the bonds and stock of the Southern Company, so that by April 1, 1900, the latter had acquired 97 per cent of the stock and 89 per cent of the bonds of the Belt Company, and the taking possession of the property of the Belt Company by the Southern Company by virtue of its ownership of these bonds and stock on April 1, 1900, when it filled the offices of the Belt Company with its chosen agents and proceeded to control and operate it, and (2) the filing on September 6, 1900, by the Provident Trust Company, the trustee in the Belt mortgage, at the instance of the Southern Company, the owner of 89 per cent of the bonds, of the bill to foreclose the mortgage of the Belt Company, 97 per cent of whose stock was owned by the Southern Company, the appearance and consent of the Belt Company on the same day to the appoint-

ment of receivers of its property, its answer on October 19, 1901, admitting the material averments of the bill, the decree on November 6, 1901, of foreclosure and sale of the Belt property and the sale thereof on December 31, 1901, under this decree to the Southern Company, the owner of nearly all its bonds and stock. The contention is that while the former transaction was the result of the scheme of reorganization, the latter was independent and free from the influence thereof, and that each of these transactions taken by itself, as counsel insist they should be, is free from any just objection by any creditor of the Belt Company.

The plan of reorganization was made November 7, 1899, and it became effective December 20, 1899. This plan was made a part of the reorganization agreement and it stated that it was expected and intended that the property of the Gulf Company would be purchased by the reorganization committee, that a successor of the company would be organized to which this property and the stocks and bonds of the Belt Company deposited under the plan would be conveyed, that all this property was to be made subject to the mortgage of the new company and that it was "intended, as soon as practicable, that the new company acquire the property of the terminal companies in fee and bring them directly under the lien of the mortgage." It was then one of the objects of the scheme of reorganization which the committee and the Southern Company, which it organized, were empowered and expected to carry into effect, that the latter company should acquire the property of the Belt Company "in fee" and bring it "directly under the lien of the mortgage," and the acquisition of the stocks and bonds of that company and their pledge under that mortgage were but the means to the accomplishment of this end which the plan contemplated.

It is conceded that the organization of the Southern Company, its purchase of the Gulf Company property, its exchange of its stocks and bonds for those of the Belt Company, and its possession and control of its property on April 1, 1900, by means of its ownership of this stock, were steps in the execution of the scheme. But the reorganization committee did not cease its work until October 1, 1900, and before that date the Southern Company by its representative, the Provident Company, had, on September 6, 1900, commenced the suit to foreclose the Belt mortgage and to put its property in the hands of receivers and had caused the Belt Company to consent to the receivership. For what purpose did the

Southern Company take these steps? It had the possession and absolute control of the Belt property by its ownership of 89 per cent of its bonds and 97 per cent of its stock. A default on its bonds was in reality a default of itself to itself. Foreclosure could give it no more power over the Belt Company than it already had. For what purpose then was the foreclosure? Evidently to carry out the reorganization agreement, as it was within the power and as it was the duty of the committee and of that company, its creature, to do, to acquire the property of the Belt Company in fee and bring it directly under the lien of the mortgage. Why did the Southern Company exchange its stock for the stock of the Belt Company? Was it not for the purpose of silencing the opposition of the Belt stockholders to the coming foreclosure, and to its acquisition of the fee of the Belt Company's property, and was not the scheme of reorganization the primary cause, the vesting of the fee of the Belt property in the Southern Company by the foreclosure the object and effect of that scheme and the exchange of the stock and the foreclosure of the Belt mortgage the means contemplated and authorized by that scheme to attain that end? To the minds of the members of this court the record in this case leaves no alternative but to answer these questions in the affirmative.

Moreover, the property of the Belt Company was a trust fund The stockholders of that company were trustees charged with the duty to apply that property to the payment of the claims of the trust company and of the other creditors of the Belt Company before they took to themselves any share in or benefit therefrom. When the Southern Company took their stock and gave them $4,750,000 par value of its stocks and bonds for their interest in the property of the Belt Company, it stepped into their shoes and became a trustee for the creditors of the Belt Company with plenary notice that the interest of those creditors in the property was at least as much as the value of the stocks and bonds it was giving for the interest of the stockholders, for the rights of the creditors in the Belt property were prior and superior to those of the stockholders. By virtue of the plan of reorganization the Trust company had become such trustee. The agreement of reorganization and its ownership of 89 per cent of the bonds and 97 per cent of the stock of the Belt Company gave the committee and the Southern Company unrestricted power to discharge its duty to the creditors of

the Belt Company, as their trustee, and to accomplish the object of the agreement regarding this property, the vesting of the fee of it in the Southern Company. They had the power to attain this object in a just and lawful way, to pay, to buy or to compromise the claims of the creditors, or to offer them a just share in the benefits of the reorganization, a share at least as valuable as that given to the stockholders. They did neither, but in the face of the danger signal that "any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation," the Southern Company proceeded by a foreclosure caused by itself, the owner of 89 per cent of the bonds, trustee for the creditors, really against and with the consent of itself as such trustee, owner of 97 per cent of the stock, to obtain against the protest of the Trust Company, whom the court expressly excepted in the decree from its effect, a foreclosure decree and sale of this property in effect by itself as trustee to itself as trustee, and thenceforth to insist that it had thereby secured to itself and deprived its cestuis que trust, the creditors of the Belt Company, of all interest in the property. In view of the fact that the acquisition of the fee of the Belt property by the Southern Company was stated in the reorganization plan and agreement to be one of their intended results, that this result has been obtained, that the exchange of the stocks and bonds were the means specified therein to attain it, and were the means by which the consent decree of foreclosure and sale of the Belt property to the Southern Company was effected, and that this foreclosure and sale were the means by which the intended result of the plant of acquisition of the fee of the Belt properties by the Southern Company was secured, this court is unwilling to hold that the validity of these proceedings can be sustained against the rule that "any device whether by private contract or judicial sale under consent decree whereby stockholders were preferred before the creditors was invalid," 228 U. S. 504, by contemplating or treating them as two separate and independent transactions, one consisting of that part of the proceedings conducted before and the other of that part of the proceedings conducted after April 2, 1909. They appear to this court to constitute a single transaction instituted, conducted and consummated pursuant to the preconceived plan to vest the fee of the properties of the Belt Company in the Southern Company and to bring them directly under the lien of its mortgage.

(3) Counsel for the Southern Company contend that the Trust Company is entitled to no favorable decree for the payment of the liability of the Southern Company to it and to no affirmative relief because it did not obtain a judgment against the Belt Company and a return of nulla bona to an execution before it presented its claim and demanded relief. But that is an objection only to the jurisdiction of a national court in equity of an original and independent bill to charge a fraudulent trustee. A claim of the nature of that made by the Trust Company in the absence of judgment or execution may be presented by intervention in a foreclosure suit and may there, or in any other suit wherein the court has acquired jurisdiction of the subject matter and the parties, be adjudicated. *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, 379. The objection is not tenable here because the decision of the question of the liability of the Southern Company to the Trust Company became, as conceded by counsel for the Southern Company, necessary to the disposition of this case, 201 Fed. 817, to which the Trust Company was originally made a defendant against its will. This is now a suit in equity in which the court below and this court have full jurisdiction of the subject-matter and the parties to the controversy regarding this liability, and under a familiar and salutary rule the power is conferred and the duty is imposed upon a court of equity, which has acquired such jurisdiction, to consider and determine all the rights and claims of the parties relating to the subject-matter and to enter a decree that will finally determine them to the end that a multiplicity of suits may be avoided and litigation may cease. *Hopkins* v. *Grimshaw*, 165 U. S. 342, 358; *Sunflower Oil Co.* v. *Wilson*, 142 U. S. 313, 325; *Ward* v. *Todd*, 103 U. S. 327, 329; *In re Blake*, 150 Fed. 279, 283, 80 C. C. A. 167, 173; *United States* v. *Standard Oil Company*, 152 Fed. 290, 296; *Campbell* v. *Golden Cycle Mining Co.*, 141 Fed. 610, 614, 73 C. C. A. 260, 264.

It is contended that the remedy of the Trust Company is limited to a pursuit of the stockholders of the Belt Company who exchanged their stock for the stock of the Southern Company. But the liability of those stockholders is founded on their relation as trustees for the creditors of the corporation. The Southern Company with full notice of their and its liability and duty to the creditors of the Belt Company by the exchange of stock became such a trustee, and by as much as its power over the property of the Belt Company by its ownership of nearly all its bonds, as well as stock, was greater

than that of the former stockholders, by so much was its duty to protect the rights and interests of its cestuis que trust, the creditors, higher and more imperative. It owed them the duty to exercise good faith, care and diligence to secure and deliver to them their full equitable share of the property or the value of that share. Any sale or conveyance of the property to itself whereby they were deprived of and it secured that share, or its value, was a breach of duty and of trust which invokes plenary relief from a court of chancery, and as by its formal foreclosure sale to itself of the property of the Belt Company it took to itself and deprived the creditors of their equitable interest in the property and of the value of that interest it is not less liable in equity for this breach of trust than were the stockholders with whom it exchanged its stock. The duty and liability of the majority stockholders to minority stockholders is not less than this, *Jones* v. *Missouri Edison Electric Co.*, 144 Fed. 765, 771, and cases there cited, and their duty to creditors whose equitable rights and interests in the property of the corporation are superior to those of stockholders cannot be less.

Moreover, where the property of a corporation is sold to a purchaser and part or all of the purchase price thereof is paid or distributed to its stockholders to the exclusion of its creditors from a collection of their debts from the property of the corporation, the latter may recover that part of its value from the purchaser with notice, on the ground that the conveyance is fraudulent in law. *Central of Georgia Ry. Co.* v. *Paul*, 93 Fed. 878, 882, 884; *Luedecke* v. *Des Moines Cabinent Co.*, 118 N. W. 456; 457; *Hibernia Ins. Co.* v. *St. Louis & N. O. Trans. Co.*, 13 Fed. 516; *Grenell* v. *Detroit Gas Co.*, 70 N. W. (Mich.) 413; *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482, and the fact must be constantly borne in mind in the consideration of this case, that as against the Trust Company the entire transaction was in effect that the Southern Company knowingly purchased and took to itself without even a formal foreclosure the property of the Belt Company and paid the latter's stockholders the value of $4,750,000 of its stock therefor to the exclusion of the Belt Company's creditors therefrom, for by the express provision of the foreclosure decree the Trust Company was excepted from all its effects.

Another argument is that the Trust Company is entitled to no relief because the equitable interest of the creditors in the property of the Belt Company was of no value. This contention is founded on

the findings of the master that there was no direct testimony of the fair value of the Belt Company's property at or before the time of the foreclosure, no proof that it was worth more than the $1,000,000 for which it was sold at the foreclosure sale, and therefore that it was sold at its fair market value. The mortgage was $1,000,000 and the deduction is that the equitable interest of the creditors was valueless. But the crucial issue here was not what the fair market value of the mortgaged property was, nor was it how much more the mortgaged property was worth than the amount of the mortgage. Although evidence upon these subjects would have been competent in the consideration of the real issue here in the absence of an estoppel, that issue was, what was the equitable interest of the creditors in the mortgaged property of the Belt Company worth during the execution of the scheme and immediately after the foreclosure sale and the appropriation of it thereby by the Southern Company, the trustee for the creditors, to itself, for a trustee who violates his trust may not profit thereby. *Ervin* v. *Oregon Railway & Navigation Co.*, 27 Fed. 625, 633; *Jones* v. *Missouri Edison Electric Co.*, 144 Fed. 765, 779. The creditors were entitled to the highest value their interest had during this time, either for the purpose of sale or for the purpose of preventing a foreclosure of the mortgage upon the Belt property, or for the purpose of compromising their claims or conditioning the foreclosure, or for the purpose of the present or future control of the property. "If the value of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control. In either event it was a right of property out of which the creditors were entitled to be paid before the stockholders could retain it for any purpose whatever." *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 508.

The report of the master discloses other facts than that he received no direct evidence of the fair market value of the property except the bid at the foreclosure sale, which leave no doubt that the equitable interest of the creditors was worth much more than the amount of the Trust Company's claim, $360,000. That report shows that the Southern Company paid $1,330,000 of its bonds and $250,000 of its preferred stock, or $1,580,000 of its new bonds and stock for the $1,000,000 of the old bonds of the Belt Company. The fact to which counsel call attention, that the new bonds drew

but three per cent interest per annum while the old bonds drew five per cent, has not been over-looked. But even so, the reorganization committee and the Southern Company would not have given for these old bonds a bonus of 33 per cent in new bonds and $250,000 in the stock of the Southern Company unless the old bonds had been well secured. The master's report also shows that the Southern Company gave $1,187,500 of its preferred stock and $3,562,500 of its common stock to the stockholders of the Belt Company for their equitable interest in the property of that company, that at the same time stockholders of the Gulf Company paid, and the Southern Company received, ten dollars per share in cash and an equal number of shares of the stock of the Gulf Company for tens of thousands of shares of the Southern Company's common stock. That stock must, therefore, have been worth at least the ten dollars cash per share which was paid for it, and it was worth as much more as the value of the stock of the Gulf Company. The preferred stock of the Southern Company could not have been worth less than its common stock. The Southern Company, therefore, paid in value at least $475,000 for the equitable interest of the stockholders of the Belt Company in its property when it gave them $4,750,000 of its preferred and common stock for their stock in that company.

But the equitable interest of the creditors in the property of the Belt Company was superior to that of the stockholders and its value could not have been less, and was undoubtedly greater, than the $475,000. That interest was, therefore, worth more than enough to have paid the $360,000 which the Belt Company owed to the Trust Company and the Southern Company cannot escape liability on the ground that it was worthless. The fact that at the foreclosure sale, where there was no competition, the Belt Company was bid in at $1,000,000 fails to disprove or to even render doubtful this conclusion, and the Southern Company which gave $4,750,000 of its full paid stock, which it was readily selling for ten dollars cash per share, and Gulf stock of equal amount, for the inferior stock of the Belt Company, cannot be heard to say that the superior equity of the creditors therein was worthless. *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 508; *Rankin* v. *Gardner*, 34 Atl. (N. J. Eq.) 935, 937; *Garrison* v. *Monaghan*, 33 Pa. St. 232, 234.

Deliberate consideration has been given to the earnest objection to the consideration by this court of the question of the value of this equitable interest of the creditors in the Belt property on the

ground that the master found that there was no direct evidence that the property of the Belt Company was worth more than $1,000,000 and hence that this was its fair value, that no exception was taken to that finding and that the evidence is not here. But because the finding of the fair market value of the mortgaged property is not conclusive of the value of the creditors' equity therein and because other facts and findings contained in the master's report, all of which are available to this court for the determination of that issue, have convinced that the value of that equity was more than $475,000, the objection of counsel has not been thought fatal to the consideration and determination of this question.

Counsel say that because the original stockholders of the Belt Company, by the exchange of their stock for that of the Southern Company retained, as they claim, only 3 1/3 percent of the value of their equitable interest in the Belt property, therefore the Southern Company is liable for only 3 1/3 per cent of that interest. But the measure of the creditors' recovery is the value of the creditors' equity which was diverted from them by their trustees, the stockholders of the Belt Company, including the Southern Company, the successory trustee, and vested in that trustee. If the Southern Company had been the owner of the bonds of the Belt Company only and knowing the condition and indebtedness of the Belt Company, as it did, had paid to the stockholders of that company $475,000 to the exclusion of the creditors for a conveyance of its property by the Belt Company to the Southern Company, it could not have escaped liability to the creditors of that company for that amount. Much less can it do so when it became owner of nearly all the Belt Company's stock, and in equity a trustee for its creditors. Story's Equity Jurisprudence, Secs. 1261, 1262; *Grenell* v. *Detroit Gas Co.*, 70 N. W. (Mich.) 413; *Camden Interstate Ry. Co.* v. *Lee*, 84 S. W. (Ky.) 332, 333; *Central of Georgia Ry. Co.* v. *Paul*, 93 Fed. 883, 884; *Luedecke* v. *Des Moines Cabinet Co.*, 118 N. W. 457, 458; *Hibernia Ins. Co.* v. *St. Louis & N. O. Trans. Co.*, 13 Fed. 516, 519.

It is another contention of counsel for the Southern Company that the remedy of the Trust Company in this court of equity is limited to the subjection of the property of the Belt Company in the possession of the Southern Company to the payment of its claim and that it may not have a decree that the Southern Company pay it. This court does not concede the soundness of this posi-

tion and the leading case on the subject cited by counsel for the Southern Company does not sustain it. The quotation they make from that case is in these words:

"A sale may be void for bad faith though the buyer pays the full value of the property bought. This is the consequence, where his purpose is to aid the seller in perpetrating a fraud upon his creditors, and where he buys recklessly, with guilty knowledge. When the fact of fraud is established in a suit at law, the buyer loses the property without reference to the amount or application of what he has paid, and he can have no relief either at law or in equity. When the proceeding is in chancery, the jurisdiction exercised is more flexible and tolerant. The equity appealed to—while it scans the transaction with the severest scrutiny—looks at all the facts, and giving to each one its due weight, deals with the subject before it according to its own ideas of right and justice. In some instances it visits the buyer with the same consequences which would have followed in an action at law. In others, it allows a security to stand for the amount advanced upon it. In others, it compels the buyer to account only for the difference between the under price which he paid and the value of the property. In others, although he may have paid the full value, and the property may have passed beyond the reach of the process of the court, it regards him as a trustee, and charges him accordingly. Where he has honestly applied the property to the liabilities of the seller it may hold him excused from further responsibility. The cardinal principle in all such cases is, that the property of the debtor shall not be diverted from the payment of his debts to the injury of his creditors, by means of the fraud." *Clements* v. *Moore*, 6 Wall. 299, 312.

The application of the principles there announced in that suit, which was in equity, was this: Nicholson, the debtor, had sold his property to Moore for $6,310.35 to defraud his creditors, and Moore had paid Nicholson for the goods in cash and his own notes which Nicholson had disposed of and Moore had sold the goods. But Nicholson had applied all of the $6,310.35 to the payment of his debts except $1,500.00. The Supreme court held that Moore was liable to the creditor Clements for that amount. By the same mark the Southern Company became liable to the Trust Company to the extent of its claim for the value of the $4,750,000 of its stocks which it issued to the stockholders of the Belt Company to secure

the property of the Belt Company and divert it from its creditors. *Central of Georgia Ry. Co.* v. *Paul*, 93 Fed. 883, 884; *Camden Interstate Ry. Co.* v. *Lee*, 84 S. W. (Ky.) 332, 333.

The question, however, is not material in the case at bar because the transaction was a conveyance of the property of the Belt Company in fraud of creditors and a breach of trust by the Southern Company, which company, with full knowledge of all the facts, actively participated in the entire transaction and thereby acquired the property of the Belt Company so that that property and the improvements the Southern Company has made thereon, free from the $1,000,000 Belt mortgage and free from any charge for the expenses which the Southern Company has made thereon, stands in its hands charged with a trust to pay the claim of the Trust Company against the Belt Company which the court may execute by a seizure and sale by its master or receiver. *Railroad Company* v. *Soutter*, 80 U. S. 517, 522, 524; *Guckenheimer* v. *Angevine*, 81 N. Y. 394, 397; *Goble* v. *O'Connor*, 61 N. W. (Neb.) 131, 132.

And if the Southern Company has disposed of the property or destroyed it, or placed it beyond the reach of the Trust Company or the court, or given a mortgage or incumbrance upon it to a party without notice, the court has plenary power and it is its duty to require the Southern Company to account for and pay over the proceeds of the property or the value of it, or the proceeds of the mortgage, or the amount of it, to the extent of the Trust Company's claim and to so conduct its proceedings and mold its decrees that full relief may be secured by the Trust Company. And as the property of the Belt Company was worth many times the amount of the claim of the Trust Company at the time of its transfer to the Southern Company the ultimate result will be the same whether the decree be for the seizure and sale of the Belt property or for the payment of the claim of the Trust Company by the Southern Company, for it must ultimately be paid either out of the property in its hands or by the Southern Company itself. 20 Cyc. 630, 631; *Doherty* v. *Holliday*, 32 N. E. (Ind.) 315, 317, 36 N. E. 907, 908; *Jones* v. *Reeder*, 22 Ind. 111; *Swinford* v. *Rogers*, 23 Cal. 234, 237; *Mason* v. *Pierron*, 34 N. W. (Wis.) 921, 925; *Blair* v. *Smith*, 15 N. E. (Ind.) 817, 819, 820; *Williamson* v. *Williams*, 11 Lea 355; *Murtha* v. *Curley*, 90 N. Y. 372; *Post* v. *Stiger*, 29 N. J. Eq. 554, 561; *Chamberlin* v. *Jones*, 16 N. E. (Ind.) 178, 179; *Muskegon Valley Furniture Co.* v. *Phillips*, 21 So. (Ala.) 822, 823; *Coale* v. *Moline*

Plow Co., 25 N. E. (Ill.) 1016, 1018; *Dilworth* v. *Curts*, 29 N. E. (Ill.) 861, 864; *Hulley* v. *Chedic*, 36 Pac. 783, 786; *Morrell* v. *Miller*, 43 Pac. (Ore.) 490, 494.

(4) Counsel argue with great force and ability that the Trust Company is estopped from enforcing against the Southern Company its claim for its breach of trust to it as a creditor of the Belt Company, (1) because it signed, and induced others to sign, the trust agreement which contained this paragraph: "No right is conferred, nor any trust, liability or obligation (except the agreements herein contained in favor of the holders of certificates of deposit hereunder) is created by this agreement or the plan, or is assumed hereunder, or by or for any new company in favor of any bondholder or any other creditor or any holder of any claims whatsoever against the said companies, nor in favor of any company now existing or to be formed hereafter (whether such claim be based on any bonds, coupon stocks, securities, lease, guaranty or otherwise) with respect to any security deposited under this agreement or any moneys paid to or received by the Committee or by the depositor hereunder, or with respect to any property acquired by purchase at any foreclosure sale, or with respect to any new certificates to be issued hereunder, or with respect to any other matter or thing." (2) because it was one of the depositories under the agreement and on June 26, 1900, it accepted bonds and stock of the Southern Company in exchange for bonds and stock in the Gulf Company and other companies reorganized under the agreement, and especially because it accepted stock of the Southern Company in exchange for stock of the Belt Company which it held, and (3) by its laches in presenting its claim against the Southern Company.

It may be that if when the Trust Company signed the agreement that instrument had disclosed a purpose or had by its terms required the committee, or the stockholders of the Belt Company, or their successory trustee the new company, the Southern Company, to violate their trust and divert the equity of the creditors of the Belt Company in its property to its stockholders, the Trust Company's signature to it, its action as a depository of the bonds and stocks under it and its exchange of its Belt Company stock for the Southern Company stock might have wrought an estoppel against it. But the agreement must be read in the light of the law which was necessarily a part of it. It was to execute a plan, which

it disclosed, to transfer the property of the Belt Company to a new company by means of the exchange of the stock of the new company for that of the Belt Company. The law was that as against creditors of the Belt Company such a plan could be lawfully executed in but one way, and that was by offering and if accepted, by paying to the creditors of the Belt Company either in cash or in stock of the new company, or in some other property at least as much in value as the stockholders should receive, and in the absence of such an offer or payment the transfer would be fraudulent and voidable as to the creditors. Unless there was in the agreement some term or provision which required the committee or the Southern Company to violate this law and to make a transfer fraudulent and voidable as to the creditors, the legal presumption was that the agreement contemplated, and that the committee and the Southern Company would make, such an offer and payment to the creditors, and upon that presumption the Trust Company had the right to rely when it signed the agreement and thenceforth until it was clearly notified to the contrary. The legal presumption was that the committee and the new company, the Southern Company, which was to succeed to the trusteeship of the stockholders of the Belt Company, and all others executing the agreement would obey the law, would refrain from making the transfer of the property from the Belt Company fraudulent and voidable and would make it fair, just and valid. The Trust Company had the right to calculate the natural and probable result of its signature to the agreement and of all its acts and omissions in reliance upon this presumption. Indeed, it could reckon upon no other, for it is alike impracticable and impossible to predicate and administer the rights and remedies of men upon the theory that their associates and fellowmen will either violate the laws or disregard their duties. *Cole* v. *German Savings & Loan Co.*, 124 Fed. 113, 119, 59 C. C. A. 593, 599; *Little Rock & M. R. Co.*, v. *Barry*, 84 Fed. 944, 950, 28 C. C. A. 644, 650; *Burt* v. *Advertiser Newspaper Co.*, 154 Mass. 238, 247; *American Bridge Co.* v. *Seeds*, 144 Fed. 605, 609, 75 C. C. A. 407, 411.

The reorganization agreement has been searched in vain for any provision which required or notified the committee or the new company that they must violate the law and make the transfer fraudulent and void as to creditors. On the other hand, that agreement declared that the results of its execution would be (a) the placing of the properties of the Belt Company, the Gulf Company

and the Dock Company under one corporate ownership, management and control, "(b) the payment of the floating debt and the existing car trust obligations." It set apart $475,000 for the payment of floating debts; it expressly authorized the committee to acquire, hold or extinguish "any obligation in the nature of floating debt or otherwise against any company or property embraced in said plan," and under this power the committee actually expended $1,164,172.50. It declared that it was intended to confer on the committee any and all powers which they might deem necessary or expedient towards carrying out and promoting the purposes of the plan and the agreement, and that the methods to be adopted for carrying out the reorganization consolidation and unification of the properties should be entirely discretionary with the committee. The committee and the Southern Company, therefore, had ample power to realize and pay to the creditors of the Belt Company the value of their equity in the property of the Belt Company before they transferred that property to the Southern Company. Let us now turn to the paragraph in the agreement on which counsel for the Southern Company rely for their estoppel by deed. So far as material it provides that "no right is conferred, nor any trust, liability or obligation * * * * is created by this agreement or the plan, or is assumed hereunder, or by or for any new company in favor of * * * * any holder of any claims whatsoever against the said companies, * * * * with respect to any property acquired by purchase at any foreclosure sale." There are two reasons why the Trust Company did not, by signing this paragraph, deprive itself of its equity in the property of the Belt Company, which it held as the cestui que trust of its stockholders, nor of its claim against the Southern Company, the stockholder's successory trustee. First, if that equity and trust were created or conferred by or under the agreement they were created and conferred, not by the just and lawful execution of that agreement, but by the inequitable and fraudulent appropriation of the Trust Company's equity in the property to the benefit of its stockholder or stockholders, and the paragraph in question barred the Trust Company from asserting only such rights, trusts, liabilities and obligations as arose out of the lawful and equitable execution of its contract. It did not bar it from enforcing its claims accruing from illegal or inequitable acts or omissions of those engaged in the execution of the agreement. If the committee or anyone engaged in such execution had unlawfully appropriated to their or his

benefit the property, money or securities of signers of the contract which came to them or him under the agreement, the signers would not have been estopped by that paragraph from recovering the property or from enforcing the personal liability of the appropriators; second, the Trust Company's right, trust and equity in the property of the Belt Company acquired by the Southern Company "by purchase at any foreclosure sale" was neither created nor conferred by the reorganization agreement. It existed in all its force and inhered in the Belt Company's property by virtue of the relation of the Trust Company as a creditor of the Belt Company to the latter's stockholders before the agreement was made, and there it still inheres so that it did not fall within the terms of the paragraph in question and therefore was not affected thereby. Nor did the liability and obligation of the Southern Company for its breach of that trust now here in suit fall within the terms of that paragraph, for it was not created by that agreement, but by the Southern Company's subsequent transfer of the equity of the creditors of the Belt Company to itself, its stockholder and the trustee for its creditors without securing and paying to them the value of that equity. For these reasons the court is of the opinion that the Trust Company was not estopped by its signature to and activity in inducing others to sign the agreement from enforcing its claims as a creditor of the Belt Company against the Southern Company and against the property of the Belt Company in its possession or control.

Was the Trust Company equitably estopped from presenting and enforcing its claim by its promotion of the reorganization agreement, its participation in its execution and its acceptance on July 26, 1900, of stock of the Southern Company in exchange for its stock in the Belt Company and its acceptance of stock and bonds of the Southern Company in exchange for its stock and bonds in the Gulf Company and some of the other reorganized companies, or by its laches? Laches is equitable estoppel under another name and these two claims of estoppel will be considered together. A statement in chronological order of the salient facts material to the issue here presented will greatly aid in its disposition.

The plan of reorganization was made on November 7, 1899. It became effective on December 20, 1899. In December, 1899, or during the early part of the year 1900, the Trust Company requested a prominent member of the reorganization committee to adjust

or settle and pay its claim against the Belt Company, and he answered that it was asserted that the Belt Company did not owe the Trust Company anything, that an examination of the books of the Belt Company and the books of the Trust Company was being made and that when that was completed he would take up the question of whether anything could be done towards an equitable settlement of the claim. On February 5, 1900, the decree of foreclosure and sale of the Gulf Company's property was rendered. On March 19, 1900, the Southern Company was incorporated. On March 19, 1900, the Southern Company purchased the property of the Gulf Company at its foreclosure sale. By April 1, 1900, it had acquired, by its exchange of its stocks and bonds for those of the Belt Company, 97 per cent of the Belt Company's stock and 89 per cent of its bonds. On April 1, 1900, it placed its chosen agents in the offices of the Belt Company and took possession of its books and property by virtue of its ownership of its stock. On June 6, 1900, the reorganization committee purchased of the Trust Company and paid it $35,000, which they applied in part payment of the debt of the Belt Company to it, for certain shares of the stock of the Terminal Company and of the Airline Company, which the Trust Company held in pledge to secure the payment of its claim against the Belt Company. On July 26, 1900, the Trust Company exchanged its stocks and bonds in the old reorganized companies for the stocks and bonds of the Southern Company. On September 1, 1900, the Trust Company gave notice of its proposed sale on September 7, 1900, of the securities which the Belt Company had pledged to it to secure the payment of the latter's debt. On September 6, 1900, the Provident Company, the trustee in the mortgage of the Belt Company and in duty and in reality the agent of the Southern Company which held 89 per cent of the bonds of the Belt Company and 97 per cent of its stock, brought a suit to foreclose the mortgage, for the appointment of receivers of the Belt Company's property and for an injunction against its sale or disposition. On September 6, 1900, the Belt Company appeared in that suit and consented to the appointment of receivers. On September 6, 1900, the Cambria Company, with the consent of the Belt Company the agent of the Southern Company which held 97 per cent of its stock, recovered a judgment and obtained a return a nulla bona to an execution against the Belt Company. On September 6, 1900, the Cambria Company commenced the suit here in hand against the Belt Company and against the Trust Company

to enjoin the latter company from selling its collaterals and applying their proceeds to the payment of the debt of the Belt Company, a suit which it founded on the averment, which has been adjudged untrue, that the Belt Company was not indebted to the Trust Company and on other allegations so baseless that it has become clear that the Cambria Company had no cause of action against the Trust Company. On September 6, 1900, the Belt Company, the hand of the Southern Company, appeared in the Cambria suit and on the same day the Trust Company was restrained by the court from selling its collaterals, and receivers of the property of the Belt Company were appointed in this suit. On November 5, 1900, the Trust Company answered and set up its claim against the Belt Company and the pleading of its collaterals. On December 3, 1900, the Cambria Company filed a replication to that answer. On that day the issue of the indebtedness of the Belt Company to the Trust Company was made in this suit and that issue really existed then between the Trust Company and the Southern Company, for the Southern Company by its ownership of 97 per cent of the Belt Company's stock controlled it and in all subsequent proceedings directed its course and is as much bound by its action as though it had been the Belt Company itself. The issue was referred to the special master and it was not until May 21, 1910, after testimony had been taken for years and after a record of approximately 34,000 pages had been accumulated, that the Trust Company succeeded in obtaining an adjudication thereof, and that issue was first determined by the court below a few days later. It will be interesting to note a few of the proceedings which resulted in this delay. Before the Trust Company reached the decision of the master more than fifteen pleadings were filed in this case by other parties to this suit, and the Trust Company was compelled to file six. On October 20, 1900, the Trust Company filed a petition in the Provident Company's foreclosure suit for leave to be made a party and to plead therein, wherein it set forth its claim against the Belt Company, that the Southern Company would cause the Belt Company to waive all defenses and to consent to a foreclosure of the mortgage upon its property to the detriment of the Trust Company and the creditors of the Belt Company. On October 22, 1900, the Provident Company amended its bill and asked that the Trust Company be made a defendant, and the court so ordered. On November 5, 1900, the Trust Company answered the Provident Company's bill and in its answer set forth the debt of the Belt Company to it, the control of

the Belt Company by the Southern Company and its purpose to waive all defenses and to consent to the foreclosure of the Belt Company's mortgage and the sale of its property for the purpose and with the effect of appropriating the equity of its unsecured creditors to itself. On September 12, 1901, and again on October 14, 1901, the Trust Company applied for leave to file its amended and supplemental answer in which it set forth the debt of the Belt Company to it, the facts regarding the reorganization agreement, the organization of the Southern Company, its exchange of its stock for the stock of the Belt Company and its purpose, by the control of the Belt Company and of its bonds and stock, to appropriate to itself the equity of the creditors of the Belt Company in its property by means of the foreclosure suit, and prayed that the bill of the Provident Company be dismissed, and for such further orders and decrees as it was entitled to receive. On October 19, 1900, the court ordered the application denied on condition that the Provident Company should file a stipulation to the effect that the decree of foreclosure to be rendered in its case should not bar the right of the Trust Company to plead and insist in any future litigation that the Southern Company was legally and equitably bound by reason of the method by which it would obtain the property of the Belt Company to pay the debt of the Belt Company to the Trust Company. On October 17, 1901, the Provident Company filed such a stipulation and the court denied the Trust Company leave to file its amended answer. On October 19, 1901, the Trust Company presented to the court in the Provident Company suit a petition for leave to prepare and file a cross bill setting forth the facts stated in its amended answer and praying for an adjudication of its claim against the Belt Company for the sale of its collaterals and for a provision in the decree of foreclosure that any purchaser of the Belt Company's property at the sale thereunder should take and hold it subject to the payment of the Trust Company's claim and to the payment of the claims of all the unsecured creditors of the Belt Company. On October 19, 1901, the court denied this application. On October 19, 1901, the Belt Company filed its answer whereby it admitted the averments of the Provident Company in its bill. On November 6, 1901, the court entered the decree of foreclosure and sale of the Belt Company which contained the express condition stipulated by the Provident Company that the decree should not bar the right of the Trust Company to recover of the Southern Company personally or out of the property of the

Belt Company the amount of its claim against that Company. On November 20, 1901, the Trust Company and the Belt Company and its receivers stipulated in the Cambria Company's suit that the accounting between the Trust Company and the Belt Company should be expedited and that a judgment should be entered in that suit against the party found to be the debtor. On December 31, 1901, the Southern Company bid in the Belt property at the Provident Company's foreclosure sale and the master conveyed it to the Southern Company.

On February 27, 1905, the Southern Company filed an intervening petition in the Cambria Company's suit by which it sought to recover certain collaterals pledged by the Belt Company to the Trust Company to secure the Belt Company's debt and certain moneys which the Trust Company had collected. On March 7, 1905, the Trust Company filed its answer to this petition wherein it denied the validity of the claim of the Southern Company and alleged that by virtue of the proceedings which resulted in the foreclosure sale and conveyance of the Belt Company's property to the Southern Company that property remained bound and the Southern Company became bound to pay the Trust Company's claim against the Belt Company. On May 1, 1905, the Southern Company filed an amended intervening petition seeking substantially the same relief on the same grounds. On May 25, 1905, the Trust Company answered it in substantially the same way as it answered the Southern Company's former petition, and the issues thus formed were, by order of the court, referred to the special master for hearing and report. Then followed objections and arguments and testimony until on May 21, 1910, the master finally filed his report and in a few days thereafter the court rendered its decree. The Trust Company, however, was not idle during this time, nor did it limit its endeavors to enforce its claim to the prosecution of it in the court below. On March 15, 1905, and on March 28, 1905, it commenced actions at law in a state court against the Southern Company for certain parts of its claim against the Belt Company. On July 3, 1905, the Southern Company filed a supplemental bill in the Provident Company's foreclosure suit to enjoin the Trust Company from prosecuting those actions. On August 29, 1905, the Circuit Court ordered the Trust Company enjoined from prosecuting it. On May 31, 1906, this court reversed that order. In May, 1907, the Southern Company made a motion in the state

court to stay the proceedings in these actions at law and in June, 1907, that motion was denied and the cases were set for trial on December 2, 1907. On November 16, 1907, the Southern Company filed another bill to enjoin the Trust Company from prosecuting those actions and the court below granted the injunction. On April 2, 1909, this court reversed that order.

Where is the evidence of any laches of the Trust Company in these proceedings? It presented to one of the members of the committee its claim against the Belt Company for adjustment and settlement and was told that when the examination of the books were completed he would take up the matter whether anything could be done towards an equitable settlement of its claim, and there that matter rested until the Trust Company was enjoined from selling its collaterals in September, 1900. By a sale of some of its collaterals to the committee it collected and applied the proceeds thereof to its claim against the Belt Company in June, 1900. It gave notice of its sale of its remaining collaterals on September 1, 1900, and was enjoined from proceeding in the baseless suit of the Cambria Company, a suit based on a judgment to which the Southern Company consented in the name of the Belt Company, and it is difficult to wink so hard as not to see that the Cambria suit was in reality the suit of the Southern Company. Twice in October, 1901, it set forth in answers to the Provident Company's suit its claim against the property of the Belt Company and against the Southern Company, and prayed the adjudication and payment thereof, to be met by a denial by the court doubtless secured by the objections of the Provident Company and by that Company's stipulation that the decree should not foreclose, bar or affect the Trust Company's claim against the Southern Company, or the property of the Belt Company which it should acquire thereunder. On October 19, 1901, it applied for leave to plead this claim in a cross bill in that suit and to pray for a decree that its claim should be paid out of the property of the Belt Company to be met by like denial. In this way the Trust Company was prevented from obtaining a hearing on the merits and an adjudication of its claim in the foreclosure suit and subjected to the objection to an original bill which it might otherwise have brought against the Southern Company that it had no judgment against the Belt Company and no execution returned unsatisfied thereon. Therefore it pressed for that judgment. Nov-

ember 20, 1901, it joined the Belt Company and its receivers in a stipulation to expedite the trial of that issue and the entry of such a judgment, but new pleadings, tens of thousands of pages of testimony delayed the result. When that result seemed nearer and on February 27, 1905, the Southern Company intervened and claimed some of the Trust Company's collaterals, and on March 7, 1905, the Trust Company answered the intervening petition and again pleaded and pressed its claim against the Southern Company. On March 17, 1905, and March 28, 1905, apparently despairing of reaching an adjudication in this suit in equity, it brought actions at law against the Southern Company upon its claim, but was prevented from trying them by injunctions procured and other proceedings conducted by the Southern Company until April 2, 1909, when the last injunction against its proceeding in the state court was reversed by this court. Meanwhile the Trust Company had pressed the issues in this suit through the hearings, they had been submitted to the master, and on May 21, 1910, he found that the Belt Company was indebted to the Trust Company in 1900, and that the amount of that debt with interest to June 22, 1910, was $639,658.86. There is much evidence of promptness, diligence and persistence, and none of laches, on the part of the Trust Company in the printed record before us. Nor does it lie in the mouth of the Southern Company to make or urge a charge of laches here. By its use of 89 per cent of the bonds of the Belt Company which the Provident Company was bound to represent in the foreclosure suit, and of 97 per cent of the stock of the Belt Company, it controlled the action of each of those companies in that suit. By means of those companies it prevented the hearing and adjudication of the Trust Company's claim upon its answers and upon its application to file a cross-bill in that suit. By the Belt Company's consent to a judgment against it in favor of the Cambria Company it laid the technical foundation of the Cambria Company's unwarranted suit which prevented the Trust Company from selling its collaterals, and held the issue of the Belt Company's indebtedness to it suspended for more than eight years. It prevented the trial of that issue in the actions which the Trust Company brought in the state courts in 1905 by injunctions it procured from the court below and there is no equity in its claim that the Trust Company unduly delayed the presentation or the prosecution of its claim against it or against the property of the Belt Company.

But counsel argue that the Trust Company is equitably estopped from maintaining its claim by the fact that it was one of the depositories under the reorganization agreement, that it persuaded others to sign it and that on July 26, 1900, it exchanged its $76,-972.00 par value of stock in the Belt Company and the stocks and bonds it held in the Gulf Company and the other reorganized companies for $1,480,909.00 par value of stock of the Southern Company. Let us see. The indispensable elements of an estoppel in pais are (1) intentional or reckless misrepresentation of a known and material fact inconsistent with the subsequent claim of him who makes the misrepresentation, (2) ignorance of the truth and absence of equal means of knowledge of it by the party who claims the estoppel, (3) action by the latter induced by the misrepresentation and (4) injury to the latter if the truth is permitted to be proved. Bigelow on Estoppel, 4th Ed. page 679; *Illinois Trust & Sav. Bank* v. *City of Arkansas City*, 76 Fed. 271, 293; 22 C. C. A. 171, 193; *Farmers' & Merchants' Bank* v. *Farwell*, 58 Fed. 633, 638, 639; 7 C. C. A. 391, 396, 397; *New York Life Ins. Co.* v. *McMaster*, 87 Fed. 63, 66, 67, 30 C. C. A. 532, 535, 536. The estoppel here probably lacks all and it certainly lacks at least three of these essential elements; (1) the requisite misrepresentation of any material fact which the Trust Company knew, (2) ignorance or absence of equal means of knowledge of that fact by the Southern Company or its stockholders and bondholders, and (3) injury to them if the truth is permitted to be proved. First, the reorganization agreement, as we have seen, disclosed a scheme whereby the property of the Belt Company might be honestly and lawfully vested in the Southern Company by offering, and if the offer was accepted by paying, to the creditors of that company at least as much in value as the scheme offered to the stockholders of the Belt Company. The Trust Company presented its claim against the Belt Company to one of the committee and was told before it made its exchange that the indebtedness of the Belt Company was denied, but was under investigation, and that when that investigation was completed he would take up the claim and see if anything could be done about its settlement, and there the matter rested until after the exchange of stock was made. Meanwhile the Southern Company had the books of the Belt Company evidencing the state of the account between the Belt Company and the Trust Company in its possession. The Trust Company never made any representation that it had no claim against the Belt Company nor that it would

not press it for payment by the committee, by the Belt Company and by the Southern Company, but it gave notice of its claim and requested its payment and neither the committee nor the Southern Company ever declared before the Trust Company exchanged its stock and bonds that they would not settle or pay it if the Belt Company really owed it.

The legal presumption was and the Trust Company had a right to rely thereon, that the scheme disclosed by the reorganization agreement would be executed in a just and lawful way and that its claim and the claims of all creditors of the Belt Company would be adjusted and settled by full or partial payment by the committee and neither its action as a depositor nor its activity to persuade others to accept the plan, nor its exchange of its stocks and bonds constituted any representation that the plan would not be so executed, that the transfer of the property of the Belt Company to the Southern Company would be illegal and fraudulent as to creditors nor any consent to or participation in such an execution of the agreement. That transfer had not then been made, the Southern Company held the stock of the Belt Company charged with the trust to secure for its creditors at least as much as it had paid to its stockholders and there was no notice or presumption that it would violate its trust. The Trust Company made no misrepresentation by any of its acts or omissions of any known fact on which an estoppel in favor of the Southern Company can be based. Second, the reorganization agreement showed that under it the title in fee of the property of the Belt Company was to be transferred to the new company, the Southern Company, and brought under the lien of its mortgage by means of the exchange of the stock of the Belt Company for the stock of the Southern Company and this disclosure and the law notified the Southern Company and everyone who received any stocks or bonds of that company that the acquisition of that stock in that way and its pledge under the mortgage charged the Southern Company, its bondholders and its stockholders with a trust to secure and distribute to the creditors of the Belt Company the value of their equity in the property of that Company, and the answers of the Belt Company in the Provident Company's foreclosure suit, its application to file its cross-bill and the paragraph in the decree of foreclosure which exempted the Trust Company from the effect of that decree, kept that notice flaming in the record so that neither the Southern Company nor any

of its bondholders, or stockholders were without equal means of knowledge nor without notice under the law that the transfer of th. property of the Belt Company to the Southern Company without offering to pay or paying anything to its creditors was a breach of trust, fraudulent and voidable as to them. Moreover, although it is immaterial under the opinion in *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 502, whether they were notified of the Trust Company's claim or not, they all had notice of it by its presentation to one of the committee, by the Southern Company's possession of the books of the Belt Company as early as April 1, 1901, by the answers and the application to file the cross-bill in the foreclosure suit and by the terms of the decree therein. The committee, the Southern Company, its stockholders and bondholders had at least equal means of knowledge and had notice under the law of the truth regarding all material things in this transaction to which the Trust Company's acts and omissions, and its exchange of stock and bonds relate. There were no innocent stockholders or bondholders of the Southern Company in or since this transaction. Third, neither the Southern Company nor its stockholders nor bondholders will suffer any injury by proof of the truth in this transaction and the granting to the Trust Company of the equitable relief to which it was entitled in 1901. They took to themselves by a breach of trust and a transfer fraudulent as to creditors by the foreclosure sale on December 31, 1901, an equity in the property of the Belt Company of a value in excess of the amount of the Trust Company's claim, then about $360,000, which belonged to that company, and they have held and enjoyed it ever since. Each stockholder and bondholder has had and still has the benefit of his just proportion of that equity. If now the Southern Company is required to restore that equity or its value in 1901, with interest from that date, each stockholder and bondholder will lose the benefit of its just proportion of that equity which it wrongfully holds and nothing more. Nor will the Trust Company secure or retain any unjust share or advantage. While it will receive the value of that equity to which it as a creditor of the Belt Company was entitled in 1901 with interest, its stocks and bonds issued by the Southern Company will lose the benefit of that equity in the same proportion as will the stocks and bonds of others. The stocks and bonds of the Trust Company and of all the others holders of stocks and bonds in the Southern Company will be diminished in value in the exact proportion by which they were enhanced in value by the wrongful appro-

priation of the equity of the Trust Company in the property of the Belt Company which the Southern Company wrongfully took and holds, and the justice and equity to all which should have been done many years ago will now as nearly as practicable be administered.

This question of estoppel was ably and exhaustively argued. It has not failed to receive the study and meditation of each member of this court. But for the reasons which have now been stated, perhaps at too great length, this study and meditation have but confirmed the court in its former view and its conclusion still remains that the Trust Company was not estopped either by its promotion of the reorganization agreement, its signature to it, its exchange of stock, or its alleged laches, from prosecuting its claim against the Southern Company to adequate relief.

In the course of their argument counsel have invoked the maxims that he who seeks equity must do equity and that he who seeks equity must come into court with clean hands, and have claimed that the Trust Company is entitled to no relief because it participated in the formation and execution of a fraudulent scheme. The answer has been given. The fraud and breach of trust which made the transfer voidable as to creditors were not committed nor disclosed until after the Trust Company's acts in the formation and execution of the plan had been done. The presumption of law was, when it exchanged its stock, that the fraud and breach of trust were not being perpetrated and it did not participate in their perpetration. Its hands are not soiled and if its claim is paid by the Southern Company it, and all the parties in interest in this transaction, will have done and received equity.

(5) Counsel have argued the question whether the Trust Company or the Southern Company has the superior equity in the lands of the Central Company, but the court is not convinced that it was in error in the conclusion upon this subject which it announced in its former opinion at pages 824, 826, 827 and 828 of 201 Federal Reporter, and as, unless the court is in error on the questions which have already been discussed, that question is no longer material because the Southern Company may have no relief in that regard, unless it pays the claim of the Trust Company, the court refrains from another discussion of it.

(6) Objection is made to the entry of a decree at this time in favor of the Trust Company for the payment of its claim by the Southern Company on the grounds that the Trust Company filed no cross-bill and made no specific prayer for such relief in its answer and because the Southern Company should have an opportunity to offer evidence and to be heard upon the question whether or not the Trust Company is entitled to such relief. But the issues whether or not the property of the Belt Company taken by the Southern Company, whether or not the property of the Central Company by reason of the pledge of its stock and whether or not the Southern Company itself, was liable to pay the debt of the Belt Company to the Trust Company, were all necessarily presented and litigated under the pleading and litigation of the controlling issue whether or not the Southern Company by its acquisition of the property of the Belt Company, its exchange of stock and its foreclosure sale deprived the Trust Company of its equity in that property and exempted itself from liability. Opportunity was offered and embraced to present evidence to consider and argue these questions. The Southern Company received ample notice of the claim of the Trust Company that it and the property of the Belt Company which it acquired were liable to pay its claim against the Belt Company. In its petition for leave to file a cross-bill in the foreclosure suit in October, 1901, the Southern Company asserted its right to be paid out of the property of the Belt Company to be superior to that of the expected purchaser at the foreclosure sale of that property and the liability of such purchaser to pay it and the right of the Trust Company to assert its claim against the property and the purchaser, were expressly reserved by the decree. In its answer to the amended intervening petition of the Southern Company in this suit filed on May 20, 1905, it made a like averment which was denied by the replication of the Southern Company. A review of the facts disclosed by the master's report and of the pleadings and proceedings printed in the record before us, has convinced that the indisputable facts and the law of this case are such that an opening of the case and the reception of further evidence would not change the result or benefit any party thereto.

The court has ample power to remand the case and permit the filing of a cross-bill or an amendment of the answer so as to pray for the specific relief to which the Southern Company is entitled. *Wiggins Ferry Co.* v. *Ohio & Mississippi Ry. Co.*, 142 U. S. 396, 413.

416; *Hardin* v. *Boyd,* 113 U. S. 756; *Clark* v. *Clark,* 62 N. H. 267, 272; *Trimble* v. *Bank,* 71 Mo. App. 467, 484, but that would be a useless proceeding and neither the law nor the rules and practice in equity require the performance of futile acts. An answer may be treated as a cross-bill and the rights and remedies which the defendant has alleged in its answer and at the hearing has proved it is entitled to enforce may be maintained and enforced although its prayer is limited to a dismissal of the bill. *Bradford* v. *Union Bank of Tennessee,* 13 How. 56, 68, 69; *Walden* v. *Bodley,* 14 Pet. 156, 164; *Moran* v. *Hagerman,* 64 Fed. 499, 503, 504; *Wyatt* v. *Sweet,* 12 N. W. (Mich.) 692, 693. In *Walden* v. *Bodley,* 14 Pet. at page 164, the Supreme court said on this subject: "It would be a reproach to the administration of justice, if in this case, the parties should be left, by the decision of this court, apparently, as remote from a final determination of it as they were forty years ago. It is true, the answer prays merely for a dissolution of the injunction and that the bill may be dismissed. But the court have, by the bill, answer and evidence, the equities of the parties before them; and having jurisdiction of the main points they may settle the whole matter. A court of equity cannot act upon a case which is not fairly made by the bill and answer. But it is not necessary that these should point out in detail the means which the court should adopt in giving relief." These rules and authorities and the principle of equity that a court of chancery which once acquires jurisdiction of the subject matter and the parties to a controversy ought, if possible, to determine the entire matter and grant just relief to each party, the length of time this litigation has already been pursued and the greater danger of injustice from its continuance than from its termination, have persuaded that the ends of justice will be best served by the entry of a decree in this case upon the issue of the mandate in favor of the Trust Company for the relief to which it is entitled.

(7) Counsel for three of the stockholders of the Trust Company have been heard upon their petition that this court adjudge that certain of the litigation herein instituted by the Cambria Company, the Belt Company and the Southern Company was commenced and prosecuted in bad faith and that it direct the court below to find the amount of attorneys' fees, stenographers' fees and expert accountants' fees necessarily incurred by the Trust Company in that litigation, and, after the entry of the main decree, to render a

further decree in favor of the Trust Company and against the southern Company for the aggregate of these amounts, or that this court direct the court below to insert in its decree an adjudication that it is rendered without prejudice to the right of the Trust Company to sue the Southern Company for those sums, that this court also direct the court below to include in the costs herein the damages, costs, fees and expenses incurred by the Trust Company in the injunction suit reported in 171 Federal 43, and also to insert in the decree an adjudication that the decree shall not prejudice the right of the Trust Company to move for such damages, costs, fees and expenses in the injunction suit reported in 146 Federal 337. A deliberate consideration of this petition and of the exhaustive arguments of counsel have, however, persuaded that inasmuch as the questions suggested came for the first time into this suit at the rehearing in this court, as no evidence has been taken relative to them and as the evidence upon the issues tried in this case was not brought to this court it would be unwise and might be unjust to adjudicate the questions presented by the petition of these stockholders. Moreover, as this court cannot rightly determine the questions relating to the costs to be taxed at this time, as there are established rules of practice concerning them and as directions to the court below to open and try new issues might, and probably would, prolong this litigation through several years more, our conclusion is that our just course is to leave the taxation of costs to the court below under the principles, rules and practice in equity.

And the conclusion of the whole matter is that the decree below should be reversed and the district court should render a decree which should contain the first five paragraphs of the former decree, should adjudge that the Southern Company is indebted to and should pay to the Trust Company the amount of the indebtedness of the Belt Company to the Trust Company, that is to say, the sum of $639,658.86 and interest from the date of the former decree on $473,723.59 at six per cent per annum, on $46,565.76 at seven per cent per annum and on $19,369.51 at eight per cent per annum, and the costs of this suit, that the Trust Company's right to and equity in the property of the Belt Company which was transferred to the Southern Company by means of the exchange of the stock of the Belt Company for the stock of the Southern Company and by the foreclosure proceedings, sale and conveyance and otherwise, was and is prior in time and superior in equity and right, to the ex-

tent necessary to pay that debt, to the right, title and equity of the Southern Company therein, that by virtue of the indebtedness of the Belt Company to the Trust Company and the pledge to it of the 1120 shares of the stock of the Central Company, the equity and right of the Trust Company in the property of the Central Company described in the sixth paragraph of the former decree is superior, to the extent necessary to pay that debt, to the right title, claim and equity of the Southern Company therein, that in case the Southern Company fails to pay its debt to the Trust Company by a day to be named by the court in the decree, the said property of the Central Company and the property of the Belt Company which was transferred to the Southern Company as aforesaid, or such part thereof as it shall be necessary to sell in order to pay the debt and costs out of the proceeds of the sale or sales to which the Trust Company, in view of the pledge to it of only 1120 shares of the stock of the Central Company and the possible equities of the Central Company's other stockholders and creditors, shall be equitably entitled, be sold by a master or receiver to be named by the court, that the proceeds of such sale or sales to which the Trust Company shall be equitably entitled be applied to the payment of the debt and of the costs after as well as before the decree until they are completely paid and that the remainder of the proceeds, if any, be paid to the Southern Company or to such other party as may be equitably entitled thereto, that on the demand of the master the Southern Company, the Central Company and its receiver, surrender and deliver to him, or to the purchaser or purchasers of any of this property as the master shall direct, such part or all of said property as he shall specify, and that if an amount to which the Trust Company shall be equitably entitled sufficient to pay the debt with interest and the costs before and after the decree is not realized from the sales, then that the Trust Company have judgment and execution against the Southern Company for the remainder unpaid. The decree should adjudge that the Trust Company may recover its costs down to the entry of the decree of the Cambria Company as well as of the Southern Company, and the court may apportion those costs between them, but not as against the Trust Company which should be permitted to pursue either or both of them until its costs are paid. The district court should reserve in the decree full jurisdiction to render such further decrees and take such subsequent proceedings in the suit as equity and good conscience may require.

Let the former decree be reversed and the case be remanded to the district court for further proceedings in accord with the views expressed in this opinion.

Filed December 2, 1913.

A true copy.

Attest:
(Seal)

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

POOR COPY

No. 941.

Office Supreme Court, U. S.
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United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 3489.—DECEMBER TERM, A. D. 1913.

Central Improvement Company, Appellant,
vs.
Cambria Steel Company, et al., Appellees.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

No. 3490.—DECEMBER TERM, A. D. 1913.

Guardian Trust Company, Appellant,
vs.
Cambria Steel Company, et al., Appellees.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

Mr. George H. English, Jr., and Mr. D. J. Haff (Mr. Edward P. Gates and Mr. E. C. Meservey, on the brief), for Guardian Trust Company.
Mr. Frank Hagerman, for Cambria Steel Company,
Mr. Samuel Untermyer and Mr. Samuel W. Moore, for Kansas City Southern Railway Company.
Mr. Newell H. Clapp, Mr. Enoch J. Price and Mr. Harry S. Mecartney, for Edward A. Shedd, and others.

Before SANBORN, Circuit Judge, and MARSHALL and WILLIAM H. MUNGER, District Judges.

PER CURIAM:

The paramount issue in these cases is, Did the Southern Company become liable to pay the unsecured debt of the Belt Company to the Trust Company by participating in the execution of a scheme whereby it acquired the title to the property of the

Belt Company, deprived its creditor, the Trust Company, of recourse thereto by execution to collect its claim and yet reserved to itself and other stockholders of the Belt Company an equity in its property and a benefit therefrom more valuable than the amount of the Trust Company's claim? After exhaustive arguments and briefs and a review of the master's report on which this case came to this court the conclusion was reached that this question should be answered in the affirmative. This question had been at issue between the Trust Company and the Southern Company in this suit and in actions at law in the state courts for many years. The prosecution of those actions had been repeatedly enjoined and delayed by orders of the court below and those orders had been as often reversed by this court. While the pleadings of the parties squarely presented the issue, while this issue had been litigated strenuously in this suit the Trust Company had not in any of its pleadings made a specific prayer for a decree for the payment of its claim by the Southrn Company, nor for the seizure or sale to pay it of the property of the Belt Company which the Southern Company had taken. The question had been suggested by three of the stockholders of the Trust Company whether or not, in view of the long delay, this court could or should direct an entry of a decree for such relief in these cases rather than to leave that relief to be granted upon trials of the cases in the state court, and as this question had not been argued, counsel for all the parties were permitted to be heard upon it. That hearing developed into a re-argument of all the salient issues in the cases and at the close of that hearing they were taken under advisement by the court. It is the purpose now to state the conclusions at which we have arrived after another consideration of the issues presented.

The history of this litigation, the issues and many of the facts found by the master are set forth in our former opinion. *Central Improvement Co.* v. *Cambria Steel Co.*, 201 Fed. 811, 120 C. C. A. 121.

(1) From all the facts pertinent to the issue which are set forth in many printed pages of his report, the master deduced this decisive conclusion, "That the Southern Company is not liable in any way for the floating indebtedness of the Belt Company." To this conclusion the Trust Company excepted on the ground that in view of other conclusions which the master reached adverse to it it was unnecessary for him to determine that issue. A consideration after argument of all the facts

relating to this issue which the master found in his report convinced this court that the conclusion lawfully deducible from them was that the Southern Company was liable to pay to the trust Company the debt which the Belt Company owed it. Counsel for the Southern Company now insist that this court was without power to consider or correct this conclusion of the master which the court below followed, and that the Trust Company must suffer the loss of this amount because its counsel did not state in its exception that the conclusion was wrong on the merits of the issue. They invoke the conceded general rule that where no exception is taken to the master's report it will be deemed to be true and where exceptions to parts of it are taken the parts to which no exception is taken will stand as correct and will not be open to review in an appellate court. *Burns* v. *Rosenstein*, 135 U. S. 449; *Provident Life & Trust Co.* v. *Railway Co.*, 177 Fed. 854, 859. But this rule, like most rules of law or practice, is not without its exceptions. In *Sheffield, etc. Ry. Co.* v. *Gordon*, 151 U. S. 285, 291, the Supreme Court, while holding the exceptions in that case insufficient to present the questions argued, said: "It is true that if the report of the master is clearly erroneous in any particular it is within the discretion of the court to correct the error, but we see no occasion for exercising such discretion in this case." In 2 Daniell's Chancery Pleading and Practice, at page 1314, it is said that it is entirely discretionary with the court to grant an opportunity to except to a report after it has been absolutely confirmed. Counsel also claim that by the Trust Company's exception they were induced to forego a review of the finding of the master that the Belt Company was indebted to the Trust Company and that thereby an equitable estopped from reviewing the issue of the liability of the Southern Company was created. But suits in chancery are tried and reviewed in view of the fact that a court of equity has and frequently exercises the power where justice may thereby be done, to grant to litigants the right remedy although they have sought the wrong one. *Clark* v. *Clark*, 62 N. H. 267, 272; *Hardin* v. *Boyd*, 113 U. S. 756; *Wiggins Ferry Co.* v. *Ohio & Mississippi Ry. Co.*, 142 U. S. 396, 414, 415, 416; *Bradford* v. *Bank*, 13 How. 56, 69, 70; *Walden* v. *Bodley*, 14 Pet. 156, 164; *Moran* v. *Hagerman*, 64 Fed. 499, 503, 504. As an appeal in equity in the federal courts results in a trial *de novo* the appellate court is not, in our opinion, so powerless that it is compelled to affirm an unjust decree, nor is the appellant so conclusively

estopped that it may not attack such a decree by the fact that it gave a wrong reason for its exception to the erroneous conclusion of the master it assails.

Moreover, the conclusion here challenged was a mere deduction from the facts disclosed in the master's report and where it appears on the face of the report that the master has drawn an erroneous conclusion from the facts he found, the absence of an exception does not disable the court from correcting the error and entering a just final decree. 2 Daniell's Chancery Pleading and Practice, * page 1310; 17 Encyc. of Pleading and Practice, 1048; *Celluloid Mfg. Co.* v. *Cellonite Mfg. Co.*, 40 Fed. 476, 477; *Burke* v. *Davis*, 81 Fed. 907, 910, 26 C. C. A. 675, 678; *Haymond* v. *Murphy*, 64 S. E. (W. V.) 855, 857; *Hayes* v. *Hammond*, 44 N. E. (Ill.) 422, 423; *Hurd* v. *Goodrich*, 59 Ill. 450, 456; *Von Tobel* v. *Ostrander*, 42 N. E. (Ill.) 152, 153. The contention that the Trust Company was estopped from seeking a correction of this error and that this court was powerless to correct it does not seem to be well founded, and this court is unwilling to affirm what it deems an unjust decree on account of the defect in the exception.

(2) It is conceded that by the transaction described in the former opinion of this court and deemed by it violative of the rights of the Trust Company, a creditor of the Belt Company, if that transaction be valid, was deprived of legal recourse to the property of the Belt Company to obtain payment of that company's debt to the Trust Company of about $360,000. At that time the Southern Company, by an exchange of its stock and bonds for the stock and bonds of the Belt Company, and by a formal foreclosure by itself, as holder of about 89 per cent of its bonds, by means of its representative, the Provident Company, trustee for the bondholders, against and with the consent of itself as the holder of about 97 per cent of its stock, and by a foreclosure sale of the property of the Belt Company to itself obtained the title to the Belt Company's property to itself, the bondholders of the Belt Company secured about $1,330,000 par value of the bonds and $250,000 of the preferred stock of the Southern Company, aggregating at their par value $1,580,000 for their $1,000,000 par value of bonds of the Belt Company, and the stockholders of the Belt Company secured for their $4,750,000 par value of the stock of that company about $1,-

187,500 par value of the preferred stock and about $3,562,500 par value of the common stock, in all about $4,750.000 par value of the stock of the Southern Company.

The following propositions of law are deemed incontestable: "A reorganization of an insolvent railroad company, by which both its mortgage bondholders and its stockholders, in exchange for their bonds and stocks, are given an interest in the new company, which purchases the property of the old company at a foreclosure sale made pursuant to such plan of reorganization and by the consent of the old company and its stockholders, is fraudulent in law as to unsecured creditors of the old company whose claims are left unpaid, and renders the new company liable for the claims of such creditors, at least to the extent of the value of the interest in the new company secured by the stockholders of the old company." *Northern Pacific Ry. Co.* v. *Boyd,* 177 Fed. 804, 101 C. C. A. 18; *Luedecke* v. *Des Moines Cabinet Co.,* 118 N. W. 456, 140 Ia. 223; *Hurd* v. *New York & Commercial Steam Laundry Co.,* 167 N. Y. 89, 60 N. E. 327.

Where such a transaction is consummated without offering to the unsecured creditor a fair share of the benefits to be derived from the vesting of the title in the purchaser at the foreclosure sale, the intent or purpose to deprive him of recourse to the property to collect his debt becomes immaterial and the fact that it has that effect charges the purchaser with liability. "As against him the sale is void in equity regardless of the motive with which it was made. For if such contract reorganization was consummated in good faith and in ignorance of the existence of the creditor, yet when he appeared and established his debt the subordinate interest of the old stockholders would still be subject to his claim in the hands of the reorganized company." *Northern Pacific Ry. Co.* v. *Boyd,* 228 U. S. 482, 502. "For, if purposely or unintentionally a single creditor was not paid or provided for by the reorganization, he could assert his superior rights against the subordinate rights of the old stockholders in the property transferred to the new company. They (the stockholders of the old company) were in the position of insolvent debtors who could not reserve an interest as against creditors. Their original contribution to the capital stock was subject to the payment of debts. The property was a trust trust fund charged primarily with the payment of corporate liabilities. Any device whether by private contract or judicial sale under consent decree whereby stockholders were preferred be-

fore the creditors was invalid. Being bound by the debts, the purchase of their property, by their new company, for their benefit, put the stockholders in the position of a mortgagor buying at his own sale. If they did so in good faith and in ignorance of Boyd's claim they were none the less bound to recognize his superior right in the property when years later his contingent claim was liquidated and established." *Northern Pacific Ry. Co.* v. *Boyd,* 228 U. S. 505. "No such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee but of every creditor of the corporation. * * * * Any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of prior rights of either class of creditors comes within judicial denunciation." *Louisville Trust Co.* v. *Louisville etc. Ry. Co.,* 174 U. S. 674, 683, 684.

The transaction in hand, if valid, had the effect to deprive the creditors of the Belt Company of and to secure to the stockholders of that company out of its property the value of $1,187,500 par value of the preferred stock and $3,562,500 par value of the common stock of the Southern Company, and upon its face it seems to fall within the denunciation of these rules of law.

But counsel for the Southern Company argue that although the completed transaction has the effect of an illegal proceeding it is not such because it is composed of two independent and valid transactions, to-wit: (1) the organization in March, 1900, of the Southern Company and the exchange of the bonds and stock of the Belt Company for the bonds and stock of the Southern Company, so that by April 1, 1900, the latter had acquired 97 per cent of the stock and 89 per cent of the bonds of the Belt Company, and the taking possession of the property of the Belt Company by the Southern Company by virtue of its ownership of these bonds and stock on April 1, 1900, when it filled the offices of the Belt Company with its chosen agents and proceeded to control and operate it, and (2) the filing on September 6, 1900, by the Provident Trust Company, the trustee in the Belt mortgage, at the instance of the Southern Company, the owner of 89 per cent of the bonds, of the bill to foreclose the mortgage of the Belt Company, 97 per cent of whose stock was owned by the Southern Company, the appearance and consent of the Belt Company on the same day to the appointment

of receivers of its property, its answer on October 19, 1901, admitting the material averments of the bill, the decree on November 6, 1901, of foreclosure and sale of the Belt property and the sale thereof on December 31, 1901, under this decree to the Southern Company, the owner of nearly all its bonds and stock. The contention is that while the former transaction was the result of the scheme of reorganization, the latter was independent and free from the influence thereof, and that each of these transactions taken by itself, as counsel insist they should be, is free from any just objection by any creditor of the Belt Company.

The plan of reorganization was made November 7, 1899, and it became effective December 20, 1899. This plan was made a part of the reorganization agreement and it stated that it was expected and intended that the property of the Gulf Company would be purchased by the reorganization committee, that a successor of the company would be organized to which this property and the stocks and bonds of the Belt Company deposited under the plan would be conveyed, that all this property was to be made subject to the mortgage of the new company and that it was "intended, as soon as practicable, that the new company acquire the property of the terminal companies in fee and bring them directly under the lien of the mortgage." It was then one of the objects of the scheme of reorganization which the committee and the Southern Company, which it organized, were empowered and expected to carry into effect, that the latter company should acquire the property of the Belt Company "in fee" and bring it "directly under the lien of the mortgage," and the acquisition of the stocks and bonds of that company and their pledge under that mortgage were but the means to the accomplishment of this end which the plan contemplated.

It is conceded that the organization of the Southern Company, its purchase of the Gulf Company property, its exchange of its stocks and bonds for those of the Belt Company, and its possession and control of its property on April 1, 1900, by means of its ownership of this stock, were steps in the execution of the scheme. But the reorganization committee did not cease its work until October 1, 1900, and before that date the Southern Company by its representative, the Provident Company, had, on September 6, 1900, commenced the suit to foreclose the Belt mortgage and to put its property in the hands of receivers and had caused the Belt Company to consent to the receivership.

For what purpose did the Southern Company take these steps? It had the possession and absolute control of the Belt property by its ownership of 89 per cent of its bonds and 97 per cent of its stock. A default on its bonds was in reality a default of itself to itself. Foreclosure could give it no more power over the Belt Company than it already had. For what purpose then was the foreclosure? Evidently to carry out the reorganization agreement, as it was within the power and as it was the duty of the committee and of that company, its creature, to do, to acquire the property of the Belt Company in fee and bring it directly under the lien of the mortgage. Why did the Southern Company exchange its stock for the stock of the Belt Company? Was it not for the purpose of silencing the opposition of the Belt stockholders to the coming foreclosure, and to its acquisition of the fee of the Belt Company's property, and was not the scheme of reorganization the primary cause, the vesting of the fee of the Belt property in the Southern Company by the foreclosure the object and effect of that scheme and the exchange of the stock and the foreclosure of the Belt mortgage the means contemplated and authorized by that scheme to attain that end? To the minds of the members of this court the record in this case leaves no alternative but to answer these questions in the affirmative.

Moreover, the property of the Belt Company was a trust fund. The stockholders of that company were trustees charged with the duty to apply that property to the payment of the claims of the trust company and of the other creditors of the Belt Company before they took to themselves any share in or benefit therefrom. When the Southern Company took their stock and gave them $4,750,000 par value of its stocks and bonds for their interest in the property of the Belt Company, it stepped into their shoes and became a trustee for the creditors of the Belt Company with plenary notice that the interest of those creditors in the property was at least as much as the value of the stocks and bonds it was giving for the interest of the stockholders, for the rights of the creditors in the Belt property were prior and superior to those of the stockholders. By virtue of the plan of reorganization the Trust company had become such trustee. The agreement of reorganization and its ownership of 89 per cent of the bonds and 97 per cent of the stock of the Belt Company gave the committee and the Southern Company unrestricted power to discharge its duty to the creditors of the Belt Com-

pany, as their trustee, and to accomplish the object of the agreement regarding this property, the vesting of the fee of it in the Southern Company. They had the power to attain this object in a just and lawful way, to pay, to buy or to compromise the claims of the creditors, or to offer them a just share in the benefits of the reorganization, a share at least as valuable as that given to the stockholders. They did neither, but in the face of the danger signal that "any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation," the Southern Company proceeded by a foreclosure caused by itself, the owner of 89 per cent of the bonds, trustee for the creditors, really against and with the consent of itself as such trustee, owner of 97 per cent of the stock, to obtain against the protest of the Trust Company, whom the court expressly excepted in the decree from its effect, a foreclosure decree and sale of this property in effect by itself as trustee to itself as trustee, and thenceforth to insist that it had thereby secured to itself and deprived its *cestuis que* trust, the creditors of the Belt Company, of all interest in the property. In view of the fact that the acquisition of the fee of the Belt property by the Southern Company was stated in the reorganization plan and agreement to be one of their intended results, that this result has been obtained, that the exchange of the stocks and bonds were the means specified therein to attain it, and were the means by which the consent decree of foreclosure and sale of the Belt property to the Southern Company was effected, and that this foreclosure and sale were the means by which the intended result of the plan of acquisition of the fee of the Belt properties by the Southern Company was secured, this court is unwilling to hold that the validity of these proceedings can be sustained against the rule that "any device whether by private contract or judicial sale under consent decree whereby stockholders were preferred before the creditors was invalid," 228 U. S. 504, by contemplating or treating them as two separate and independent transactions, one consisting of that part of the proceedings conducted before and the other of that part of the proceedings conducted after April 2, 1900. They appear to this court to constitute a single transaction instituted, conducted and consummated pursuant to the preconceived plan to vest the fee of the properties of the Belt Company in the Southern Company and to bring them directly under the lien of its mortgage.

(3) Counsel for the Southern Company contend that the Trust Company is entitled to no favorable decree for the payment of the liability of the Southern Company to it and to no affirmative relief because it did not obtain a judgment against the Belt Company and a return of *nulla bona* to an execution before it presented its claim and demanded relief. But that is an objection only to the jurisdiction of a national court in equity of an original and independent bill to charge a fraudulent trustee. A claim of the nature of that made by the Trust Company in the absence of judgment or execution may be presented by intervention in a foreclosure suit and may there, or in any other suit wherein the court has acquired jurisdiction of the subject matter and the parties, be adjudicated. *Hollins* v. *Brierfield Coal & Iron Co.*, 150 U. S. 371, 379. The objection is not tenable here because the decision of the question of the liability of the Southern Company to the Trust Company became, as conceded by counsel for the Southern Company, necessary to the disposition of this case, 201 Fed. 817, to which the Trust Company was originally made a defendant against its will. This is now a suit in equity in which the court below and this court have full jurisdiction of the subject-matter and the parties to the controversy regarding this liability, and under a familiar and salutary rule the power is conferred and the duty is imposed upon a court of equity, which has acquired such jurisdiction, to consider and determine all the rights and claims of the parties relating to the subject-matter and to enter a decree that will finally determine them to the end that a multiplicity of suits may be avoided and litigation may cease. *Hopkins* v. *Grimshaw*, 165 U. S. 342, 358; *Sunflower Oil Co.* v. *Wilson*, 142 U. S. 313, 325; *Ward* v. *Todd*, 103 U. S. 327, 329; *In re Blake*, 150 Fed. 279, 283, 80 C. C. A. 167, 173; *United States* v. *Standard Oil Company*, 152 Fed. 290, 296; *Campbell* v. *Golden Cycle Mining Co.*, 141 Fed. 610, 614, 73 C. C. A. 260, 264.

It is contended that the remedy of the Trust Company is limited to a pursuit of the stockholders of the Belt Company who exchanged their stock for the stock of the Southern Company. But the liability of those stockholders is founded on their relation as trustees for the creditors of the corporation. The Southern Company with full notice of their and its liability and duty to the creditors of the Belt Company by the exchange of stock became such a trustee, and by as much as its power over the property of the Belt Company by its ownership of nearly all its bonds, as well as stock, was greater than that of the former

stockholders, by so much was its duty to protect the rights and interests of its cestuis que trust, the creditors, higher and more imperative. It owed them the duty to exercise good faith, care and diligence to secure and deliver to them their full equitable share of the property or the value of that share. Any sale or conveyance of the property to itself whereby they were deprived of and it secured that share, or its value, was a breach of duty and of trust which invokes plenary relief from a court of chancery, and as by its formal foreclosure sale to itself of the property of the Belt Company it took to itself and deprived the creditors of their equitable interest in the property and of the value of that interest it is not less liable in equity for this breach of trust than were the stockholders with whom it exchanged its stock. The duty and liability of the majority stockholders to minority stockholders is not less than this, *Jones* v. *Missouri Edison Electric Co.*, 144 Fed. 765, 771, and cases there cited, and their duty to creditors whose equitable rights and interests in the property of the corporation are superior to those of stockholders cannot be less.

Moreover, where the property of a corporation is sold to a purchaser and part or all of the purchase price thereof is paid or distributed to its stockholders to the exclusion of its creditors from a collection of their debts from the property of the corporation, the latter may recover that part of its value from the purchaser with notice, on the ground that the conveyance is fraudulent in law, *Central of Georgia Ry. Co.* v. *Paul*, 93 Fed. 878, 882, 884; *Luedecke* v. *Des Moines Cabinet Co.*, 118 N. W. 456, 457; *Hibernia Ins. Co.* v. *St. Louis & N. O. Trans. Co.*, 13 Fed. 516; *Grenell* v. *Detroit Gas Co.*, 70 N. W. (Mich.) 413; *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482, and the fact must be constantly borne in mind in the consideration of this case, that as against the Trust Company the entire transaction was in effect that the Southern Company knowingly purchased and took to itself without even a formal foreclosure the property of the Belt Company and paid the latter's stockholders the value of $4,750,000 of its stock therefor to the exclusion of the Belt Company's creditors therefrom, for by the express provision of the foreclosure decree the Trust Company was excepted from all its effects.

Another argument is that the Trust Company is entitled to no relief because the equitable interest of the creditors in the property of the Belt Company was of no value. This contention is

founded on the findings of the master that there was no direct testimony of the fair value of the Belt Company's property at or before the time of the foreclosure, no proof that it was worth more than the $1,000,000 for which it was sold at the foreclosure sale, and therefore that it was sold at its fair market value. The mortgage was $1,000,000 and the deduction is that the equitable interest of the creditors was valueless. But the crucial issue here was not what the fair market value of the mortgaged property was, nor was it how much more the mortgaged property was worth than the amount of the mortgage. Although evidence upon these subjects would have been competent in the consideration of the real issue here in the absence of an estoppel, that issue was, what was the equitable interest of the creditors in the mortgaged property of the Belt Company worth during the execution of the scheme and immediately after the foreclosure sale and the appropriation of it thereby by the Southern Company, the trustee for the creditors, to itself, for a trustee who violates his trust may not profit thereby. *Ervin* v. *Oregon Railway & Navigation Co.*, 27 Fed. 625, 633; *Jones* v. *Missouri Edison Electric Co.*, 144 Fed. 765, 779. The creditors were entitled to the highest value their interest had during this time, either for the purpose of sale or for the purpose of preventing a foreclosure of the mortgage upon the Belt property, or for the purpose of compromising their claims or conditioning the foreclosure, or for the purpose of the present or future control of the property. "If the value of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control. In either event it was a right of property out of which the creditors were entitled to be paid before the stockholders could retain it for any purpose whatever." *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 508.

The report of the master discloses other facts than that he received no direct evidence of the fair market value of the property except the bid at the foreclosure sale, which leave no doubt that the equitable interest of the credtiors was worth much more than the amount of the Trust Company's claim, $360,000. That report shows that the Southern Company paid $1,330,000 of its bonds and $250,000 of its preferred stock, or $1,580,000 of its new bonds and stock for the $1,000,000 of the old bonds of the Belt Company. The fact to which counsel call attention, that

the new bonds drew but three per cent interest per annum while the old bonds drew five per cent, has not been over-looked. But even so, the reorganization committee and the Southern Company would not have given for these old bonds a bonus of 33 per cent in new bonds and $250,000 in the stock of the Southern Company unless the old bonds had been well secured. The master's report also shows that the Southern Company gave $1,187,500 of its preferred stock and $3,562,500 of its common stock to the stockholders of the Belt Company for their equitable interest in the property of that company, that at the same time stockholders of the Gulf Company paid, and the Southern Company received, ten dollars per share in cash and an equal number of shares of the stock of the Gulf Company for tens of thousands of shares of the Southern Company's common stock. That stock must, therefore, have been worth at least the ten dollars cash per share which was paid for it, and it was worth as much more as the value of the stock of the Gulf Company. The preferred stock of the Southern Company could not have been worth less than its common stock. The Southern Company, therefore, paid in value at least $475,000 for the equitable interest of the stockholders of the Belt Company in its property when it gave them $4,750,000 of its preferred and common stock for their stock in that company. But the equitable interest of the creditors in the property of the Belt Company was superior to that of the stockholders and its value could not have been less, and was undoubtedly greater, than the $475,000. That interest was, therefore, worth more than enough to have paid the $360,000 which the Belt Company owed to the Trust Company and the Southern Company cannot escape liability on the ground that it was worthless. The fact that at the foreclosure sale, where there was no competition, the Belt Company was bid in at $1,000,000 fails to disprove or to even render doubtful this conclusion, and the Southern Company which gave $4,750,000 of its full paid stock, which it was readily selling for ten dollars cash per share, and Gulf stock of equal amount, for the inferior stock of the Belt Company, cannot be heard to say that the superior equity of the creditors therein was worthless. *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 508; *Rankin* v. *Gardner*, 34 Atl. (N. J. Eq.) 935, 937; *Garrison* v. *Monaghan*, 33 Pa. St. 232, 234.

Deliberate consideration has been given to the earnest objection to the consideration by this court of the question of the value of this equitable interest of the creditors in the Belt property

on the ground that the master found that there was no direct evidence that the property of the Belt Company was worth more than $1,000,000 and hence that this was its fair value, that no exception was taken to that finding and that the evidence is not here. But because the finding of the fair market value of the mortgaged property is not conclusive of the value of the creditors' equity therein and because other facts and findings contained in the master's report, all of which are available to this court for the determination of that issue, have convinced that the value of that equity was more than $475,000, the objection of counsel has not been thought fatal to the consideration and determination of this question.

Counsel say that because the original stockholders of the Belt Company, by the exchange of their stock for that of the Southern Company retained, as they claim, only 3 1/3 per cent of the value of their equitable interest in the Belt property, therefore the Southern Company is liable for only 3 1/3 per cent of that interest. But the measure of the creditors' recovery is the value of the creditors' equity which was diverted from them by their trustees, the stockholders of the Belt Company, including the Southern Company, the successory trustee, and vested in that trustee. If the Southern Company had been the owner of the bonds of the Belt Company only and knowing the condition and indebtedness of the Belt Company, as it did, had paid to the stockholders of that company $475,000 to the exclusion of the creditors for a conveyance of its property by the Belt Company to the Southern Company, it could not have escaped liability to the creditors of that company for that amount. Much less can it do so when it became owner of nearly all the Belt Company's stock, and in equity a trustee for its creditors. Story's Equity Jurisprudence, Secs. 1261, 1262; *Grenell* v. *Detroit Gas Co.*, 70 N. W. (Mich.) 413; *Camden Interstate Ry. Co.* v. *Lee*, 84 S. W. (Ky.) 332, 333; *Central of Georgia Ry. Co.* v. *Paul*, 93 Fed. 883, 884; *Luedecke* v. *Des Moines Cabinet Co.* 118 N. W. 457, 458; *Hibernia Ins. Co.* v. *St. Louis & N. O. Trans. Co.*, 13 Fed. 516, 519.

It is another contention of counsel for the Southern Company that the remedy of the Trust Company in this court of equity is limited to the subjection of the property of the Belt Company in the possession of the Southern Company to the payment of its claim and that it may not have a decree that the Southern Company pay it. This court does not concede the soundness of this

position and the leading case on the subject cited by counsel for the Southern Company does not sustain it. The quotation they make from that case is in these words:

"A sale may be void for bad faith though the buyer pays the full value of the property bought. This is the consequence, where his purpose is to aid the seller in perpetrating a fraud upon his creditors, and where he buys recklessly, with guilty knowledge. When the fact of fraud is established in a suit at law, the buyer loses the property without reference to the amount or application of what he has paid, and he can have no relief either at law or in equity. When the proceeding is in chancery, the jurisdiction exercised is more flexible and tolerant. The equity appealed to—while it scans the transaction with the severest scrutiny—looks at all the facts, and giving to each one its due weight, deals with the subject before it according to its own ideas of right and justice. In some instances it visits the buyer with the same consequences which would have followed in an action at law. In others, it allows a security to stand for the amount advanced upon it. In others, it compels the buyer to account only for the difference between the under price which he paid and the value of the property. In others, although he may have paid the full value, and the property may have passed beyond the reach of the process of the court, it regards him as a trustee, and charges him accordingly. Where he has honestly applied the property to the liabilities of the seller it may hold him excused from further responsibility. The cardinal principle in all such cases is, that the property of the debtor shall not be diverted from the payment of his debts to the injury of his creditors, by means of the fraud." *Clements* v. *Moore,* 6 Wall. 299, 312.

The application of the principles there announced in that suit, which was in equity, was this: Nicholson, the debtor, had sold his property to Moore for $6,310.35 to defraud his creditors, and Moore had paid Nicholson for the goods in cash and his own notes which Nicholson had disposed of and Moore had sold the goods. But Nicholson had applied all of the $6,310.35 to the payment of his debts except $1,500.00. The Supreme court held that Moore was liable to the creditor Clements for that amount. By the same mark the Southern Company became liable to the Trust Company to the extent of its claim for the value of the $4,750,000 of its stocks which it issued to the stockholders of the Belt Company to secure the property of the Belt Company

and divert it from its creditors. *Central of Georgia Ry. Co.* v. *Paul,* 93 Fed. 883, 884; *Camden Interstate Ry. Co.* v. *Lee,* 84 S. W. (Ky.) 332, 333.

The question, however, is not material in the case at bar because the transaction was a conveyance of the property of the Belt Company in fraud of creditors and a breach of trust by the Southern Company, which company, with full knowledge of all the facts, actively participated in the entire transaction and thereby acquired the property of the Belt Company so that that property and the improvements the Southern Company has made thereon, free from the $1,000,000 Belt mortgage and free from any charge for the expenses which the Southern Company has made thereon, stands in its hands charged with a trust to pay the claim of the Trust Company against the Belt Company which the court may execute by a seizure and sale by its master or receiver. *Railroad Company* v. *Soutter,* 80 U. S. 517, 522, 524; *Guckenheimer* v. *Angevine,* 81 N. Y. 394, 397; *Goble* v. *O'Connor,* 61 N. W. (Neb.) 131, 132.

And if the Southern Company has disposed of the property or destroyed it, or placed it beyond the reach of the Trust Company or the court, or given a mortgage or incumbrance upon it to a party without notice, the court has plenary power and it is its duty to require the Southern Company to account for and pay over the proceeds of the property or the value of it, or the proceeds of the mortgage, or the amount of it, to the extent of the Trust Company's claim and to so conduct its proceedings and mold its decrees that full relief may be secured by the Trust Company. And as the property of the Belt Company was worth many times the amount of the claim of the Trust Company at the time of its transfer to the Southern Company the ultimate result will be the same whether the decree be for the seizure and sale of the Belt property or for the payment of the claim of the Trust Company by the Southern Company, for it must ultimately be paid either out of the property in its hands or by the Southern Company itself. 20 Cyc. 630, 631; *Doherty* v. *Holliday,* 32 N. E. (Ind.) 315, 317, 36 N. E. 907, 908; *Jones* v *Reeder,* 22 Ind. 111; *Swinford* v. *Rogers,* 23 Cal. 234, 237; *Mason* v. *Pierron,* 34 N. W. (Wis.) 921, 925; *Blair* v. *Smith,* 15 N. E. (Ind.) 817, 819, 820; *Williamson* v. *Williams,* 11 Lea 355; *Murtha* v. *Curley,* 90 N. Y. 372; *Post* v. *Stiger,* 29 N. J. Eq. 554, 561; *Chamberlin* v. *Jones,* 16 N. E. (Ind.) 178, 179; *Muskegon Valley Furniture Co* v. *Phillips,* 21 So. (Ala.) 822, 823; *Coale* v.

Moline Plow Co., 25 N. E. (Ill.) 1016, 1018; *Dilworth* v. *Curtz*, 29 N. E. (Ill.) 861, 864; *Hulley* v. *Chedic*, 36 Pac. 783, 786; *Morrell* v. *Miller*, 43 Pac. (Ore.) 490, 494.

(4) Counsel argue with great force and ability that the Trust Company is estopped from enforcing against the Southern Company its claim for its breach of trust to it as a creditor of the Belt Company, (1) because it signed, and induced others to sign, the trust agreement which contained this paragraph: "No right is conferred, nor any trust, liability or obligation (except the agreements herein contained in favor of the holders of certificates of deposit hereunder), is created by this agreement or the plan, or is assumed hereunder, or by or for any new company in favor of any bondholder or any other creditor or any holder of any claims whatsoevr against the said companies, nor in favor of any company now existing or to be formed hereafter (whether such claim be based on any bonds, coupon stocks, securities, lease, guaranty or otherwise) with respect to any security deposited under this agreement or any moneys paid to or received by the Committee or by the depositor hereunder, or with respect to any property acquired by purchase at any foreclosure sale, or with respect to any new certificates to be issued hereunder, or with respect to any other matter or thing," (2) because it was one of the depositories under the agreement and on June 26, 1900, it accepted bonds and stock of the Southern Company in exchange for bonds and stock in the Gulf Company and other companies reorganized under the agreement, and especially because it accepted stock of the Southern Company in exchange for stock of the Belt Company which it held, and (3) by its laches in presenting its claim against the Southern Company.

It may be that if when the Trust Company signed the agreement that instrument had disclosed a purpose or had by its terms required the committee, or the stockholders of the Belt Company, or their successory trustee the new company, the Southern Company, to violate their trust and divert the equity of the creditors of the Belt Company in its property to its stockholders, the Trust Company's signature to it, its action as a depository of the bonds and stocks under it and its exchange of its Belt Company stock for the Southern Company stock might have wrought an estoppel against it. But the agreement must be read in the light of the law which was necessarily a part of it. It was to

execute a plan, which it disclosed, to transfer the property of the Belt Company to a new company by means of the exchange of the stock of the new company for that of the Belt Company. The law was that as against creditors of the Belt Company such a plan could be lawfully executed in but one way, and that was by offering and if accepted, by paying to the creditors of the Belt Company either in cash or in stock of the new company, or in some other property at least as much in value as the stockholders should receive, and, in the absence of such an offer or payment the transfer would be fraudulent and voidable as to the creditors. Unless there was in the agreement some term or provision which required the committee or the Southern Company to violate this law and to make a transfer fraudulent and voidable as to the creditors, the legal presumption was that the agreement contemplated, and that the committee and the Southern Company would make, such an offer and payment to the creditors, and upon that presumption the Trust Company had the right to rely when it signed the agreement and thenceforth until it was clearly notified to the contrary. The legal presumption was that the committee and the new company, the Southern Company, which was to succeed to the trusteeship of the stockholders of the Belt Company, and all others executing the agreement would obey the law, would refrain from making the transfer of the property from the Belt Company fraudulent and voidable and would make it fair, just and valid. The Trust Company had the right to calculate the natural and probable result of its signature to the agreement and of all its acts and omissions in reliance upon this presumption. Indeed, it could reckon upon no other, for it is alike impracticable and impossible to predicate and administer the rights and remedies of men upon the theory that their associates and fellowmen will either violate the laws or disregard their duties. *Cole* v. *German Savings & Loan Co.*, 124 Fed. 113, 119, 59 C. C. A. 593, 599; *Little Rock & M. R. Co.* v. *Barry*, 84 Fed. 944, 950, 28 C. C. A. 644, 650; *Burt* v. *Advertiser Newspaper Co.*, 154 Mass. 238, 247; *American Bridge Co.* v. *Seeds*, 144 Fed. 605, 609, 75 C. C. A. 407, 411.

The reorganization agreement has been searched in vain for any provision which required or notified the committee or the new company that they must violate the law and make the transfer fraudulent and void as to creditors. On the other hand, that agreement declared that the results of its execution would be (a) the placing of the properties of the Belt Company, the

Gulf Company and the Dock Company under one corporate ownership, management and control, "(b) the payment of the floating debt and the existing car trust obligations." It set apart $475,000 for the payment of floating debts; it expressly authorized the committee to acquire, hold or extinguish "any obligation in the nature of floating debt or otherwise against any company or property embraced in said plan," and under this power the committee actually expended $1,164,172.50. It declared that it was intended to confer on the committee any and all powers which they might deem necessary or expedient towards carrying out and promoting the purposes of the plan and the agreement, and that the methods to be adopted for carrying out the reorganization, consolidation and unification of the properties should be entirely discretionary with the committee. The committee and the Southern Company, therefore, had ample power to realize and pay to the creditors of the Belt Company the value of their equity in the property of the Belt Company before they transferred that property to the Southern Company. Let us now turn to the paragraph in the agreement on which counsel for the Southern Company rely for their estoppel by deed. So far as material it provides that "no right is conferred, nor any trust, liability or obligation * * * * is created by this agreement or the plan, or is assumed hereunder, or by or for any new company in favor of * * * * any holder of any claims whatsoever against the said companies, * * * * with respect to any property acquired by purchase at any foreclosure sale." There are two reasons why the Trust Company did not, by signing this paragraph, deprive itself of its equity in the property of the Belt Company, which it held as the *cestui que* trust of its stockholders, nor of its claim against the Southern Company, the stockholder's successory trustee. First, if that equity and trust were created or conferred by or under the agreement they were created and conferred, not by the just and lawful execution of that agreement, but by the inequitable and fraudulent appropriation of the Trust Company's equity in the property to the benefit of its stockholder or stockholders, and the paragraph in question barred the Trust Company from asserting only such rights, trusts, liabilities and obligations as arose out of the lawful and equitable execution of its contracts. It did not bar it from enforcing its claims accruing from illegal or inequitable acts or omissions of those engaged in the execution of the agreement. If the committee or anyone engaged in such execution had unlawfully appropriated to their or his benefit the property, money

or securities of signers of the contract which came to them or him under the agreement, the signers would not have been estopped by that paragraph from recovering the property or from enforcing the personal liability of the appropriators; second, the Trust Company's right, trust and equity in the property of the Belt Company acquired by the Southern Company "by purchase at any foreclosure sale" was neither created nor conferred by the reorganization agreement. It existed in all its force and inhered in the Belt Company's property by virtue of the relation of the Trust Company as a creditor of the Belt Company to the latter's stockholders before the agreement was made, and there it still inheres so that it did not fall within the terms of the paragraph in question and therefore was not affected thereby. Nor did the liability and obligation of the Southern Company for its breach of that trust now here in suit fall within the terms of that paragraph, for it was not created by that agreement, but by the Southern Company's subsequent transfer of the equity of the creditors of the Belt Company to itself, its stockholder and the trustee for its creditors without securing and paying to them the value of that equity. For these reasons the court is of the opinion that the Trust Company was not estopped by its signature to and activity in inducing others to sign the agreement from enforcing its claims as a creditor of the Belt Company against the Southern Company and against the property of the Belt Company in its possession or control.

Was the Trust Company equitably estopped from presenting and enforcing its claim by its promotion of the reorganization agreement, its participation in its execution and its acceptance on July 26, 1900, of stock of the Southern Company in exchange for its stock in the Belt Company and its acceptance of stock and bonds of the Southern Company in exchange for its stock and bonds in the Gulf Company and some of the other reorganized companies, or by its laches? Laches is equitable estoppel under another name and these two claims of estoppel will be considered together. A statement in chronological order of the salient facts material to the issue here presented will greatly aid in its disposition.

The plan of reorganization was made on November 7, 1899. It became effective on December 20, 1899. In December, 1899, or during the early part of the year 1900, the Trust Company requested a prominent member of the reorganization committee

to adjust or settle and pay its claim against the Belt Company, and he answered that it was asserted that the Belt Company did not owe the Trust Company anything, that an examination of the books of the Belt Company and the books of the Trust Company was being made and that when that was completed he would take up the question of whether anything could be done towards an equitable settlement of the claim. On February 5, 1900, the decree of foreclosure and sale of the Gulf Company's property was rendered. On March 19, 1900, the Southern Company was incorporated. On March 19, 1900, the Southern Company purchased the property of the Gulf Company at its foreclosure sale. By April 1, 1900, it had acquired, by its exchange of its stocks and bonds for those of the Belt Company, 97 per cent of the Belt Company's stock and 89 per cent of its bonds. On April 1, 1900, it placed its chosen agents in the offices of the Belt Company and took possession of its books and property by virtue of its ownership of its stock. On June 6, 1900, the reorganization committee purchased of the Trust Company and paid it $35,000, which they applied in part payment of the debt of the Belt Company to it, for certain shares of the stock of the Terminal Company and of the Airline Company, which the Trust Company held in pledge to secure the payment of its claim against the Belt Company. On July 26, 1900, the Trust Company exchanged its stocks and bonds in the old reorganized companies for the stocks and bonds of the Southern Company. On September 1, 1900, the Trust Company gave notice of its proposed sale on September 7, 1900, of the securities which the Belt Company had pledged to it to secure the payment of the latter's debt. On September 6, 1900, the Provident Company, the trustee in the mortgage of the Belt Company and in duty and in reality the agent of the Southern Company which held 89 per cent of the bonds of the Belt Company and 97 per cent of its stock, brought a suit to foreclose the mortgage, for the appointment of receivers of the Belt Company's property and for an injunction against its sale or disposition. On September 6, 1900, the Belt Company appeared in that suit and consented to the appointment of receivers. On September 6, 1900, the Cambria Company, with the consent of the Belt Company, the agent of the Southern Company, which held 97 per cent of its stock, recovered a judgment and obtained a return of *nulla bona* to an execution against the Belt Company. On September 6, 1900, the Cambria Company commenced the suit here in hand against the Belt Company and against the Trust

Company to enjoin the latter company from selling its collateral and applying their proceeds to the payment of the debt of the Belt Company, a suit which it founded on the averment, which has been adjudged untrue, that the Belt Company was not indebted to the Trust Company and on other allegations so baseless that it has become clear that the Cambria Company had no cause of action against the Trust Company. On September 6, 1900, the Belt Company, the hand of the Southern Company, appeared in the Cambria suit and on the same day the Trust Company was restrained by the court from selling its collaterals, and receivers of the property of the Belt Company were appointed in this suit. On November 5, 1900, the Trust Company answered and set up its claim against the Belt Company and the pledging of its collaterals. On December 3, 1900, the Cambria Company filed a replication to that answer. On that day the issue of the indebtedness of the Belt Company to the Trust Company was made in this suit and that issue really existed then between the Trust Company and the Southern Company, for the Southern Company by its ownership of 97 per cent of the Belt Company's stock controlled it and in all subsequent proceedings directed its course and is as much bound by its action as though it had been the Belt Company itself. This issue was referred to the special master and it was not until May 21, 1910, after testimony had been taken for years and after a record of approximately 34,000 pages had been accumulated, that the Trust Company succeeded in obtaining an adjudication thereof, and that issue was first determined by the court below a few days later. It will be interesting to note a few of the proceedings which resulted in this delay. Before the Trust Company reached the decision of the master more than fifteen pleadings were filed in this case by other parties to this suit, and the Trust Company was compelled to file six. On October 20, 1900, the Trust Company filed a petition in the Provident Company's foreclosure suit for leave to be made a party and to plead therein, wherein it set forch its claim against the Belt Company, that the Southern Company would cause the Belt Company to waive all defenses and to consent to a foreclosure of the mortgage upon its property to the detriment of the Trust Company and the creditors of the Belt Company. On October 22, 1900, the Provident Company amended its bill and asked that the Trust Company be made a defendant, and the court so ordered. On November 5, 1900, the Trust Company answered the Provident Company's bill and in its answer set forth the debt of the Belt Company to it, the control of the

Belt Company by the Southern Company and its purpose to waive all defenses to and to consent to the foreclosure of the Belt Company's mortgage and the sale of its property for the purpose and with the effect of appropriating the equity of its unsecured creditors to itself. On September 12, 1901, and again on October 14, 1901, the Trust Company applied for leave to file its amended and supplemental answer in which it set forth the debt of the Belt Company to it, the facts regarding the reorganization agreement, the organization of the Southern Company, its exchange of its stock for the stock of the Belt Company and its purpose, by the control of the Belt Company and of its bonds and stock, to appropriate to itself the equity of the creditors of the Belt Company in its property by means of the foreclosure suit, and prayed that the bill of the Provident Company be dismissed, and for such further orders and decrees as it was entitled to receive. On October 19, 1900, the court ordered the application denied on condition that the Provident Company should file a stipulation to the effect that the decree of foreclosure to be rendered in its case should not bar the right of the Trust Company to plead and insist in any future litigation that the Southern Company was legally and equitably bound by reason of the method by which it would obtain the property of the Belt Company to pay the debt of the Belt Company to the Trust Company. On October 17, 1901, the Provident Company filed such a stipulation and the court denied the Trust Company leave to file its amended answer. On October 19, 1901, the Trust Company presented to the court in the Provident Company suit a petition for leave to prepare and file a cross-bill setting forth the facts stated in its amended answer and praying for an adjudication of its claim against the Belt Company for the sale of its collaterals and for a provision in the decree of foreclosure that any purchaser of the Belt Company's property at the sale thereunder should take and hold it subject to the payment of the Trust Company's claim and to the payment of the claims of all the unsecured creditors of the Belt Company. On October 19, 1901, the court denied this application. On October 19, 1901, the Belt Company filed its answer whereby it admitted the averments of the Provident Company in its bill. On November 6, 1901, the court entered the decree of foreclosure and sale of the Belt Company which contained the express condition stipulated by the Provident Company that the decree should not bar the right of the Trust Company to recover of the Southern Company personally or out of the prop-

erty of the Belt Company the amount of its claim against that Company. On November 20, 1901, the Trust Company and the Belt Company and its receivers stipulated in the Cambria Company's suit that the accounting between the Trust Company and the Belt Company should be expedited and that a judgment should be entered in that suit against the party found to be the debtor. On December 31, 1901, the Southern Company bid in the Belt property at the Provident Company's foreclosure sale and the master conveyed it to the Southern Company.

On February 27, 1905, the Southern Company filed an intervening petition in the Cambria Company's suit by which it sought to recover certain collaterals pledged by the Belt Company to the Trust Company to secure the Belt Company's debt and certain moneys which the Trust Company had collected. On March 7, 1905, the Trust Company filed its answer to this petition wherein it denied the validity of the claim of the Southern Company and alleged that by virtue of the proceedings which resulted in the foreclosure sale and conveyance of the Belt Company's property to the Southern Company that property remained bound and the Southern Company became bound to pay the Trust Company's claim against the Belt Company. On May 1, 1905, the Southern Company filed an amended intervening petition seeking substantially the same relief on the same grounds. On May 25, 1905, the Trust Company answered it in substantially the same way as it answered the Southern Company's former petition, and the issues thus formed were, by order of the court, referred to the special master for hearing and report. Then followed objections and arguments and testimony until on May 21, 1910, the master finally filed his report and in a few days thereafter the court rendered its decree. The Trust Company, however, was not idle during this time, nor did it limit its endeavors to enforce its claim to the prosecution of it in the court below. On March 15, 1905, and on March 28, 1905, it commenced actions at law in a state court against the Southern Company for certain parts of its claim against the Belt Company. On July 3, 1905, the Southern Company filed a supplemental bill in the Provident Company's foreclosure suit to enjoin the Trust Company from prosecuting those actions. On August 29, 1905, the Circuit Court ordered the Trust Company enjoined from prosecuting it. On May 31, 1906, this court reversed that order. In May, 1907, the Southern Company made a motion in the state court to stay the

proceedings in these actions at law and in June, 1907, that motion was denied and the cases were set for trial on December 2, 1907. On November 16, 1907, the Southern Company filed another bill to enjoin the Trust Company from prosecuting those actions and the court below granted the injunction. On April 2, 1909, this court reversed that order.

Where is the evidence of any laches of the Trust Company in these proceedings? It presented to one of the members of the committee its claim against the Belt Company for adjustment and settlement and was told that when the examination of the books were completed he would take up the matter whether anything could be done towards an equitable settlement of its claim, and there that matter rested until the Trust Company was enjoined from selling its collaterals in September, 1900. By a sale of some of its collaterals to the committee it collected and applied the proceeds thereof to its claim against the Belt Company in June, 1900. It gave notice of its sale of its remaining collaterals on September 1, 1900, and was enjoined from proceeding in the baseless suit of the Cambria Company, a suit based on a judgment to which the Southern Company consented in the name of the Belt Company, and it is difficult to wink so hard as not to see that the Cambria suit was in reality the suit of the Southern Company. Twice in October, 1901, it set forth in answers to the Provident Company's suit its claim against the property of the Belt Company and against the Southern Company, and prayed the adjudication and payment thereof, to be met by a denial by the court doubtless secured by the objections of the Provident Company and by that Company's stipulation that the decree should not foreclose, bar or affect the Trust Company's claim against the Southern Company, or the property of the Belt Company which it should acquire thereunder. On October 19, 1901, it applied for leave to plead this claim in a cross-bill in that suit and to pray for a decree that its claim should be paid out of the property of the Belt Company, to be met by like denial. In this way the Trust Company was prevented from obtaining a hearing on the merits and an adjudication of its claim in the foreclosure suit and subjected to the objection to an original bill which it might otherwise have brought against the Southern Company that it had no judgment against the Belt Company and no execution returned unsatisfied thereon. Therefore it pressed for that judgment. November

20, 1901, it joined the Belt Company and its receivers in a stipulation to expedite the trial of that issue and the entry of such a judgment, but new pleadings, tens of thousands of pages of testimony delayed the result. When that result seemed nearer and on February 27, 1905, the Southern Company intervened and claimed some of the Trust Company's collaterals, and on March 7, 1905, the Trust Company answered the intervening petition and again pleaded and pressed its claim against the Southern Company. On March 17, 1905, and March 28, 1905, apparently despairing of reaching an adjudication in this suit in equity, it brought actions at law against the Southern Company upon its claim, but was prevented from trying them by injunctions procured and other proceedings conducted by the Southern Company until April 2, 1909, when the last injunction against its proceeding in the state court was reversed by this court. Meanwhile the Trust Company had pressed the issues in this suit through the hearings, they had been submitted to the master, and on May 21, 1910, he found that the Belt Company was indebted to the Trust Company in 1900, and that the amount of that debt with interest to June 22, 1910, was $639,658.86. There is much evidence of promptness, diligence and persistence, and none of laches, on the part of the Trust Company in the printed record before us. Nor does it lie in the mouth of the Southern Company to make or urge a charge of laches here. By its use of 89 per cent of the bonds of the Belt Company which the Provident Company was bound to represent in the foreclosure suit, and of 97 per cent of the stock of the Belt Company, it controlled the action of each of those companies in that suit. By means of those companies it prevented the hearing and adjudication of the Trust Company's claim upon its answers and upon its application to file a cross-bill in that suit. By the Belt Company's consent to a judgment against it in favor of the Cambria Company it laid the technical foundation of the Cambria Company's unwarranted suit which prevented the Trust Company from selling its collaterals, and held the issue of the Belt Company's indebtedness to it suspended for more than eight years. It prevented the trial of that issue in the actions which the Trust Company brought in the state courts in 1905 by injunctions it procured from the court below and there is no equity in its claim that the Trust Company unduly delayed the presentation or the prosecution of its claim against it or against the property of the Belt Company.

But counsel argue that the Trust Company is equitably estopped from maintaining its claim by the fact that it was one of the depositories under the reorganization agreement, that it persuaded others to sign it and that on July 26, 1900, it exchanged its $76,972.00 par value of stock in the Belt Company and the stocks and bonds it held in the Gulf Company and the other reorganized companies for $1,480,909.00 par value of stock of the Southern Company. Let us see. The indispensable elements of an estoppel in *pais* are (1) intentional or reckless misrepresentation of a known and material fact inconsistent with the subsequent claim of him who makes the misrepresentation, (2) ignorance of the truth and absence of equal means of knowledge of it by the party who claims the estoppel, (3) action by the latter induced by the misrepresentation and (4) injury to the latter if the truth is permitted to be proved. Bigelow on Estoppel, 4th Ed. page 679; *Illinois Trust & Sav. Bank* v. *City of Arkansas City*, 76 Fed. 271, 293; 22 C. C. A. 171, 193; *Farmers' & Merchants' Bank* v. *Farwell*, 58 Fed. 633, 638, 639; 7 C. C. A. 391, 396, 397; *New York Life Ins. Co.* v. *McMaster*, 87 Fed. 63, 66, 67, 30 C. C. A. 532, 535, 536. The estoppel here probably lacks all and it certainly lacks at least three of these essential elements; (1) the requisite misrepresentation of any material fact which the Trust Company knew, (2) ignorance or absence of equal means of knowledge of that fact by the Southern Company or its stockholders and bondholders, and (3) injury to them if the truth is permitted to be proved. First, the reorganization agreement, as we have seen, disclosed a scheme whereby the property of the Belt Company might be honestly and lawfully vested in the Southern Company by offering, and if the offer was accepted by paying, to the creditors of that company at least as much in value as the scheme offered to the stockholders of the Belt Company. The Trust Company presentel its claim against the Belt Company to one of the committee and was told before it made its exchange that the indebtedness of the Belt Company was denied, but was under investigation, and that when that investigation was completed he would take up the claim and see if anything could be done about its settlement, and there the matter rested until after the exchange of stock was made. Meanwhile the Southern Company had the books of the Belt Company evidencing the state of the account between the Belt Company and the Trust Company in its possession. The Trust Company never made any representation that it had no claim against the Belt Company nor that it would not press it

for payment by the committee, by the Belt Company and by the Southern Company, but it gave notice of its claim and requested its payment and neither the committee nor the Southern Company ever declared before the Trust Company exchanged its stock and bonds that they would not settle or pay it if the Belt Company really owed it.

The legal presumption was and the Trust Company had a right to rely thereon, that the scheme disclosed by the reorganization agreement would be executed in a just and lawful way and that its claim and the claims of all creditors of the Belt Company would be adjusted and settled by full or partial payment by the committee and neither its action as a depositor nor its activity to persuade others to accept the plan, nor its exchange of its stocks and bonds constituted any representation that the plan would not be so executed, that the transfer of the property of the Belt Company to the Southern Company would be illegal and fraudulent as to creditors nor any consent to or participation in such an execution of the agreement. That transfer had not been made, the Southern Company held the stock of the Belt Company charged with the trust to secure for its creditors at least as much as it had paid to its stockholders and there was no notice or presumption that it would violate its trust. The Trust Company made no misrepresentation by any of its acts or omissions of any known fact on which an estoppel in favor of the Southern Company can be based. Second, the reorganization agreement showed that under it the title in fee of the property of the Belt Company was to be transferred to the new company, the Southern Company, and brought under the lien of its mortgage by means of the exchange of the stock of the Belt Company for the stock of the Southern Company and this disclosure and the law notified the Southern Company and everyone who received any stocks or bonds of that company that the acquisition of that stock in that way and its pledge under the mortgage charged the Southern Company, its bondholders and its stockholders with a trust to secure and distribute to the creditors of the Belt Company the value of their equity in the property of that company, and the answers of the Belt Company in the Provident Company's foreclosure suit, its application to file its cross-bill and the paragraph in the decree of foreclosure which exempted the Trust Company from the effect of that decree, kept that notice flaming in the record so that neither the Southern

Company nor any of its bondholders or stockholders were without equal means of knowledge nor without notice under the law that the transfer of the property of the Belt Company to the Southern Company without offering to pay or paying to its creditors was a breach of trust, fraudulent and voidable as to them. Moreover, although it is immaterial under the opinion in *Northern Pacific Ry. Co.* v. *Boyd,* 228 U. S. 502, whether they were notified of the Trust Company's claim or not, they all had notice of it by its presentation to one of the committee, by the Southern Company's possession of the books of the Belt Company as early as April 1, 1901, by the answers and the application to file the cross-bill in the foreclosure suit and by the terms of the decree therein. The committee, the Southern Company, its stockholders and bondholders had at least equal means of knowledge and had notice under the law of the truth regarding all material things in this transaction to which the Trust Company's acts and omissions, and its exchange of stock and bonds relate. There were no innocent stockholders or bondholders of the Southern Company in or since this transaction. Third, neither the Southern Company nor its stockholders nor bondholders will suffer any injury by proof of the truth in this transaction and the granting to the Trust Company of the equitable relief to which it was entitled in 1901. They took to themselves by a breach of trust and a transfer fraudulent as to creditors by the foreclosure sale on December 31, 1901, an equity in the property of the Belt Company of a value in excess of the amount of the Trust Company's claim, then about $360,000, which belonged to that company, and they have held and enjoyed it ever since. Each stockholder and bondholder has had and still has the benefit of his just proportion of that equity. If now the Southern Company is required to restore that equity or its value in 1901, with interest from the date, each stockholder and bondholder will lose the benefit of its just proportion of that equity which it wrongfully holds and nothing more. Nor will the Trust Company secure or retain any unjust share or advantage. While it will receive the value of that equity to which it as a creditor of the Belt Company was entitled in 1901 with interest, its stocks and bonds issued by the Southern Company will lose the benefit of that equity in the same proportion as will the stocks and bonds of others. The stocks and bonds of the Trust Company and of all the other holders of stocks and bonds in the Southern Company will be diminished in value in the exact proportion by which they were enhanced in value by

the wrongful appropriation of the equity of the Trust Company in the property of the Belt Company which the Southern Company wrongfully took and holds, and the justice and equity to all which should have been done many years ago will now as nearly as practicable be administered.

This question of estoppel was ably and exhaustively argued. It has not failed to receive the study and meditation of each member of this court. But for the reasons which have now been stated, perhaps at too great length, this study and meditation have but confirmed the court in its former view and its conclusion still remains that the Trust Company was not estopped either by its promotion of the reorganization agreement, its signature to it, its exchange of stock, or its alleged laches, from prosecuting its claim against the Southern Company to adequate relief.

In the course of their argument counsel have invoked the maxims that he who seeks equity must do equity and that he who seeks equity must come into court with clean hands, and have claimed that the Trust Company is entitled to no relief because it participated in the formation and execution of a fraudulent scheme. The answer has been given. The fraud and breach of trust which made the transfer voidable as to creditors were not committed nor disclosed until after the Trust Company's acts in the formation and execution of the plan had been done. The presumption of law was, when it exchanged its stock, that the fraud and breach of trust were not being perpetrated and it did not participate in their perpetration. Its hands are not soiled and if its claim is paid by the Southern Company it, and all the parties in interest in this transaction, will have done and received equity.

(5) Counsel have argued the question whether the Trust Company or the Southern Company has the superior equity in the lands of the Central Company, but the court is not convinced that it was in error in the conclusion upon this subject which it announced in its former opinion at pages 824, 826, 827 and 828 of 201 Federal Reporter, and as, unless the court is in error on the questions which have already been discussed, that question is no longer material because the Southern Company may have no relief in that regard, unless it pays the claim of the Trust Company, the court refrains from another discussion of it.

(6) Objection is made to the entry of a decree at this time in favor of the Trust Company for the payment of its claim by the Southern Company on the grounds that the Trust Company filed no cross-bill and made no specific prayer for such relief in its answer and because the Southern Company should have an opportunity to offer evidence and to be heard upon the question whether or not the Trust Company is entitled to such relief. But the issues whether or not the property of the Belt Company taken by the Southern Company, whether or not the property of the Central Company by reason of the pledge of its stock and whether or not the Southern Company itself, was liable to pay the debt of the Belt Company to the Trust Company, were all necessarily presented and litigated under the pleading and litigation of the controlling issue whether or not the Southern Company by its acquisition of the property of the Belt Company, its exchange of stock and its foreclosure sale deprived the Trust Company of its equity in that property and exempted itself from liability. Opportunity was offered and embraced to present evidence to consider and argue these questions. The Southern Company received ample notice of the claim of the Trust Company that it and the property of the Belt Company which it acquired were liable to pay its claim against the Belt Company. In its petition for leave to file a cross-bill in the foreclosure suit in October, 1901, the Southern Company asserted its right to be paid out of the property of the Belt Company to be superior to that of the expected purchaser at the foreclosure sale of that property and the liability of such purchaser to pay it and the right of the Trust Company to assert its claim against the property and the purchaser, were expressly reserved by the decree. In its answer to the amended intervening petition of the Southern Company in this suit filed on May 20, 1905, it made a like averment which was denied by the replication of the Southern Company. A review of the facts disclosed by the master's report and of the pleadings and proceedings printed in the record before us, has convinced that the indisputable facts and the law of this case are such that an opening of the case and the reception of further evidence would not change the result or benefit any party thereto.

The court has ample power to remand the case and permit the filing of a cross-bill or an amendment of the answer so as to pray for the specific relief to which the Southern Company is entitled. *Wiggins Ferry Co.* v. *Ohio & Mississippi Ry. Co.*, 142

U. S. 396, 413-416; *Hardin* v. *Boyd,* 113 U. S. 756; *Clark* v. *Clark,* 62 N. H. 267, 272; *Trimble* v. *Bank,* 71 Mo. App. 467, 484, but that would be a useless proceeding and neither the law nor the rules and practice in equity require the performance of futile acts. An answer may be treated as a cross-bill and the rights and remedies which the defendant has alleged in its answer and at the hearing has proved it is entitled to enforce may be maintained and enforced although its prayer is limited to a dismissal of the bill. *Bradford* v. *Union Bank of Tennessee,* 13 How. 56, 68, 69; *Walden* v. *Bodley,* 14 Pet. 156, 164; *Moran* v. *Hagerman,* 64 Fed. 499, 503, 504; *Wyatt* v. *Sweet,* 12 N. W. (Mich.) 692, 693. In *Walden* v. *Bodley,* 14 Pet. at page 164, the Supreme Court said on this subject: "It would be a reproach to the administration of justice, if in this case, the parties should be left, by the decision of this court, apparently, as remote from a final determination of it as they were forty years ago. It is true, the answer prays merely for a dissolution of the injunction and that the bill may be dismissed. But the court have, by the bill, answer and evidence, the equities of the parties before them, and having jurisdiction of the main points they may settle the whole matter. A court of equity cannot act upon a case which is not fairly made by the bill and answer. But it is not necessary that these should point out in detail the means which the court should adopt in giving relief." These rules and authorities and the principle of equity that a court of chancery which once acquires jurisdiction of the subject matter and the parties to a controversy ought, if possible, to determine the entire matter and grant just relief to each party, the length of time this litigation has already been pursued and the greater danger of injustice from its continuance than from its termination, have persuaded that the ends of justice will be best served by the entry of a decree in this case upon the issue of the mandate in favor of the Trust Company for the relief to which it is entitled.

(7) Counsel for three of the stockholders of the Trust Company have been heard upon their petition that this court adjudge that certain of the litigation herein instituted by the Cambria Company, the Belt Company and the Southern Company was commenced and prosecuted in bad faith and that it direct the court below to find the amount of attorney's fees, stenographers' fees and expert accountants' fees necessarily incurred by the Trust Company in that litigation, and, after the entry of the

main decree, to render a further decree in favor of the Trust Company and against the Southern Company for the aggregate of these amounts, or that this court direct the court below to insert in its decree an adjudication that it is rendered without prejudice to the right of the Trust Company to sue the Southern Company for those sums, that this court also direct the court below to include in the costs herein the damages, costs, fees and expenses incurred by the Trust Company in the injunction suit reported in 171 Federal, 43, and also to insert in the decree an adjudication that the decree shall not prejudice the right of the Trust Company to move for such damages, costs, fees and expenses in the injunction suit reported in 146 Federal, 337. A deliberate consideration of this petition and of the exhaustive arguments of counsel have, however, persuaded that inasmuch as the questions suggested came for the first time into this suit at the rehearing in this court, as no evidence has been taken relative to them and as the evidence upon the issues tried in this case was not brought to this court it would be unwise and might be unjust to adjudicate the questions presented by the petition of these stockholders. Moreover, as this court cannot rightly determine the questions relating to the costs to be taxed at this time, as there are established rules of practice concerning them and as directions to the court below to open and try new issues might, and probably would, prolong this litigation through several years more, our conclusion is that our just course is to leave the taxation of costs to the court below under the principles, rules and practice in equity.

And the conclusion of the whole matter is that the decree below should be reversed and the district court should render a decree which should contain the first five paragraphs of the former decree, should adjudge that the Southern Company is indebted to and should pay to the Trust Company the amount of the indebtedness of the Belt Company to the Trust Company, that is to say, the sum of $639,658.86 and interest from the date of the former decree on $473,723.59 at six per cent per annum, on $46,565.76 at seven per cent per annum and on $19,369.51 at eight per cent per annum, and the costs of this suit, that the Trust Company's right to and equity in the property of the Belt Company which was transferred to the Southern Company by means of the exchange of the stock of the Belt Company for the stock of the Southern Company and by the foreclosure proceedings, sale and conveyance and otherwise, was and is prior in time and superior in equity and right, to the extent necessary

to pay that debt, to the right, title and equity of the Southern Company therein, that by virtue of the indebtedness of the Belt Company to the Trust Company and the pledge to it of the 1120 shares of the stock of the Central Company, the equity and right of the Trust Company in the property of the Central Company described in the sixth paragraph of the former decree is superior, to the extent necessary to pay that debt, to the right, title, claim and equity of the Southern Company therein, that in case the Southern Company fails to pay its debts to the Trust Company by a day to be named by the court in the decree, the said property of the Central Company and the property of the Belt Company which was transferred to the Southern Company as aforesaid, or such part thereof as it shall be necessary to sell in order to pay the debt and costs out of the proceeds of the sale or sales to which the Trust Company, in view of the pledge to it of only 1120 shares of the stock of the Central Company and the possible equities of the Central Company's other stockholders and creditors, shall be equitably entitled, be sold by a master or receiver to be named by the court, that the proceeds of such sale or sales to which the Trust Company shall be equitably entitled be applied to the payment of the debt and of the costs after as well as before the decree until they are completely paid and that the remainder of the proceeds, if any, be paid to the Southern Company or to such other party as may be equitably entitled thereto, that on the demand of the master the Southern Company, the Central Company and its receiver, surrender and deliver to him, or to the purchaser or purchasers of any of this property as the master shall direct, such part or all of said property as he shall specify, and that if an amount to which the Trust Company shall be equitably entitled sufficient to pay the debt with interest and the costs before and after the decree is not realized from the sales, then that the Trust Company have judgment and execution against the Southern Company for the remainder unpaid. The decree should adjudge that the Trust Company may recover its costs down to the entry of the decree of the Cambria Company as well as of the Southern Company, and the court may apportion those costs between them, but not as against the Trust Company which should be permitted to pursue either or both of them until its costs are paid. The district court should reserve in the decree full jurisdiction to render such further decrees and take such subsequent proceedings in the suit as equity and good conscience may require.

Let the former decree be reversed and the case be remanded to the district court for further procedings in accord with the views expressed in this opinion.

Filed December 2, 1913.

A true copy.

Attest:

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.
[Seal]

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—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1915.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Appellant and Petitioner,*
vs.
GUARDIAN TTUST COMPANY, CENTRAL IMPROVEMENT COMPANY, CAMBRIA STEEL COMPANY, and KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, *Respondents.*
No. 85.

REPLY BRIEF OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY, APPELLANT AND PETITIONER.

SAMUEL UNTERMYER,
SAMUEL W. MOORE,
Solicitors for Appellant and Petitioner.

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vs.

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No. 85.

REPLY BRIEF OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY, APPELLANT AND PETITIONER.

I.

We construe the Trust Company's failure to support the theory on which the court of appeals based its decision of this case as an admission that the court's views on the question of estoppel were unsound.

The significant feature of the Trust Company's brief, as we conceive it, is its *entire change of front*, and its *complete repudiation* of the theory on which the court of appeals rested its decision in each of its two written opinions.

No one can read these opinions without reaching the conclusion that the court's judgment is based upon two main propositions: (a) that the reorganization plan by which the so-called "creditor's equity" was diverted to stockholders

constituted a fraudulent conveyance, and (b) that the Trust Company's participation in the plan did not operate to estop it from basing its action upon the same transaction in which it participated.

The opinions, in characterizing the reorganization, are replete with the expressions "fraudulent in law as to unsecured creditors of the old company," "voidable by its creditors," "void as against creditors," "fraudulent and voidable against the unsecured creditors," "void in equity regardless of the motive with which it was made," "fraudulent and voidable as to creditors," "the inequitable and fraudulent appropriation of the Trust Company's equity in the property to the benefit of its stockholder or stockholders," "a breach of trust fraudulent and voidable as to them," "a transfer fraudulent as to creditors," "the fraud and breach of trust," etc.

Indeed, there could not be a stronger or more conclusive declaration upon this subject than is contained in the language of the court of appeals in its second opinion (210 Fed. 709), as follows:

> The question, however, is not material in the case at bar because the transaction was a conveyance of the property of the Belt Company in fraud of creditors and a breach of trust by the Southern Company, which company, with full knowledge of all the facts, actively participated in the entire transaction and thereby acquired the property of the Belt Company, so that that property and the improvements the Southern Company has made thereon, free from the $1,000,000 Belt mortgage and free from any charge for the expenses which the Southern Company has made thereon, stands in its hands charged with a trust to pay the claim of the Trust Company against the Belt Company which the court may execute by a seizure and sale by its master or receiver.

The court of appeals, after thus reaching the conclusion that the reorganization amounted to a conveyance in fraud of creditors, next proceeds to the conclusion, which we believe to be wholly erroneous, that the Trust Company is not estopped by its participation to maintain the present action.

Our brief on the merits of this case is largely devoted to a demonstration that the position of the court of appeals upon the question of estoppel was erroneous and highly prejudicial to the appellant.

It would be most natural to expect that counsel for the Trust Company would bend their energies to support the position taken by the court of appeals, and that their diligence and astuteness would be employed in reinforcing and giving emphasis to the considerations which form the basis of that court's judgment.

But they, in their wisdom, as we read their brief, in order to escape from the dangerous doctrine of the non-application of the doctrine of estoppel, have *repudiated* and *discarded* the entire theory of a fraudulent conveyance so elaborately worked out by the court of appeals.

They will have none of it. The transaction, they say, was *not* a fraudulent conveyance, and therefore there can be no discussion of the application of the rules of estoppel contended for in our brief.

They now say the plan was an honest one, and the only *fraud* in the case was the refusal of the Southern Company to comply with its contract. They now urge, in support of the decree of the court of appeals, two propositions, both of which were *repudiated as unsound* by the master and by the lower court, and *ignored*, and therefore stand unreversed by the court of appeals, to-wit: (a) that the plan was an express contract, obligating the Southern Company to pay the entire floating debt of all the companies involved, on which the Trust Company can maintain an action at law, as upon a contract made for its benefit, and (b) that the reorganization was a *consolidation* of all the companies involved, *including the Southern Company*, under the Missouri statutes.

This is our understanding of the position of counsel for the Trust Company, for they so state (page 3):

> The Trust Company contends that the plan of reorganization, in addition to making provision for the stocks and bonds of the old companies, contemplated

> and provided for the payment of all the general creditors, and was an honest and lawful plan of reorganization, and the Circuit Court of Appeals so held.
>
> The Trust Company insists that the only fraud in the case was the refusal to perform the promise of the plan and the Circuit Court of Appeals so held.

They say the plan was an honest one, that it never became a dishonest one, and that no action taken under the plan was fraudulent as to creditors (page 86):

> The plan was an honest one in its terms, and it never became a dishonest one for there never was a change in its terms. Nor did any "action taken under the plan become fraudulent as to creditors," so that "the duty immediately devolved upon the Trust Company to elect whether to accept the benefits of the fraudulent scheme, or to retain them if they had been already received," as the appellant contends.

The same position is reiterated throughout the brief, notably at pages 76, 81, 125 and 126.

The unwillingness of counsel to accept the case made for them so elaborately and laboriously by the court of appeals, and to reinforce it and support it by their argument and learning, is so unprecedented as to provoke an immediate inquiry as to its cause.

We believe the explanation of this remarkable change of front is to be found in counsel's profound distrust of the soundness of the views of the court of appeals upon the question of estoppel. Unquestionably, if they had believed that they could sustain the court of appeals on this question, they would have devoted their time and energies in support of the court's opinion in its entirety, without having recourse to the discredited theories of consolidation and express contract.

But counsel have concluded that it is unwise for them to lie in the bed which the court of appeals made for them, and they have accordingly staked their chances of success in this Court substantially upon the two propositions stated above.

This reply brief will be devoted largely to a consideration of these two questions, a discussion of which was not thought necessary in our original brief for the reason that they had been ignored by the court of appeals.

We deny most emphatically the statement in the foregoing quotation from the Trust Company's brief, "and the Circuit Court of Appeals so held," and shall contend that it is perfectly plain from the opinions of the court that it did not so hold.

We also dissent from the statement that, upon the Trust Company's theory of an express promise in the plan to pay all the floating debt of the old companies involved, there could be any *fraud* in the failure to pay any creditor of any one of the old companies. If the obligation to pay existed, then the failure to pay was a default in the performance of an express contractual obligation, and to call this fraud is to employ a meaningless expression.

II.

There is no basis whatever for the extraordinary statement that the entire floating debt of the constituent companies has been paid except only the debt of the Trust Company.

Counsel for the Trust Company, at page 3 of their brief herein filed in opposition to our petition for *certiorari*, said:

> The floating debt of all the constituent companies was paid by the reorganization committee or by the Southern Railway, with the exception of the Trust Company's debt.

In our reply thereto we called attention to this misstatement, saying:

> We deeply regret to be compelled to say that there is not a syllable of testimony in the entire record to support this statement, or from which any such inference can be drawn, or which furnishes any excuse for the statement.

In their brief on final hearing, counsel have seen fit to repeat the same erroneous statement without the slightest foundation except unwarranted and unjustifiable inference, as we shall presently demonstrate. They say:

> Its creditors other than the Trust Company were all paid. (p. 29.)
>
> They (the committee) went on regardless of the estimate and paid every claim except that of the Trust Company. (p. 51.)
>
> In this case the floating debts, save a large balance due to the Trust Company, were paid. (p. 55.)
>
> And, so we repeat, that all the floating debts of the Belt Company were paid, as it was originally intended they should be, except that to the Trust Company. (p. 60.)
>
> And the committee acted accordingly and did buy, pay, compromise or settle all claims except that of the Trust Company. (p. 84.)
>
> The creditors were all paid, save the Trust Company. (p. 128.)
>
> The Trust Company is now the only creditor in the case, and asks only that it be paid as the plan promised and as other creditors were paid. (p. 128.)

At page 55 there is a discussion under the heading, "All creditors, save the Trust Company, were paid, and the Trust Company was paid in part."

We proceed to consider the reasons assigned for this statement, none of which affords the slightest excuse for the assertion made.

(a) The first reason assigned (p. 56) is the following:

> In the first place, the presumption, in absence of evidence to the contrary, is that the floating debts of the constituent companies were paid, as otherwise the payments to the stockholders were fraudulently made.

There is no such presumption. As said by this Court in *Howard* v. *Chesapeake Ry. Co.*, 123 U. S. 222:

> But if, as such purchasers (at foreclosure sale), they thereby became bound to pay all the debts and per-

> form all the obligations of the corporations whose property they bought, it would put an end to purchases of railroads.

It is a matter of common knowledge that every railroad reorganization and foreclosure sale in the history of the country has had the effect of cutting out, to a greater or less extent, the claims of unsecured creditors, where they are not preferential within the principles of equity.

The presumption invoked arises, counsel say, from the assumption that otherwise the payments to stockholders were fraudulently made. The court of appeals held that they *were* made in fraud of the rights of creditors, in which event, by the same token, a contrary presumption would arise. The existence of this peculiar presumption, therefore, cannot be determined until *after* the case has been finally decided by this Court on its merits.

(b) Counsel, not content with this tardy and belated presumption, invoke a second one, as follows:

> Secondly, $1,164,172.56 was in fact paid on account of those debts (Rec. 860), and the presumption is that there was no arbitrary or capricious refusal to pay any debt believed to be just.

Counsel appear wholly oblivious of the master's finding that *these very payments* made by the committee and the Southern Company, aggregating $1,164,172.56, to which reference was made, "in reality consisted of *all kinds of items which the committee deemed necessary to take care of so as to secure absolutely the first mortgage lien* of the properties transferred to the Southern Company." (Rec. 860.)

The purpose of the plan and of the committee in executing it was to pay and discharge "such obligations as the committee might find necessary to discharge *in order to relieve the properties to be included in the Southern mortgage from any liens claimed thereon, or from any interference as a matter of business policy.*" (Rec. 861.)

It appears from the finding of the master (Rec. 870) that

the Trust Company "was well acquainted with the *purposes* of the reorganization scheme and with such knowledge entered into the same," etc. The master refers (Rec. 871) to "the *intimate connection and knowledge* of respondent (the Trust Company), as heretofore shown, with the *practical working out of the reorganization scheme* and the large financial interests it had in the successful carrying out thereof," etc.

The conclusion is irresistible, therefore, not only that there was no intention to pay *all* the floating debt of all the companies, but that there was no arbitrary or capricious selection of the floating debt to be paid. The line was sharply drawn, *as the Trust Company well knew*, so as to include liens, and claims of liens, which the committee thought necessary to take care of, so as to secure an absolute first mortgage lien upon the properties transferred to the Southern Company. No one knew this better than the Trust Company. The record contains 76 pages of letters passing between the Trust Company and the reorganization committee during the reorganization period. (Rec. 870.)

We insist that the Trust Company, as the master says, was well acquainted with the purposes of the reorganization scheme, and *with the purpose and intent of the floating debt provision* to make the lien of the Southern Company's new mortgage an absolute first lien upon all the properties, to the benefit and advantage of all the bondholders of the Southern Company, of which the Trust Comapny was one to the extent of $614,981.50, par value.

The findings of the master show conclusively what was intended to be done, and what was done in fact. There is no room for presumptions.

(c) Attention is called to the statement of the master (Rec. 664) to the effect that the Cambria bill was brought for the benefit of all Belt creditors who might wish to join therein, and that, "so far as this record shows," the only indebtedness against the Belt Company, other than that of the Cambria Company and the Trust Company, was on account of the deficiency judgment rendered in favor of the Provident

Company. Counsel seek to create the inference that there were no other creditors, but here again the facts confound them. The master had under consideration, at the time of making the statement above referred to, the argument of the Trust Company (Rec. 664) that none of the transactions in the second ancilliary bill could be attacked by a *subsequent creditor*. For that reason *alone* the master referred to the claims asserted in the Cambria suit. He did not say there were no other claims. There was no occasion for him to say whether there were other claims.

It is obvious, moreover, that no presumption of the absence of creditors can arise from the fact that no other creditors intervened in this Cambria accounting case, which involved the sifting of from ten to twelve thousand items of account, covering a period of ten years. That was not the forum in which it was to be expected that claims would be asserted.

It is unfortunate that the evidence is not here as to the amount of claims against the mortgagor companies, together with a statement of the amounts that were actually paid so as to thoroughly and conclusively disprove the unwarranted claims made by counsel that all of the floating debt was paid. We may, however, with propriety refer to some of the reported cases where it appears that claims of creditors of the mortgagor companies were asserted against the property or against the Southern Company by intervention, or otherwise.

State Trust Company v. *Kansas City, P. & G. R. Co.*, 110 Fed. 10, in which suits by creditors of the Gulf Company brought against the Southern Company were stayed by order of the Federal Court.

State Trust Company v. *Kansas City, P. & G. R. Co.* (Breuel et al, Intervenors), 120 Fed. 398, in which the claims of unsecured creditors asserted by intervening petitioners in the Gulf foreclosure suit were disallowed.

State Trust Company v. *Kansas City, P. & G. R. Co.* (Westinghouse Air Brake Co., Intervenor), 128 Fed. 129; *State Trust Company* v. *Kansas City, P. & G. R. Co.* (West-

inghouse Air Brake Co., Intervenor), 129 Fed. 455, and *Westinghouse Air Brake Company* v. *Kansas City Southern Railway Company*, 137 Fed. 26, in which claims of a material man were allowed in part and disallowed in part in the Gulf foreclosure case.

Fordyce v. *Bradley*, 111 Fed. 769, in which a claim for personal injuries was disallowed.

State Trust Company v. *Kansas City, P. & G. R. Co.* (Temple et al., Intervenors), 115 Fed. 367, and *State Trust Company* v. *Kansas City, P. & G. R. Co.* (Turner, Intervenor), 115 Fed. 1023, in which it appears that claims for personal injuries arising under the statutes of the State of Arkansas and presented by intervening petition in the Gulf receivership were required by the court to be paid by the Southern Company.

The foregoing cases demonstrate that the Southern Company was resisting all claims asserted against its property acquired at foreclosure sale, or against itself personally, and was only paying those claims which were determined to be prior in lien or superior in equity to the mortgages foreclosed.

It appears incidentally in the record that other claims of creditors were being asserted by virtue of intervening petitions in the foreclosure suits, as is the customary practice. It appears (Rec. 775) that the account of the Belt Company against the Gulf Company for $133,000 is still pending before the master as an intervening petition awaiting determination of this case. It also appears (Rec. 688) that the Arkansas Construction Company filed an intervening petition in the Gulf receivership "claiming large sums due them for construction work upon the Gulf road," and that one De Goeijen (Rec. 689) held a claim amounting to $407,478, of which $280,000 was covered by an intervening petition in the Gulf receivership case. It appears (Rec. 689) that the Southern Company settled with the Arkansas Construction Company, paying it the sum of $350,000, and that it settled with De Goeijen, paying him $150,000.

It also appears from the Trust Company's answer (Rec. 466) that the Southern Company, after the reorganization, paid to the Provident Company certain real estate mortgage notes, secured at the time of the Belt receivership by a lien on the property of the Belt Company, aggregating $89,333.33.

It thus appears from the record, as well as from the reported cases, that the Southern Company, so far from paying all of the unsecured obligations of the reorganized company, was resisting their payment, except to the extent that such claims were of a *preferential nature;* that the payments above mentioned were all of liens, or lien claims, all of which was in complete harmony with the master's finding as to the purpose of the floating debt provision and the manner of its execution.

Counsel assert in their brief, p. 62, that the committee purchased the stocks of the Union Terminal Company and of the Air Line "in recognition of the validity of the Trust Company's claim." The transaction does not justify any such inference. As appears from the master's report (Rec. 769-770), the committee needed the Air Line and Union Terminal stocks, which were then held by the Trust Company as collateral security, in order that these stocks might be pledged under the new mortgage of the Southern Company. The stocks had no real value, but nevertheless the Trust Company required the committee to pay to it $35,000 for the shares. The master says:

> These Air Line and Union Company stocks were acquired by the committee for the Southern in order that the latter might be able to include such stock in its general mortgage as further security to the new security holders or bondholders thereunder. (Rec. 770.)

The committee was compelled to secure these stocks in order to carry out the plan, for at that time, June, 1900, those two companies could only be brought under the new Southern mortgage through the pledge of their securities. Nothing was further from the mind of the committee in conducting this

transaction than a recognition of the validity of the Trust Company's claim.

The Trust Company, in its petition against the Southern Company filed in the state court in 1905 (Rec. 505), charges that the reorganization committee

> did sell bonds issued by defendant of the par value of $3,000,000, and its preferred stock of the par value of $3,000,000, and realize thereon over $3,000,000 in money; that out of the proceeds of said sale said committee paid such floating debt of the Belt Company as it chose to pay and made such disbursements as it saw fit to make, and paid over the balance to defendant, said balance amounting to several million dollars and being greatly in excess of the *entire floating or unsecured debt of the Belt Company.*

The petition further alleges (Rec. 506) that a settlement was had between the committee and the Southern Company in October, 1900, and

> said committee turned over to defendant the cash remaining on hand after making the disbursements aforesaid, the amount of which was greatly in excess of the *entire floating or unsecured debt of the Belt Company.*

Substantially the same allegations are made (Rec. 522) in respect to "the entire floating or unsecured debt of the *Belt and Dock Companies.*"

Again, substantially the same allegations are made in its petition filed in 1906 (Rec. 539), in respect to "the entire floating or unsecured debt of the *Gulf Company.*"

It appears, therefore, that as late as 1905 and 1906 the Trust Company, so far from asserting its present claim that all the floating debt except the Trust Company's debt had been paid, solemnly asserted and reiterated the existence of "the entire floating or unsecured debt of the Belt Company, the Dock Company and the Gulf Company."

Counsel insinuate in their brief, pp. 48, 60, that the indebtedness of the Cambria Company has been taken care of. We deny this most emphatically.

It is worthy of note that nowhere in this record, in any one of the six answers that the Trust Company was "compelled" to file, nor in any exception, master's report, or in the opinion of any court, does there appear to have been a claim made, such as is now put forward at the eleventh hour, that all of the debts of the reorganized companies, except that of the Trust Company, have been paid by the committee or by the Southern Company.

It is not at all material to a determination of the issues herein whether the Southern Company has paid, settled, or compromised any of the floating debt of the reorganized companies. The sole question is whether a legal obligation exists to pay the debt of the Trust Company. We have gone into the matter, perhaps at too great length, for the purpose of demonstrating conclusively that the Trust Company, in its effort to bolster up its case, has felt compelled to resort to statements which have no foundation of fact upon which to rest, the only apparent purpose of which is to create the misleading impression in the minds of the court that the Trust Company has been a victim of discrimination or hostility, and that it has been singled out for unfair treatment. Most emphatically this is not the case. There has been no discrimination and no favoritism of any kind whatsoever.

III.

The claim of the Trust Company that it is not barred because participating in the plan as bondholder and stockholder.

The Trust Company, as before stated, is unwilling to rest its case upon the theory of a fraudulent diversion of the "creditor's equity" so elaborately worked out by the court of appeals and so strongly supported in principle by the Boyd case. In its brief it refers to this theory casually, as a matter to be noted in passing, but does not invoke it as a ground of recovery. Likewise, the observations of the court of appeals upon

the subject of estoppel *in pais*, without which we contend the decree of that court would have been in favor of the Southern Company, are passed over in silence. Instead of endeavoring to uphold, support, and reinforce the position of the court of appeals, the Trust Company is content to allow that court, with its pronounced views on fraudulent reorganizations and estoppel *in pais*, to shift for itself, while it has recourse to other theories, already more or less discredited in this litigation, for the support of its decree.

Counsel "find it unnecessary to consider the distinction between estoppel and *quasi*-estoppel." (p. 86.) They insist that the plan was an honest one; that it never became a dishonest one, and that no action taken under the plan became fraudulent as to creditors. (p. 86.) They insist that the plan was one "which dealt fairly with bondholders, stockholders, and creditors, and dealt equally with the members of each class." (p. 76.)

The Trust Company is at last forced to a recognition of the fact that it cannot "grasp the benefits of a contract with one eager hand, while thrusting aside its burdens with the other." (*St. Louis* v. *Davidson*, 102 Mo. 149.) It cannot claim a fraudulent diversion of the "creditor's equity" while it has in its treasury a goodly share of the proceeds of the same transaction. It must needs, therefore, abandon its charge of fraud, and with it, the aid and comfort furnished by the opinions of the court of appeals; and as a last resort, it now boldly stands upon the plan of reorganization, and openly claims that the plan is a contractual obligation to pay all floating debt in full, or that it created a statutory consolidation of all the companies involved. Obviously, if there is no fraud, then there is no estoppel to claim fraud.

If the plan of organization was an enforceable contractual obligation to pay *all* the floating debt of the companies involved, then *that fact* is decisive of this case, and there is no necessity or excuse for arguing or considering the distinction between estoppel and *quasi*-estoppel. That the plan was *not* such a contract is elsewhere considered.

Counsel assert (p. 79) that participation in the plan according to its terms involved no inconsistency and required no election on the part of anyone who was alike bondholder, stockholder, and general creditor; and they ask the question:

> What difference does it make, when we are dealing with the same plan that one person was alike bondholder, stockholder and creditor?

And they argue that a creditor who was also a stockholder could sell his stock, and that then both must be paid.

It is doubtful if this could be done, since the only value the stock could then have would be its right to participate in the reorganization and to receive in exchange the stock in the new company, and it was held in the Wormser case, 184 N. Y. 83, that a sale of such rights was such a participation in the reorganization as created an estoppel to claim that the plan was fraudulent or to base an action thereon.

However that may be, the law is plain that a different rule *does* apply to one who is *both* creditor and security holder, as this Court expressly decided in *Bank of Ft. Madison* v. *Alden*, 129 U. S. 372. There, eight persons, two of whom owned the Bank of Ft. Madison, organized a lumber company and transferred timber lands to a trustee for it in payment of stock subscriptions, and received their allotted shares of stock in the company. The Lumber Company afterwards became indebted in a large amount to the Bank of Ft. Madison and, becoming embarrassed financially, caused the timber lands to be reconveyed to the stockholders who originally owned them. The Bank of Ft. Madison sought to enforce its debt against the Lumber Company by action against the stockholders. The contention of the bank is thus stated by the Court:

> It is contended that the lands, which in the hands of the trustee constituted a *trust fund for the benefit of the stockholders and creditors of the company*, were not divested of their trust character upon their reconveyance to the stockholders; that the only effect of the reconveyance was to substitute several trustees in place of one; and that the appellant has therefore a right to proceed against either or all of them for an accounting.

But it was held that the bank (which was owned by two of the stockholders) occupied the dual relation of creditor and stockholder, and for that reason, was not entitled to maintain the action, this Court saying:

> If this were a suit by a creditor *other than a stockholder* there would be great force in this position of the appellant. It might be well contended that a conveyance of the trust fund to the stockholders upon their resolution could not deprive a *creditor*, not consenting thereto, of his right to compel the application of that fund to the payment of his demand, or of a ratable proportion with other creditors. *But the right to compel such application cannot be invoked by a stockholder consenting to such disposition of the trust fund, and himself participating in its appropriation, as in the present case.* Here the lands conveyed to the trustee were subject, as stated above, to a mortgage of $75,000, and its payment was assumed by the company. It turned out that the company was not prosperous in its business, and in the year following its organization it became involved in litigation, and a receiver of its property and effects was appointed. And in April, 1880, its stockholders upon consultation came to the conclusion that it would be impossible for the company to comply with its engagements to pay off that mortgage, and they therefore advised, and at their meeting resolved, that the lands should be reconveyed to the original owners, and the company be thus released. The bank, through its stockholders, who were also stockholders of the lumber company, *united in this advice and resolution*, and in pursuance thereof the several reconveyances were made, as stated above, and among others to the stockholders of the bank. It was expected that the original owners would then hold the lands as they had held them before the lumber company was organized. That the property when reconveyed was sold by the holders at prices which, if the company could have obtained them, would have made its retention advisable, does not alter the transaction.

The Court then refers with approval to *Thompson* v. *Bemis Paper Bag Co.*, 127 Mass. 595, the facts of which are well stated in the syllabus as follows:

A made a contract with B for the purchase of a certain number of shares of the capital stock in a corporation, and paid part of the agreed price; but the stock was not then transferred to him. While the stock stood in B's name on the books of the corporation, A attended meetings of the corporation and voted as a stockholder. At one of these meetings, a vote was cast to divide the cash assets among the stockholders, A voting the affirmative. After this, a settlement was had between A and B, the stock transferred to him, and he was credited with dividends received, including that from the withdrawal of the cash assets. A then brought an action against the corporation for a debt due from it to him, recovered judgment, and, the corporation neglecting to pay for thirty days after a demand duly made upon it, brought a bill in equity, under the St. of 1870, c. 224, Sec. 42, to enforce the personal liability of the other stockholders on the ground of the withdrawal of the capital stock while there were debts outstanding. *Held*, that the bill could not be maintained.

The opinion of the Court, which was delivered by Chief Justice Gray, is as follows:

A creditor who is *also* a stockholder of a corporation, and as such liable for its debts, is not entitled to the remedies afforded by statute to creditors against stockholders for the debts of the corporation. *Thayer* v. *Union Tool Co.*, 4 Gray 75; *Potter* v. *Stevens Machine Co.*, *ante* 592. The mere fact that the plaintiff was the equitable owner of shares might not indeed subject him to the liabilities or disabilities of a stockholder. *Crease* v. *Babcock*, 10 Met. 525; *Johnson* v. *Somerville Dyeing & Bleaching Co.*, 15 Gray 216.

But this plaintiff, at the time of the commencement of the suit in which judgment was rendered against the corporation, was the absolute legal owner of eight shares; and even at the earlier period before the passage of the vote on which this bill is founded, he was not only the equitable owner of these shares then standing in the name of Warren, but he was treated by the corporation, and acted, as the legal owner thereof, receiving notices of and attending meetings as a stockholder; he *participated* in the vote by which the whole cash assets of the corporation

were withdrawn, and paid to the stockholders in proportion to the amount of the stock held by each; *and he received through Warren his share of the money so paid out.* He now seeks to make the *very act* which he, as a stockholder, took part in bringing about, and in reaping the benefit of, the ground for charging Warren and other stockholders with personal liability upon a bill in equity under the St. of 1870, c. 224, Secs. 39-43, for a debt due from the corporation to himself. This cannot be permitted.

In the following cases the same person was both creditor and stockholder, and that fact disabled him from asserting his rights as creditor:

Cunningham v. *Holley*, 121 Fed. 720.
Whitehill v. *Jacobs*, 75 Wis. 474.

Counsel argue (p. 82) that there was a "reserve" of Southern securities issued under the plan, or their proceeds, amply sufficient to pay all floating indebtedness of the reorganized companies and, in particular, the indebtedness of the Trust Company. Leaving out of view for the moment the fact that there is nothing in the record to indicate the extent of the floating indebtedness which would thus be included, and also the fact that this argument has not the slightest bearing upon the question of the *legal liability* of the Southern Company, we proceed to examine the Trust Company's contention.

At page 47 of their brief they set out the committee's estimate of probable amounts necessary to pay car trust obligations, floating debts, receivers' certificates, coupons, working capital and expenses of reorganization, aggregating $5,900,000 —the cash requirements of the plan. On the same page they state that the amounts actually paid, *exclusive of working capital and expenses of reorganization*, were $5,070,210.11, thus leaving in round figures $830,000 for working capital and expenses of reorganization, the estimated amount of which, under the plan, was $2,150,000. They also call attention to the fact that there remained $582,500 par value of preferred stock, or $438,750 of common stock, not designated for any particular use.

The practical effect of the Trust Company's insistence is that the estimated amount of $2,150,000 for working capital and expenses of reorganization, already reduced to $830,000, should be still further reduced or entirely wiped out by the payment of floating debt, and that the unappropriated securities should also go the same way.

But if the estimate of $475,000 for payment of floating debt was a trust fund which could not be violated or diverted to any other use, although it might be increased, if necessary, as counsel contend, equally so was the estimate of $2,150,000 for working capital and expenses of reorganization. If creditors of the old companies had the right to sue the Southern Company for their debts under the floating debt estimate, so would the new creditors of the Southern Company, who became such within the working capital provision, be entitled to maintain their actions against it upon that provision; and likewise, the reorganization committee, its counsel, its depositaries (which included the Trust Company), receivers, officers of court, etc., etc., would be entitled to bring suit against the Southern Company for their services, under the estimate for expenses of reorganization. They would have the right to say, as the Trust Company does here, that the estimates for other purposes should be diminished or wiped out but that the estimates for *their* purposes should remain inviolate, except that the estimate might be increased at the expense of some other fund if necessary.

The amount actually paid for floating debt exceeded the estimate by $689,172.56 which was much more than the value of the preferred and common stock not designated for any particular use.

What right has the Trust Company to say that there was a reserve fund sufficient for all of the unsecured creditors when the effect of this insistence is to reduce or entirely wipe out other estimates of equal dignity and importance for working capital and expenses of reorganization?

Counsel also seek to appropriate for their purposes, bonds of the par value of $3,802,500, reserved for future require-

ments of the company, which included "such extensions, betterments, and new equipment as might be required by the business of the company." (Rec. 820.) If counsel are correct in their contention, then not only was this reservation of bonds a sacred fund reserved for the payment of the contractors, workmen, vendors of equipment, etc., who should provide the future improvements, but it was not intended as a *limitation* on the amount which might be used by the committee or the Southern Company, but the deficit, if there should be one, might be made up from the other estimates, including the estimate for the payment of the floating debts which might thereby be materially reduced or entirely wiped out.

These considerations demonstrate the entire incorrectness of counsel's contentions.

IV.

The reorganization plan and agreement do not constitute a contract for the payment of the floating debt of the constituent companies.

This question of the liability of the Southern Company under the "floating debt" provision of the plan is considered by the master (Rec. 854-862), and he reaches the conclusion, which was concurred in by the lower court, that there was no liability under that provision, and his conclusions were not reversed by the court of appeals.

No exception was taken by the Trust Company to the master's conclusion in this respect, the only exception being that the master "should have omitted reference to or recommendation concerning the liability of the Southern Company for the floating indebtedness of the Belt Company" (Rec. 893). We insist that the question of the liability of the Southern Company, by reason of the floating debt provision of the plan, is not properly here for review, for the reasons stated in our brief, pages 167 *et seq.*

In its first opinion, in answer to our claim that the Trust Company, by its exchange of securities, was estopped to

maintain its action, the court of appeals said (201 Fed. 832), referring to the floating debt provision of the plan:

> The Trust Company may well have *supposed* that its claim would be paid by the committee.

But this position was abandoned in the second opinion, and, as the opinion itself shows, no significance whatever, except as bearing on the estoppel question, was attached to the floating debt provision. It is nowhere held that a right of recovery could be based thereon.

But now, in its brief on the merits in this court, the Trust Company not only insists that the plan was both "an honest and lawful plan of reorganization," in repudiation of the court of appeals' theory of liability, but puts forth the claim (p. 44, *et seq.*) that the plan of reorganization provided for the payment of all the unsecured debts of the old companies, and that this was a contract on which the Trust Company is entitled to maintain its action.

Let us consider, first, whether the floating debt provision amounts to a *contract.*

The plan was dated Philadelphia, November 7, 1899, and was addressed: "To the holders of the bonds and stocks of the Gulf, Belt, Union, Consolidated, Air Line, and Port Arthur Channel & Dock Companies," and the plan and the agreement were to be read together as one and the same instrument (Rec. 814). The plan provided for "the payment of the floating debt" (Rec. 815), and made a tentative estimate or appropriation of $475,000 "for payment of floating debts" (Rec. 820). The payment of the floating debt was to be made "from the proceeds of the disposition of the new securities" (Rec. 821), as set forth in the statement in our brief, pages 15-19.

The agreement gave to the committee a broad discretion in respect to the payment of the floating debt, and *authorized* the committee to pay "such indebtedness as, in their judgment, was necessary or expedient in furtherance of the purposes of the reorganization plan and agreement" (Rec. 859).

It also contained the following provision:

> But no estimate, statement, or explanation, or suggestion, contained in said plan or this agreement, or in any circular issued by the depositary or by the committee, is intended or is to be accepted as representation, warranty, or condition under this agreement (Rec. 822).

The master says (Rec. 854), in respect to the power of the committee to alter or modity its terms:

> The reorganization agreement gave the committee plenary power to *alter or modify the terms* as might seem necessary or desirable.

The agreement also contained a covenant in the twelfth paragraph (Rec. 823), the substance of which (210 Fed. 712) is as follows:

> No right is conferred nor any trust, liability, or obligation is created by this agreement or the plan, or is assumed hereunder by or for any new company, in favor of any creditor or any holder of any claim whatsoever against the said companies (including the Belt Company), with respect to any moneys paid to or received by the committee, or with respect to any property acquired by purchase at any foreclosure sale, or with respect to any other matter or thing.

What, at that time, was the situation of the parties? Valuable railroad properties had become hopelessly insolvent, and their reorganization was imperatively necessary in order to prevent a loss of their transportation service to the public, as well as to prevent great pecuniary loss to investors. A plan of reorganization was prepared by the interested parties, which was intended to preserve the interests of bondholders as nearly as might be in proportion to their value, which should preserve, to a certain extent, the interests of stockholders upon the condition (as to the majority of them) that they should pay cash assessments to raise funds necessary to make the reorganization possible, and which should make provision for the claims of such unsecured creditors as

it was necessary to take care of in order to give strength and value to the securities of the new reorganized company. The plan had been preceded by the agreement, by the terms of which the depositing stockholders invested the reorganization committee with plenary power to formulate a plan, to modify it at any time, to shape and alter the details of reorganization as might become necessary, to incorporate a new company, to issue new securities, and, in short, to do anything necessary or advisable in their discretion to work out a desperate situation for the common good.

It was necessary in this case, as it is in all similar cases, that the committee should give to the depositing security holders as much general information as was consistent with conditions which they were called upon to meet, and which might change and vary from day to day, or even from hour to hour. It was obviously necessary to give to depositors all available information as to the capitalization of the new company, the securities which it was to issue, and the disposition of the securities and their proceeds. This was essential in order that the depositing security holders might be able to elect whether to come in under the plan or to act independently of it.

The committee sought to give this information to the depositing security holders by formulating and promulgating the plan of November 7, 1899, with the distinct statement, as above set forth, that it was *subject to modification* by them; that the statements in it were *not* representations or warranties, and that it did not create any obligation or trust or liability *in favor of creditors* or others.

Certain of the securities were to be appropriated for exchange for the securities of the old companies. The proceeds of the remaining securities were "ear-marked" (but not specifically appropriated) for the payment of car trusts which were liens on equipment, for payment of receivers' certificates which were liens on the property, for payment of first mortgage coupons which were also liens, for the payment of floating debts which the master finds were understood by the

Trust Company to mean liens or claims of liens, and for working capital and expenses of reorganization.

There was no fixed or definite or unalterable appropriation of funds for *any* of these specific purposes. They were *estimates* of the amounts which the managers thought would be devoted to those purposes. The purpose was, as said by the master (Rec. 854), "to advise the depositing security holders of the *probable disposition* of the moneys to be realized from the securities to be issued by the new company."

How can it be plausibly claimed that these elastic provisions of the plan and agreement, subject as they were to modification by the committee, and intended only to advise depositing security holders of the *probable* disposition of the new securities, possess the certainty of a contract? How can it be argued that they created a *fixed obligation* to pay all of the floating debt of all of the companies, as the Trust Company now insists was the case?

Let us put the so-called contract into legal form (ignoring for the moment the master's finding that the floating debt provision referred only to unsecured claims which were, or might become liens on the property), for the purpose of showing the weakness of the Trust Company's contentions:

> The bondholders and stockholders hereby enter into the following agreement with the committee:
>
> 1. The committee hereby sets aside $475,000 for the payment of the floating debt of the old companies; provided, that the committee reserves the power to *alter and modify* the terms hereof as in its discretion it may deem necessary or desirable; provided further, that this estimate of the amount to be paid on account of the floating debt is *not* to be accepted as a representation, warranty, or condition; and provided further, that it is distinctly understood that by this agreement no right is conferred, nor is any liability assumed by, or obligation imposed upon the new company in favor of any creditor.

Surely no person will seriously contend that the foregoing agreement constituted a contract which could be enforced in court. The utmost that could be said for it would be that

it was an undertaking by the committee to use its judgment and discretion in using the proceeds of securities in such a manner as would, in its judgment, best promote the interests of stockholders and bondholders.

The Trust Company's position possesses less strength than that of the second mortgage bondholders in *Robinson* v. *Ry. Co.*, 135 U. S. 522, where, pending the reorganization of several railway companies, there was organized a committee of first mortgage bondholders, and also a committee of second mortgage bondholders. The two committees entered into an agreement for the mutual participation of first mortgage bondholders and second mortgage bondholders in the reorganization, which is thus described by the court:

> On the 19th day of June, 1884, the two committees met, and it was agreed between them that the second mortgage bondholders should participate in the reorganization, and should rank therein substantially as they ranked previously, subject to a fair division of expenses, it being understood that a plan of reorganization should be submitted, and that the committee of the first mortgage bondholders should purchase the property at the sale. The railroad and property were sold on the 28th of June, 1884, in pursuance of the decree, and the defendant Coombs, acting for the committee of the first mortgage bondholders, purchased the same for $500,000, and, as the plaintiff assumed and had reason to believe, for the benefit of both classes of security holders.

The first mortgage bondholders appropriated all the property to their own benefit and excluded the second mortgage bondholders from any participation therein, and thereupon plaintiff, bringing his action for all the second mortgage bondholders, brought suit to set aside the foreclosure sale, or, in the alternative, to charge the property with a trust in favor of both classes of bondholders, as provided in the contract above referred to.

It was held, however, that the second mortgage bondholders were not entitled to relief, the court saying:

> The alleged agreement is too vague and indefinite to furnish a foundation for its enforcement. On the showing of the bill the parties never entered into any contract, and the court would have to make one for them. There was no mutuality in the agreement alleged, and no adequate consideration for it is stated or can be imported. These same considerations show that the agreement cannot be adjudged to create a trust for the benefit of the second mortgage bondholders.

The Trust Company, in executing the agreement, consented that the same might be modified by the committee in its discretion, and that fact in and of itself *destroyed* its status as a contract. The committee could have increased the estimate to double the amount, or have reduced it, or eliminated it altogether, and the Trust Company would have had no right to complain.

The Trust Company likewise, by the signing of the agreement, covenanted that the agreement itself should not create any trust, liability, or obligation, in favor of creditors, or against the new company, and this fact in and of itself bars the Trust Company from claiming that any obligation was created *by the plan* in its favor. The position of the Trust Company (p. 69) is that "no right existing *independently* of the agreement is disavowed or renounced (by this covenant)." This is an implied admission of the obvious fact that rights which otherwise might be *created* by the covenant are, in fact, disavowed and renounced by it. Certain it is that where the Trust Company relies upon the plan and agreement for the *creation* of a liability in its favor to pay the floating debt, all limitations imposed by the plan and agreement itself must be given effect.

In signing the agreement, the Trust Company also assented to the provision that no estimate, statement, explanation, or suggestion contained in the plan should be accepted as a representation, warranty, or condition, and this fact likewise operated to destroy the right of the Trust Company to treat the plan and agreement as a contract.

The very purpose of this provision was to advise all concerned that the estimates, statements, explanations and suggestions contained in the plan were subject to modification or even cancellation, and that no person should be misled by relying upon them as fixed or definite representations or warranties. It would have added nothing to the legal effect if the agreement, in lieu of the statement above referred to, had carried the express language, "the Trust Company is not entitled to consider the floating debt provision as a contractual obligation, since it may be modified, increased, decreased or even eliminated altogether, in the discretion of the committee."

The Trust Company also knew that the floating debt provision was intended to free the property from liens or claims of liens, and that its claim was not of that nature.

V.

The floating debt provision, as the Trust Company well knew, contemplated only the discharge of liens or claims of liens so as to make the Southern mortgage an absolute lien, and the Trust Company's claim was not of this character.

We are not left in doubt as to the precise meaning of the floating debt provision contained in the plan. The master, reciting the testimony of the members of the reorganization committee, says (Rec. 860):

> That the $475,000 appropriated, as above stated, for the payment of floating debts, was a lump sum set aside by the committee to make provision for the payment and discharge of such obligations as the committee might find necessary to discharge in order to relieve the properties, to be included in the Southern mortgage, from any liens claimed thereon or from any interference as a matter of business policy, and that said $475,000.00 was simply an estimate or reservation to cover such charges.

There is no countervailing testimony in the record.

Counsel insist (p. 53) that there is no finding of this fact by the master. This is incorrect. The master (Rec. 860) said, in speaking of the large expenditure in payment of what are called the floating debts:

> —but which in reality consist of all kinds of items, which the committee deemed necessary to take care of, so as to secure absolutely the first mortgage lien on the properties transferred to the Southern Company.

This was the finding of the master. There was no exception to the finding.

The master says (Rec. 859):

> The committee was fully authorized to do as they thought best in respect to paying off such indebtedness as, in their judgment, was necessary or expedient, in furtherance of the purposes of the reorganization plan and agreement.

Again, the master states (Rec. 856):

> Nor does the evidence in the record show that it (the Trust Company) ever changed or altered its position in any way on account of said floating debt provision.

It must be accepted, therefore, as conclusive in this case, from the finding of the master, based not only upon the plan and agreement itself, but upon all the oral and documentary testimony in the record, that the purpose and intent of the floating debt provision of the plan was to remove liens and claims of liens so that the mortgage of the Southern Company would be an absolute first lien; that the committee was invested with a wide discretion in carrying out this provision, and was authorized to pay as much or as little of unsecured claims as, in their judgment, was best calculated to promote the reorganization.

Nor can the Trust Company plead ignorance that such was the purpose of the plan, for the master, with 76 pages of letters between the Trust Company and the committee before him (Rec. 870), says:

> The respondent was *well acquainted with the purposes of the reorganization scheme*, and with such knowl-

edge entered into the same, depositing its own securities and exchanging them for the new Southern securities, and advising others to make like changes.

The master also refers (Rec. 871) to:

> The *intimate connection and knowledge* of respondent with the *practical working out of the reorganization scheme* and the large financial interests it had in the successful carrying out thereof.

The conclusion is irresistible not only that the sole purpose of the floating debt provision was to remove liens and those claims which might ripen into liens against the property to be embraced in the Southern mortgage, so as to give value to the Southern securities for the protection of those who should become their owners (which included the Trust Company), but that the Trust Company was *well aware* of this purpose, and that it, with such knowledge, took the benefits of the plan. It knew then, and it knows now, that its claim is not one of the class which it was contemplated would be taken care of under the floating debt provision. We are at a loss, therefore, to understand how the Trust Company, in view of the findings of the master, can base any claim on the floating debt provision.

VI.

The finding of the master that the committee did not, directly or indirectly, agree to pay, in whole or in part, any of the indebtedness of the Belt Company to the Trust Company, is conclusive against the claims of the Trust Company with respect to the floating debt provision.

The master finds that there was no promise or agreement by the committee, or by the Southern Company, to pay the Belt debt to the Trust Company. He says (Rec. 862):

> The alleged liability of the Southern Company arising on account of any promise or agreement by either the committee or the Southern Company, to pay the Belt debt to the Trust Company, is not satisfactorily supported by the proofs in the record.

And again (Rec. 866) the master says:

> There is no sufficient evidence in the record of the making of any legal agreement, or even of an attempt to do so, by the reorganization committee, or by any person authorized to represent them, or by the Southern Company, by which the Belt indebtedness to the Trust Company would be discharged, either by the committee or by the Southern Company.

And again the master, referring to the minutes of the reorganization committee (some 364 pages) says (Rec. 864):

> It will be seen that at no time did the committee, either directly or indirectly, ever agree to pay, in whole or in part, any of the indebtedness of the Belt to the Trust Company.

This finding is directly responsive to the charge that the committee promised to pay the Belt debt, made by the Trust Company in its answer (Rec. 311) as follows:

> Further answering, this respondent shows that said reorganization committee, when working out said plan of reorganization, expressly represented to this respondent that, in consideration of the debt due and owing from said Belt Company to this respondent, said committee would provide for the payment of all debts and obligations due to this respondent from all of said corporations proposed to be included in said reorganization plan, and particularly said Belt Railroad Company, and *expressly promised* this respondent that said committee would pay, or cause to be paid, all debts of every character due to this respondent from said several corporations proposed to be consolidated, and particularly from said Belt Railroad Company; and that the said new and reorganized company would pay such debts; that certain members of said reorganization committee, constituting a so-called purchasing committee, purchased at the foreclosure sale of said Kansas City, Pittsburg & Gulf Railroad Company all its assets, right-of-way, rolling stock, etc., and thereafter assigned said bid to said Kansas City Southern Railway Company, which said company entered into a contract with said reorganization committee wherein and whereby it assumed and agreed to complete and carry out all the obligations

undertaken and assumed by said reorganization committee; that under and by reason of said agreement and contract said Kansas City Southern became liable and agreed to pay all the obligations of said Belt Railroad Company to this respondent, and is still so liable.

The finding made by the master that there was no promise or agreement on the part of the reorganization committee or of the Southern Company to pay the indebtedness of the Belt Company would include an express promise as well as an implied promise.

This finding of the master cannot be reviewed here in the absence of the evidence on which it was based.

It is evident that this finding, taken in connection with the master's report, does not depend upon the construction of the reorganization agreement alone, inasmuch as the master refers to testimony of numerous witnesses on the subject, including the members of the reorganization committee (Rec. 860), the minutes of the committee (Rec. 864) and, in effect, finds that the provision in the plan concerning the payment of the floating debt related primarily to floating debts which had a legal or equitable lien or priority, although otherwise unsecured.

The master embodies, in his report, an abstract of the plan and a copy of certain portions of the agreement, but he refers to other oral and documentary evidence before him, which is not here.

The rule is elementary that the finding of the master cannot be reviewed without all of the evidence. For aught that appears from this record, the plan may have been modified before or after the deposit of securities by the Trust Company, or the Trust Company may have been told by every member of the committee that it had been or would be modified, or the finding of the master may have been based upon his other finding that the Trust Company was well acquainted with the purposes of the reorganization scheme, and that it had an intimate connection with and knowledge of the practical working out of the reorganization scheme. It may

well be that the master's finding was based upon the purpose of the floating debt provision to remove lien claims, and that the Trust Company knew of this purpose and acquiesced in it in depositing its securities.

VII.

Even if the reorganization plan and agreement amounted to an express contract to pay the floating debt (which is strenuously denied) yet it was not a contract made for the benefit of unsecured creditors, as its object, and hence the Trust Company cannot maintain an action upon it.

The reorganization plan and agreement were addressed to stockholders and bondholders, not to creditors. The obvious purpose of the agreement was "to protect the interests of the stockholders and bondholders of those companies which had become insolvent and which then or shortly afterwards would have to be administered by the court." (Rec. 854.) It was not the intention of the agreement to benefit creditors, although they might, and some of them did receive an incidental benefit therefrom.

In these circumstances, even if it be assumed for the purpose of the argument that the reorganization plan and agreement constituted a contract (which is strongly denied), yet the Trust Company is not entitled, in its capacity as creditor, to maintain any action thereon.

Our position in this respect was fully sustained by the master (Rec. 854-861), and his conclusions were sustained by the lower court, which has not been reversed by the court of appeals in this respect.

The master's finding, which, it must be remembered, was based not only upon the plan, but upon other oral and documentary evidence, is shown in the following quotations:

> It is claimed by the Trust Company that it appears from the reorganization plan and agreement that the floating debts of the constituent companies were to be paid, whether more or less than $475,000.00, the amount

named therein, which was simply in the nature of an estimation. The intervenor contends that no such liability was intended to be, or was in fact, created by the reorganization plan. The relations of the parties interested will be helpful in determining the meaning of that part of the agreement. The reorganization committee was merely an agency constituted by such bondholders and stockholders of the Gulf Company and its allied companies as saw fit to act in concert under the proposed reorganization plan and agreement, which were expressed to be for the benefit of the participating bondholders and stockholders. General or unsecured creditors of those companies were not parties thereto, the manifest purpose and object being to protect the interests of the stockholders and bondholders of those companies, which had become insolvent, and which then or shortly afterwards would have to be administered by the court. It became necessary for them to devise some plan for the disposition of the properties belonging to those companies which would preserve them for the benefit of stockholders and bondholders, which could only be done through concerted action on the part of the security holders, and hence the modified Philadelphia Plan of November 7, 1899, was adopted for that purpose. (Rec. 854.)

Neither the bondholders, stockholders nor the reorganization committee owed any legal or equitable duty to the Trust Company, unless such duty can be implied in some way from the reorganization plan and agreement. The Trust Company as a creditor was not intended to be, and was not in fact, a party to the reorganization agreements, though it received benefits therefrom in the exchange of its old securities for the new ones of the Southern Company; nor does the evidence in the record show that it ever changed or altered its position in any way on account of said floating debt provision. (Rec. 856.)

For the reasons above stated, the master is of the opinion that the Trust Company, in its capacity as creditor, is not directly interested in the floating debt provision of the reorganization plan, but that any right which it may have therein is collateral and incidental to the main purpose and object of such plan, and that the respondent had no such legal or equitable right as en-

titled it to avail itself of said floating debt provision. (Rec. 861.)

Other excerpts from the finding of the master upon this question will be found in our brief, pages 16, 17, 106 and 125.

Inasmuch as the reorganization plan and agreement were for the benefit *solely* of the security holders of the properties involved, it follows necessarily, upon authority from both the state and federal courts, that the Trust Company can claim no privity of contract; can maintain no action upon it, nor claim any right or benefit from it.

This Court, in *German Alliance Insurance Company* v. *Water Supply Company*, 226 U. S. 220, had under consideration the right of an insurance company, which had become subrogated to the right of a taxpayer who had suffered damage by reason of the breach of contract between the water company and a municipality, to recover against the water company the amount of damages which the insurance company had paid. It was held that there could be no recovery for the reason that the taxpayer was not a party to the contract and it did not appear that the contract was intended for his direct benefit. The Court said:

> Before a stranger can avail himself of the exceptional privilege of suing for a breach on an agreement to which he is not a party, he must, at least, show that it was intended for his direct benefit. For, as said by this Court, speaking of the right of bondholders to sue a third party who had made an agreement with the obligor to discharge the bonds, they "may have had an indirect interest in the performance of the undertakings * * * but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names." *Second Nat. Bank* v. *Grand Lodge F. & A. M.*, 98 U. S. 124, 25 L. Ed. 76; *Cf. Hendrick* v. *Lindsay*, 93 U. S. 149, 23 L. Ed. 857; *National Sav. Bank* v. *Ward*, 100 U. S. 202, 205, 25 L. Ed. 623, 625.

The Court approves the rule stated in *Second National Bank* v. *Grand Lodge*, 98 U. S. 124, to the effect:

that a third person cannot sue for the breach of a contract to which he is a stranger unless he is in privity with the parties and is therein given a direct interest.

It was conceded that the taxpayer had an interest in the faithful performance of the contract between the water company and the municipality, but it was held that this was an indirect interest and did not entitle him to maintain an action for breach of contract, the Court saying:

> He is interested in the faithful performance of contracts of service by policemen, firemen and mail contractors, as well as in holding to their warranties the vendors of fire engines. All of these employees, contractors or vendors are paid out of taxes. But for the breaches of their contracts the citizen cannot sue, though he suffer loss because the carrier delayed in hauling the mail, or the policeman failed to walk his beat, or the fireman delayed in responding to an alarm, or the engine proved defective, resulting in his building being destroyed by fire. 1 Beven Neg., 3 Ed. 305; Pollock, Torts, 8th Ed. 434, 547; *Davis* v. *Clinton Waterworks Co.*, 54 Iowa 61, 37 Am. Rep. 185, 6 N. W. 126.
>
> Each of these promisors of the city, like the water company here, would be liable for any tort done by him to their persons. But for acts of omission and breaches of contract, he would be responsible to the municipality alone. To hold to the contrary would unduly extend contract liability, would introduce new parties with new rights, and would subject those contracting with municipalities to suits by a multitude of persons for damages which were not, and in the nature of things could not have been, in contemplation of the parties.
>
> The result is that plaintiff cannot maintain this action, and though based upon the general principle that the parties to a contract are those who are entitled to its rights, is in accordance with the particular intent of those who made this agreement.

The Supreme Court of Missouri in a recent case (*St. Louis* v. *Contracting Co.*, 202 Mo. 451) had this question under consideration. The facts were as follows: The city of St. Louis entered into a contract with the Wright Con-

tracting Company whereby it undertook to grade and pave some of the streets and alleys according to certain plans and specifications, for the price therein stated; it gave a bond to properly and faithfully perform the contract according to all its terms. The contracting company refused to do any work whatever under the contract and the city relet the contract to one Perkinson at an advanced price of $6,500; Perkinson made the improvements according to the second contract and the city issued special tax bills against the adjoining property, each tax bill bearing its proportional part of the $6,500 increased cost of the improvements. Thereupon, the city of St. Louis, as trustee of an express trust, instituted suit against the Wright Contracting Company and its bondsmen to recover the damage sustained by the property owners by reason of being compelled to pay the increased cost of construction occasioned by the default of the contractor in the first contract.

The lower court held there could be a recovery, and this was reversed by the Supreme Court. The court says:

> There is a broad distinction between the principle involved where a contract is entered into between two parties for their *own use and benefit*, and where they make a similar contract for the *benefit of a third party*. A breach of the first would create no cause of action in favor of a third party, even though he was thereby deprived of large benefits which would have flown to him had the contract been performed; while in the latter case the breach would create a cause of action in his favor, even though the benefits he would have received from its performance might have been insignificant as compared to those he was deprived of by the breach of the former. * * * From what has thus been stated it can be seen that the character and value of the benefits and their loss or reception have no weight whatever in determining the question as to whether or not the contract was made for the benefit of third parties, who in this case are the property owners. * * * All of the well-considered cases start out by the assertion of the broad proposition that the contract must be made for the *benefit* of the third parties, as *its object*, and they must be the parties *intended* to be benefited thereby.

No one can for a moment assume that the object of making the reorganization agreement was to benefit the unsecured creditors or the owners of the floating debt; and yet it is necessary to indulge such a presumption before any right can be created under the plan and agreement in favor of the Trust Company.

The court continues:

> So it seems clear to us that whatever benefit may accrue to the property owners as a result of street improvements is purely an *incident* to the improvement, and not an *object intentionally sought* to be obtained by the contract which was made for the improvements. Third persons who are only *collaterally* and *incidentally* benefited by the terms of a contract have no cause of action for its breach.

The utmost that can be legitimately claimed by the Trust Company under the plan and agreement would be that the carrying out of the plan and the reservation of certain funds with which to pay off and discharge the floating debt, might incidentally benefit it if its claim came within the scope of the floating debt provision (which is denied). But such benefit would be only collateral and incidental and was not the purpose, object and intention of the plan. The court continues:

> The courts are not uniform in their opinions as to the principle upon which this class of actions are maintained. Many of them base their opinion upon the ground that the obligee in the contract owed the third party some debt or duty, either legal or equitable, and that by accepting the contract the law creates a privity of consideration between them upon which he could maintain a cause of action for its breach. *Vrooman* v. *Turner*, 69 N. Y. 280. But in applying that principle to this case, we are confronted with the proposition that the city owed no duty to the property owners to increase the value of their property, but were merely creating a fund, or providing a means, out of which or by which the contemplated improvements could be paid. To this proposition the respondent might reply that while that may be true, yet the law requires the city to let the contract at the lowest price obtainable, and that the property owners had the

> right to avail themselves of that price. In answer to that contention it may be said that, in all the cases where third parties have been permitted to recover upon a contract entered into for their benefit, said third parties had either adopted the contract or complied with the provisions thereof relating to them, or that the debt or duty which was owing to the third party had passed or vested in the obligee of the contract before the suit was instituted.

The reorganization plan and agreement were binding upon the Trust Company because it had assented to the legality and propriety of everything which it was contemplated would be done under the plan and agreement. No legal or equitable duty, therefore, was owing to the Trust Company. It cannot claim, under the theory of the Boyd case or otherwise, that any rights, property or equities were held by the committee which properly belonged to it. The principles of estoppel argued at length in the original brief are sufficient authority for this statement.

Upon the authority of this case, therefore, the conclusion is irresistible that the intention, purpose and object of the reorganization plan and agreement was to benefit the security holders. If there was any benefit to the Trust Company or other claimants it was purely incidental and collateral and therefore the Trust Company is not entitled to maintain any cause of action thereon.

A later case to the same effect is *Beattie Mfg. Co.* v. *Clark*, 208 Mo. 89.

The rule stated in *Howsman* v. *Water Co.*, 119 Mo. 304, is also in point. There a contract had been entered into between the town of Trenton and the Water Company, by the terms of which the Water Company agreed with said town to furnish, at all times, an adequate supply of water for fire and other purposes for public and private use, and further agreed that "should said Water Company, from lack of water supply, or other cause, except providential or unavoidable accident, fail to furnish a reasonable or adequate supply of water

to extinguish any fire, then it shall be liable for all damage occasioned by such fire or neglect."

The plaintiff's dwelling house was destroyed by fire and the action was against the Water Company for a breach of its obligation above quoted. The court held there could be no recovery for the reason that the contract was not made for the benefit of the plaintiff *as its object;* and the fact that he was *indirectly* or *incidentally* benefited by it did not give him the right to sue upon it. The opinion is an elaborate one, with the citation of many authorities.

Other cases of similar nature are:

Metropolitan Trust Co. v. *Topeka Water Co.*, 132 Fed. 702.

Allen Mfg. Co. v. *Shreveport Water Works Co.*, 37 So. 980.

The rule consistently adhered to by the federal courts is unfavorable to the Trust Company. The leading case is *Second National Bank* v. *Grand Lodge*, 98 U. S. 123. This was an action by the bank against the Grand Lodge of Missouri to compel the payment of certain coupons formerly attached to bonds issued by the Masonic Hall Association, a corporation existing under the laws of the State of Missouri, in relation to which bonds the Grand Lodge had adopted the following resolution:

> RESOLVED, That this Grand Lodge assume the payment of Two Hundred Thousand Dollars bonds issued by the Masonic Hall Association, provided that stock is issued to the Grand Lodge by said Association to the amount of said assumption of payment by this Grand Lodge as the said bonds are paid.

The court held that the bank, as the holder of the bonds, was not in such privity with the contract as to warrant a suit upon it, saying:

> It was a contract made for the benefit of the Association and of the Grand Lodge—made that the latter might acquire the ownership of stock of the former, and that the former might obtain a relief from its liabilities.

The holders of the bonds were not parties to it and there was no privity between them and the lodge. They may have had an *indirect* interest in the performance of the undertakings of the parties, as they would have in any agreement by which the lodge should undertake to lend money to the association or contract to buy its stock to enable it to pay its debts; but that is *a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names.* We do not propose to enter at large upon a consideration of the inquiry how far privity of contract between a plaintiff and defendant is necessary to the maintenance of an action of *assumpsit.* The subject has been much debated and the decisions are not all reconcilable. No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands or under his control which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and, therefore, the rule is that the original creditor cannot sue. His case is not an exception from the general rule that privity of contract is required. There are some other exceptions recognized, but they are unimportant now. The plaintiff's case is within none of them. Nor is he *sole beneficiary* of the contract between the association and the Grand Lodge. The contract was made, as we have said, for the benefit of the association, and if enforceable at all, is enforceable by it. That the several bondholders of the

association are not in a situation to sue upon it is apparent on its face.

The Trust Company is barred by the rule announced in the foregoing case. Nor does it come within any of the enumerated exceptions. It is estopped to claim that assets came into the hands of the reorganization committee or under its control, which in equity belonged to the Trust Company; nor can it be claimed that the Trust Company is the beneficiary solely interested in the provisions contained in the plan and agreement for the payment of the floating debt.

In *Keller* v. *Ashford*, 136 U. S. 610, the rule of the case above referred to is re-affirmed, and it is there held that a mortgagee has no right to enforce payment of the mortgage debt against the grantee of the mortgagor, by virtue of the assumption by the latter of the mortgage debt, and his agreement to pay the same. The court said:

> In equity, as in law, the contract of the purchaser to pay the mortgage, being made with the mortgagor and for his benefit only, creates no direct obligation of the purchaser to the mortgagee.

The mortgagee, however, is entitled to relief by bill in equity in which he may avail himself of the right of a mortgagor against his grantee, because in equity a creditor is entitled to avail himself of a security which his debtor holds from a third person for the payment of the debt.

In *Sayward* v. *Dexter*, 72 Fed. 758, the court applies the same rule, saying:

> But it is not every contract for the benefit of a third person that is enforceable by the beneficiary. It must appear that the contract was *made* and was *intended* for his benefit. The fact that he is *incidentally* named in the contract or that the contract, if carried out according to its terms, would inure to his benefit, is not sufficient to entitle him to demand its fulfillment. It must appear to have been the intention of the parties to secure to him personally the benefit of its provisions.

In *American Bank* v. *Railroad Company*, 76 Fed. 130, the syllabus is as follows:

> An agreement made by one person with another to pay a debt due by the latter to a third person is not the subject of suit by such third person, when there was *no intention to benefit him*, and nothing of value came under the contract within the control of the promisor which in equity belonged to such third person, or is subject to a lien in his favor.

The court said:

> The explicit language of the complaint makes it clear that the promise of the defendant was to pay an existing debt, and it was made for the benefit of the Chicago & Northern Pacific Railroad Company; and no facts are alleged from which an inference may be drawn that the parties to the contract were actuated by a desire to *benefit the plaintiff*, nor that the scope of their intentions included any provision for rights or interests other than their own; and there is no pretense that under the contract anything of value or assets have come to the promisor's hands, or under its control, which, in equity, belongs to the plaintiff, or is subject to any lien existing in favor of the plaintiff. The case, therefore, comes fully and fairly within the rule of the decision of the Supreme Court in the case of *National Bank* v. *Grand Lodge*, 98 U. S. 123. The rule and the authority of the case cited have received express recognition in the Circuit Court of Appeals for the Ninth Circuit, in the case of *Sayward* v. *Derter*, 72 Fed. 765.

The case of *Moyer* v. *Ft. Wayne Railroad Co.*, 132 Indiana 88, announces a rule fatal to the contention of the Trust Company. There the plaintiff agreed to erect a station for two railroad companies, each of which was to pay part of the cost thereof, and he agreed to pay part of the cost himself, although it did not appear that he was to have any interest in the station when completed. He built the station as agreed, but did not receive payment from one of the roads. Later this road was sold under a mortgage foreclosure, and bought in by the bondholders, who organized a new corporation to

own and run it. The new corporation used the station and plaintiff sued it for the amount which the former owners of the road agreed to pay him. It appeared that there was an agreement between the bondholders of the original company that a certain sum should be retained for the payment of small claims as required. The court held that the plaintiff could not recover and that the agreement created no obligation in favor of the plaintiff, saying:

> The provision in the contract between the bondholders, which we have quoted, does not bind the appellee to pay the appellant any sum whatever. It simply *authorizes* the directors to use that sum as they may deem necessary in the payment of claims. But, if it were conceded that the provision does create an obligation in favor of the appellant, still there is no right to recover upon it, *because it does not appear that the sum was not properly used to pay the claim specified, or other claims having rightful precedence of the appellant's claim.*

In this connection it should be borne in mind that the reorganization committee and the Southern Company, as shown by the evidence, have paid the floating debt of the constituent companies in an amount exceeding a million dollars. Even if the estimate of $475,000 for payment of floating debt had been a fixed appropriation of that sum for that purpose (which we deny), the liability of the committee and of the Southern Company would have been discharged when that sum had been paid out. (*Davis* v. *Dunn*, 121 Mo. App. 490; *Raithel* v. *Smith*, 68 Mo. 258.)

In *Freeman* v. *Pennsylvania Co.*, 173 Pa. St. 274, it is held:

> The holder of coupons representing interest upon railroad bonds has no right of action on an agreement by the lessee of the railroad to apply the net earnings to the payment of the interest coupons, and to buy up the coupons if the net earnings should not be sufficient to pay them; such holder of coupons being a stranger to the contract and the consideration.

In *McIlvaine* v. *Big Stony Lumber Company*, 54 S. E. 473, it is held:

> Code 1904, Section 2860, authorizes the assignee of a bond or a chose in action to sue in his own name and to maintain any action which the original obligee party or contracting party might have brought. *Held*, that such section did not authorize an original creditor to sue at law on covenants of third persons to assume and pay the debt where there was no consideration passing from such creditors to such covenantors, and there was no privity between them.

The court said:

> The test, therefore, in such a case, seems to be whether or not the promise or covenant sued on was made for the *sole benefit* of the plaintiff.

In *Armour & Company* v. *Construction Co.*, 78 Pac. 1106, it is held:

> One who furnishes provisions to a contractor doing work for a railroad cannot recover from one who gave a bond to the railroad to pay persons supplying provisions to the contractor, there being no privity.

See also *Rochester Dry Goods Co.* v. *Fahy*, 97 N. Y. S. 1013; *Nalle* v. *Costley*, (Tex.) 174 S. W. 625; *Chung Kee* v. *Davidson*, (Colo.) 15 Pac. 100; *Clark* v. *Construction Co.*, (Minn.) 142 N. W. 874; *O'Connell* v. *Trust Co.*, (Mo.) 147 S. W. 841; *Gulf Compress Co.* v. *Harris*, (Ala.) 48 Sou. 477.

It seems only necessary in conclusion to add that the Trust Company, in its capacity as creditor, was a stranger to the reorganization plan; the plan was not for its benefit, but for the benefit of the parties to it; and, therefore, within the rule heretofore stated the Trust Company has no right to avail itself of the provisions in the reorganization plan, with reference to the payment of the floating debt.

Nor can the Trust Company claim to come within any of the recognized exceptions to the rule. The reorganization committee acquired no property or assets upon which the Trust Company had any equitable lien. Indeed, no such claim is made either in the pleadings or by evidence.

VIII.

The Southern Company is not liable for the debts of the Belt Company upon the theory of a statutory consolidation of the two companies.

The Trust Company, in its brief (p. 87 *et seq.*) argues that the reorganization of the Gulf Company, Belt Company, and others, was a consolidation of all the companies involved in the reorganization, *including the Southern Company*, under and in accordance with the statute of the State of Missouri (Sec. 3077, R. S. 1909) which, in the event of a statutory consolidation, imposes upon the consolidated company all the debts and obligations of the constituent companies. The claim of the Trust Company, in this respect, was denied by the master (Rec. 824-854), and his conclusions were approved by the lower court, and they stand unreversed by the court of appeals.

No exception was taken by the Trust Company to the *correctness* of the master's conclusion on the consolidation issue, the only exception being that the master "should have omitted reference to or recommendation concerning the liability of the Southern Company for the floating indebtedness of the Gulf Company." (Rec. 893.)

We insist that the question of consolidation is not properly here for review for the reasons stated in our brief, pp. 167 *et seq.*

The specific charge in the answer of the Trust Company upon which the claim of liability by reason of the alleged consolidation is predicated (Rec. 310) is as follows:

> This respondent further shows that the organization of said Kansas City Southern Railway Company and exchange of its stocks and bonds above alleged for the stocks and bonds of said Belt Railroad Company, and the other steps taken in pursuance of said reorganization plan, *effected a consolidation of said Kansas City Southern Railway Company and said Kansas City Suburban Belt Railroad Company under the statutes of the State of Mis-*

> *souri;* or a consolidation *de facto*, and that said Kansas City Southern Railway Company is estopped to deny such consolidation, or to claim that the same was not legally complete; and that said Kansas City Southern Railway Company thereby became and is liable for all the debts incurred by said Belt Railroad Company to the same extent as said last mentioned company, including the debts of this respondent heretofore mentioned and alleged in this answer.

We have to deal, therefore, with the claim that the *Southern Company* and the *Belt Company* "became consolidated under the statutes of the State of Missouri." It is important to bear in mind that the *Southern Company* was one of the companies which, it is said, became consolidated, for the reason that the legal effect of the consolidation of railroad companies under the Missouri statutes is that the companies thus becoming consolidated *go out of existence* and give birth to a *new* consolidated company.

A brief review of the underlying facts which, the Trust Company claims, converted this *reorganization* of several railway companies, passing through a receivership at foreclosure sale, into a statutory consolidation of the reorganized companies including the *purchaser*, may assist in the consideration of the question.

The master reviews the facts in respect of which a statutory consolidation is predicated as follows (Rec. 825):

> It is not controverted that the Gulf road defaulted in the payment of its interest April 1st, 1899; that receivers were then appointed, and that thereupon a decree of foreclosure and sale was rendered February 5, 1900, and the property sold at such foreclosure sale on March 19, 1900, to the Southern Company, which became the purchaser thereof, and took possession on April 1, 1900, and has been operating the property since that time. The Belt Railroad Company was placed in the hands of receivers September 6, 1900, in a suit instituted by the Provident Company, the trustee named in the first mortgage on the Belt property. A decree of foreclosure and sale was rendered on November 6, 1901, and the foreclosure sale

had on December 31, 1901, the Southern Company becoming the purchaser thereof, and continuing to operate the property since that time. A Philadelphia committee, on August 17, 1899, promulgated a plan, which, on November 7, 1899, was modified, and under which the stockholders and bondholders of the Gulf Company and its allied companies, including the Belt, deposited their securities and in lieu thereof finally obtained new securities of the Southern Company. The Trust Company, being the owner of a large amount of these securities, including those of the Belt Company, deposited them with the reorganization committee, and obtained in lieu thereof certain stocks and bonds of the Southern Company, which the Trust Company still retains. The Trust Company was also one of the depositaries in the modified plan of reorganization, and it is claimed by intervenor and it is abundantly shown by the testimony in the record that the respondent actively co-operated in the reorganization of the Belt properties, and induced its correspondents to accept said plan and to exchange their securities for the Southern Company securities. The effect of the Trust Company's participation in the reorganization plan is hereinafter considered.

It is not controverted that the bondholders and stockholders of the Belt Company received the stocks and bonds of the Southern Company in the ratio provided by the reorganization plan, and that the Southern Company thereby became the owner in some capacity of practically all of the outstanding stocks and bonds issued by the Belt Company, and the former bondholders and stockholders of the latter company became the owners by exchange of the stocks and bonds of the Southern Company.

The Missouri statute providing for consolidation of railroad companies, under which it is alleged that the Southern Company and the Belt Company became consolidated (Sec. 3077, R. S. 1909), is set forth in the Trust Company's brief, page 87, and in the record, page 825.

It should be borne in mind that the Southern Company had express statutory power by Section 3080, R. S. 1909, to acquire and hold the stocks and bonds of the Belt Company. It "may acquire and may hold the obligations and stock of

other companies owning or operating any such lines of road." This section of the statute at the time of the reorganization was as follows (Sec. 1061, R. S. 1899):

> Any railroad company heretofore organized, or which may hereafter be organized under the laws of this state, may extend its line of railroad beyond this state into or through any other state or territory, and may acquire any line of railroad within or without this state which shall form a continuous line with the road operated by such company, by direct connection or over any other line or lines constructed or to be constructed, and which such company shall have the right, by contract or otherwise, when completed, to use or operate, and *may acquire and may hold the obligations and stock of other companies owning or operating any such lines of road;* provided, that no line of railroad shall be so purchased until a meeting of the stockholders of such company or companies of this state, party, or parties to such an agreement, whereby a railroad in this state may be purchased, shall have been called by the directors thereof, at such times and places and in such manner as they shall designate, sixty days' due notice thereof having been previously given, and the holders of a majority of such stock, by person or proxy, shall have assented thereto, or until a majority of the holders of the stock of such company shall have consented thereto, in writing, and a certificate thereof, signed by the president and secretary of said company or companies, shall have been filed in the office of the secretary of state.

The exchange of stocks and bonds whereby the stockholders and bondholders of the old companies received in lieu thereof the securities of the Southern Company, was, in effect, a purchase and sale (*Harriman* v. *Northern Securities Company*, 197 U. S. 244).

The foreclosure and sale of the Gulf Company, the Belt Company and the other companies involved, were duly and regularly had under the supervision of the court, and the titles to the properties were duly and regularly conveyed and confirmed by orders of court to the Southern Company. It was done pursuant to a reorganization plan and agreement, for the

obvious reason that transactions of that magnitude can be conducted only by organized co-operation of the interested parties. It was initiated, conducted, and carried on to a conclusion in the same manner and under substantially the same conditions as other railroad reorganizations have been conducted and carried on in this country for many years. It has never been claimed, so far as we are advised, that these reorganizations have amounted to a consolidation of all the participating companies, including the *purchasers* at foreclosure sale. It has always been supposed that they were *reorganizations* conducted through judicial proceedings, as distinguished from *consolidations.*

In the present instance, the existence of the mortgage indebtedness and the validity and priority of the mortgage lien are conceded. "It (the Trust Company) did not deny the validity or priority of the bonded debt," say counsel in their brief, p. 33. The properties embraced within the mortgages were subjected to the payment of the mortgage debts by judicial proceedings regularly initiated and carried on to final decree, and were sold at public sales. The considerations paid for the properties, "which were large and sufficient," says the master (Rec. 852), were paid into court and distributed under the directions of the court. The officer making the sale was directed by the court to convey the premises to the Southern Company, as the accepted purchaser, and deliver possession to it. The proceeds of the sale, which were paid into court, took the place of the mortgaged premises and were subjected to the same liens and charges as had attached to the property itself, and distribution was made in accordance with the equities and priorities of the respective claimants. Such a proceeding, we insist, is as far removed from a statutory consolidation as it is possible to conceive.

It is obvious, in the first place, that *no effort* was ever made, by any one, at any time, to take *any* of the steps provided for in the Missouri statute prescribing the proceedings necessary to effect a consolidation of railroad companies. There was not, at any time, any *intention* on the part of anyone to

invoke the provisions of the Missouri statute, or to form a consolidation under the terms of the statutes of that state. No one ever dreamed that a statutory consolidation was in contemplation, or that it had been accomplished.

Not only was there no *intention* to consolidate, but no steps were ever taken to comply with any of the necessary formalities required by the statute. It is not even claimed by the Trust Company that there was a *substantial compliance* with the terms of the statute.

Bearing in mind that the "essential provisions of the act" must be "complied with" (134 U. S., l. c. 698, and *Pingree* v. *Michigan Ry. Co.*, 118 Mich. 314) in order that there may be a consolidation, we proceed to consider what the requirements are.

In order that there may be a statutory consolidation, under Sec. 3077, R. S. 1909, it is necessary that,

(*a*) The *companies* interested shall enter into a *contract* fixing the terms and conditions of such consolidation.

(*b*) Such *contract* shall be ratified and approved by a majority in interest of all the stock held by each company proposing to consolidate either,

(*c*) At a *meeting* of the stockholders regularly called for the purpose, or,

(*d*) By the *approval in writing* of the persons or parties holding and representing a majority of such stock.

(*e*) A certified copy of such articles of agreement with the *corporate name* to be assumed by the new company shall be filed with the Secretary of State, when the consolidation shall be considered duly consummated, and a certified copy in the office of the Secretary of State shall be deemed conclusive evidence thereof.

(*f*) The *boards of directors* of the several companies shall then proceed to carry out said contract according to its provisions, calling in the certificates of stock then outstanding in the several companies or roads, and,

(*g*) Issuing certificates of stock in the *new consolidated company* under such corporate name as may have been adopted.

(*h*) Before any railroad companies shall consolidate their roads under said statute, they shall each file with the Secretary of State a *resolution* accepting the provisions thereof to be signed by their respective presidents and attested by their respective secretaries under the seal of their respective companies, which resolution shall have been passed by a majority vote of the stock of each at a *meeting* of the stockholders to be called for the purpose of considering the same, sixty days' public notice of the time, place and *purpose* of such meeting having been given by advertisement in some newspaper printed in the county where the general offices of said company or companies of this state are situated.

As the master states (Rec. 843):

> In the Burge case (100 Mo. App. 464) the court construes said Section 1059 (3077, R. S. 1909) as providing for the amalgamation of two or more railroad companies in this state, and the formation of one company. The statutory corporate formalities, requisite to effect such purposes, are plainly stated, and are such as to really appeal to one's intelligent judgment as being reasonably necessary to protect and safeguard both the corporate and individual interests involved in the consolidation of corporations, desiring to unite into one corporation.

Not one of the foregoing requisite steps to effect a consolidation was ever taken by the Belt Company, or by the Southern Company, or by anyone having any connection with them or either of them. The statute requires that the companies interested shall enter into a *contract*, which naturally presupposes a meeting of the board of directors and the adoption of a resolution authorizing the contract; in other words, *corporate action*. But not only was there no corporate action, no meeting of the board of directors of either company and no resolutions passed, but there was no *contract* made between the companies contemplating a consolidation, much less a

contract fixing the terms and conditions of such consolidation; nor was there any meeting of the stockholders to ratify any contract of consolidation; nor was there any approval in writing of such *contract of consolidation* by persons or parties holding and representing a majority of the stock; nor was there any certified copy of such contract or articles of agreement with the corporate name to be assumed by the new company filed with the Secretary of State; nor did the boards of directors of the several companies proceed to carry out such contract of consolidation; nor were there any resolutions filed with the Secretary of State accepting the provisions thereof, as required by the statutes.

But it is urged by counsel that the modified plan of reorganization and the reorganization agreement fulfilled the requirements of the statute above referred to. It is difficult to consider this contention seriously. The plan did not even *require* that the terminals at Port Arthur and Kansas City should be brought into the reorganization. They might be included and they might not. Arrangements for other terminals had already been made. All this is apparent from the following language of the plan (Rec. 815):

> *(f)* Or in the event that either or both of the said terminal properties are not so acquired, then (under arrangements *already provided)* the requisite terminal facilities at Kansas City and on the Gulf will be otherwise secured—in which event the amount of the new securities to be issued will, of course, be correspondingly reduced.

The reorganization committee were thus given a wide discretion, and had the power to modify the plan as they might deem advisable.

Whether the terminals at Kansas City or on the Gulf were to be included in the reorganization at all depended upon whether sufficient of their securities should be deposited "to warrant the retention of that property by the new company." If sufficient of the securities of the terminal properties should be deposited, then the plan provided that these properties, together with the Gulf property, should be operated

in the same interest. The new company would then own the stocks and bonds of the terminal companies and "thereby," in the language of the plan, "all three properties will be under one corporate ownership, management and control." It was also "*intended*, as soon as practicable, that the new company acquire the properties of the terminal companies in fee, and bring them directly under the lien of the mortgage." Whether the Belt Company was to be brought into the reorganization was a matter which only the future could decide. If it should be brought in, then the plan in a general way was naturally to have it tied to other properties in some way by consolidation, by stock control or otherwise. It is, we respectfully submit, the height of absurdity for counsel to assert that the plan assented to by the depositing stockholders for the purpose of securing a reorganization of the interested companies constituted the necessary and essential statutory steps to accomplish a reorganization of the properties.

Counsel assign various reasons in support of their claim that a consolidation was effected. They say, p. 95:

> Method was of no concern to them (the committee), but results were wanted. And they got results, and the very results intended by the statute, the unification of the three connecting lines of railroad into one company.

But this result was accomplished *without any consolidation*, when the committee, and afterwards the Southern Company, owned the securities of the Belt Company and the other companies involved, for it was expressly authorized by statute "to acquire and hold the obligations and stock of other companies owning or operating any such lines of road" (Sec. 1061, R. S. 1899, above quoted).

Again counsel say, p. 96:

> That what was done in this case was a virtual consolidation under the statute results from the fact that it could lawfully be done only under the conditions prescribed and for the purposes designed by the statute. The *only* authority for what was done is Section 1059 of the Missouri Statutes. One company cannot issue its stock for

> the entire capital stock of another company except as a means of consolidation under the conditions prescribed by the statute. It can absorb another company in that way, or in any other, only when the result will be a connected and continuous line of railroad. There was here no sale of the roads by the old companies to the new.

Counsel are mistaken in pointing to Sec. 1059 of the Missouri Statutes (Sec. 3077, R. S. 1909), as authority for the ownership by one company of the stock of another. Sec. 3080 R. S. 1909 (Sec. 1061, R. S. 1899), is express authority for the "results" set forth in the foregoing quotation. Under it, one company is permitted to "acquire and hold" the entire capital stock of other companies, thus bringing about the "unification of the three lines of railroad into one company," without accomplishing a consolidation under Sec. 3077. The two sections are separate and distinct, requiring different procedure and accomplishing different results.

The vital distinction between the two sections is pointed out in *Burge* v. *Ry. Co.*, 100 Mo App. 460, as follows:

> There are two methods recognized by the statutes of Missouri by which railroad corporations may become associated or merged. By Section 1059 of the Revised Statutes of 1899, provision is made for the amalgamation of two or more railroad companies in this State, and the formation of one company; Sec. 1061 contemplates the manner adopted by defendant in this case, and expressly legalizes the extension of the line of any railroad company organized under the laws of this State, by acquiring by purchase any line of railroad within or without this State, and the acquisition and ownership of the assets and property of the company so bought. Under the section of consolidation (1059) the absorbing corporation succeeds to all the powers, rights and property of the consolidated companies and becomes subject to all their obligations and liabilities. Under the section making valid the purchase by one railroad company of the line and property of another railroad company, no responsibility is imposed on the purchasing company for the obligations of its vendor. It is manifest that no statutory liability resulted from the mere purchase by defendant, and in the absence of

averment and proof that it acquired and succeeded to the line and property of the selling company otherwise than as a purchaser in good faith and for a valuable consideration, the transaction in nowise differs in legal effect from the purchase of any other property, realty or personalty, and no duty is devolved by law upon defendant to respond to the liabilities, whether in tort or in contract of the selling corporation. A mere purchase in good faith for value imposes no such obligation. *Powell* v. *North Missouri R. R. Co.*, 42 Mo. 63; *Hoard* v. *C. & O. R. R.*, 123 U. S. 222; *Fogg* v. *Blair*, 133 U. S. 534.

In Volume 3, Purdy's Beach on Private Corporations, p. 1844, it is said:

> The mere purchase by one corporation of the franchises and property of another at foreclosure sale or otherwise does not work a consolidation of the corporations, unless otherwise provided by statute.

In Volume 6, Am. & Eng. Ency. of L., 2d Ed., p. 801, it is said:

> Reorganization is to be distinguished from consolidation. The former term is used to designate the formation of an entirely new and distinct corporation for the purpose of purchasing the property of another corporation or superseding it in business without incurring any liability to the creditors of the latter.
>
> The purchase of the property and franchises of a railroad company at a foreclosure sale and the creation by the Legislature of a new company with rights, privileges, and franchises similar to those enjoyed by the former, and the transfer of the property to the latter, is not a consolidation.

Other cases of similar import are as follows:

St. Louis & San Francisco R. R. Co. v. *Cross*, 171 Fed. 480.
Gulf, Colorado & Santa Fe Ry. Co. v. *Newell*, 73 Tex. 334.
Chase v. *Michigan Telephone Co.*, 80 N. W. 718.
Hawkins v. *Central of Georgia Ry. Co.*, 46 S. E. 82.
Austin v. *Tecumseh National Bank*, 68 N. W. 628.
Meyer v. *Johnston*, 53 Ala. 237.

The master sums up the situation very accurately as follows (Rec. 843):

> In the case at bar, the proofs in the record do not show the necessary corporate action, or in fact, any action whatever, on the part of the Belt Company, providing for the terms and conditions of a consolidation with the Southern Company, or any other company; in fact, there was no corporate action whatever as to the alleged consolidation. Inasmuch as there was no contract between the two companies, it necessarily follows that there could not be any approval or ratification of it by a majority in interest of the shareholders, either at a stockholders' meeting, called for that purpose, or by the approval in writing of such contract by a majority of the stock interested.
>
> It is not pretended that the Belt Company, as a corporation, was a party to the reorganization plan and agreement, but simply that its stockholders became depositors thereunder. In other words, there were no regular corporate proceedings, as provided by the statute, but merely the individual stockholders' action, and, through which latter, it is claimed by the respondent there was a substantial compliance with the Missouri Statute.
>
> After a careful examination of all the authorities, cited by counsel, the master is not convinced that there has been a statutory consolidation, as charged in respondent's answer to the intervening petition.

For the same reasons it cannot be claimed that there was a *de facto* consolidation, which necessarily implies (a) an *attempt* to invoke the provisions of the statute permitting railway companies to consolidate; (b) a failure to comply with all of the requirements, and (c) the conduct of the company's business as a consolidated corporation (d) resulting in obligations or liabilities incurred in favor of those who have treated with the abortive consolidation as an actual one. The record does not present such a situation. The master, after concluding that there was no legal consolidation, correctly disposes of the claim of a *de facto* consolidation as follows (Rec. 844):

> If he is right in such conclusion, then how can there be a *de jure* consolidation in this case, which could only arise from a compliance with the Missouri statute? If

merely a *de facto* consolidation, or some kind of amalgamation of interests has been effected between the Belt and Southern Companies, then other questions, affecting the Trust Company's connection with the reorganization plan and agreement, may be determinative of respondent's claim against the intervenor for the Belt indebtedness; and these questions are hereinafter considered.

IX.

If the Southern Company and the Belt Company became consolidated under the Missouri statute, as claimed by the Trust Company, then both corporations ceased to exist. The Trust Company has recognized and continues to recognize the existence of both companies, and is estopped to assert that they were consolidated and thereby became extinct.

One of the conditions which necessarily attaches to a consolidation under the Missouri statute is that the constituent companies cease to exist as legal entities and a new corporation is *ipso facto* formed. If the Southern Company and the Belt Company became consolidated under the statute, then they both ceased to exist and some new corporation, *whose name has not been divulged*, immediately came into existence, holding all of the properties, and liable for all of the obligations of the constituent companies. This is apparent from the consistent decisions of this court as well as of the Missouri courts.

In *Pullman Company* v. *Missouri Pacific*, 115 U. S. 587, the court says (page 595):

> This (consolidation under the Missouri statute) clearly contemplates the *actual dissolution* of the old corporations and the *creation* of a new one to take their place.

The Supreme Court of Missouri, in the case of *State ex. rel.* v. *Lesueur*, 145 Mo. 322, 328, in speaking of the consolidation of railroads under the Missouri statute, says:

> We are of opinion that the consolidation, when completed in the manner provided, does create a *new corporation* just as effectually as any other mode allowed by our laws. The new corporation owns all the property, whereas the old companies only owned each its part. * * * By the consolidation the old companies are *dissolved* and a new corporation formed.

The court there held that upon the consolidation the new company thus formed was required, by virtue of Section 21 of Article 10 of the Constitution, to pay into the state treasury the fees provided for upon the *organization* of corporations.

In *Railroad Company* v. *Missouri*, 152 U. S. 301 (followed in *Yazoo & Miss. Ry. Co.* v. *Adams*, 180 U. S. 1), this Court, in speaking of the Missouri Statute, said:

> Looking at the act in question in this case, we find that by Section 1 any Missouri railroad company whose track should connect with the road of an adjoining state was authorized to make and enter into an agreement with such connecting company for the consolidation of the stock of the respective companies whose tracks should be so connected, making one company of the two, whose stock should be so consolidated upon such terms, conditions and stipulations as might be mutually agreed between them; that by Section 2 'Such consolidation shall not be made, unless the terms and provisions thereof shall be approved by a majority of the stock, or the holders of a majority of the capital stock in each of said companies whose stock shall be consolidated'; that by Section 3 the board of directors were authorized to adopt by resolution a new corporate name for the consolidated company, and call in the certificates of stock then outstanding in each company, and exchange them for stock in the new company; and providing that a copy of the consolidation agreement and the name adopted for the new company 'shall be filed with the Secretary of State, and shall be conclusive evidence of such consolidation, and of the corporate name of the consolidated company.' It is difficult to see how the Legislature could provide more clearly for the *extinguishment* of the prior companies and the formation of a *new* one than by providing that the two companies shall become one, that new certificates of stock

shall be issued in exchange for the stock of the constituent companies, and that the consolidation agreement shall be recorded with the Secretary of State as the charter of the new company. In our opinion this was the effect of the act in question.

The rule is the same in other jurisdictions.

In *Adams* v. *Railroad Company*, 24 So. 211, it is said:

> It is in the interest of clearness of definition that consolidation should be limited to signify such union of two or more corporations as necessarily results in the *creation* of a third *new* corporation, and, as we understand the decisions, this is what is known as the American doctrine, and the better view.

In *Vicksburg Telephone Co.* v. *Telephone Company*, 30 So. 725, the court says (728):

> There seems to be a great confusion as to the differences between consolidation and merger and sale. Rightly understood there never can be a consolidation of corporations except where all the constituent companies cease to exist as separate corporations, and a new corporation, to-wit, the consolidated corporation, comes into being. A merger, rightly understood, is not the equivalent of consolidation at all, but exists where one of the constituent companies remains in being, absorbing or merging in itself all the other constituent companies.

In *Lee* v. *Atlantic Coast Line Railroad Co.*, 150 Fed. 775, it is held:

> There is a distinct difference between a consolidation and a merger of two railroad companies. In a consolidation, both go out of existence as separate corporations, and a new corporation is created, which takes their place and property; while in case of a merger one loses its identity by absorption in the other, which remains in existence, and succeeds to its property, and issues its own stock to the stockholders of the merged company.

It necessarily follows, therefore, that if there was a statutory consolidation, both the Belt Company and the Southern Company have gone *out of existence*, and a new consolidated

company has been formed. Counsel have not taken the pains to inform us as to the name of the new consolidated company which, if their position is correct, has thus come into existence and succeeded to the properties as well as the obligations of the constituent companies. This new company cannot be the Southern Company, because the charge is that the *Southern Company consolidated with the Belt Company,* which necessarily implies the extinction of both.

The acts and conduct of the Trust Company are strangely at variance with its legal theories. It has recognized and still recognizes both of these companies as existent, as proper parties defendant, as able to respond to judgments against them, and is now in this Court engaged in an effort to support the decree of the court of appeals against the Southern Company.

On November 20, 1901, which was after the foreclosure decree in the Belt case, the Trust Company stipulated that the *Belt Company* should come into the case as a co-plaintiff with its receivers (Rec. 888-889), so that judgment might be rendered against it without a cross-bill. On December 9, 1901, the Trust Company answered the bill of the Belt Company and its receivers, the answer being filed out of time by stipulation (Rec. 114-115). On June 5, 1905, the Trust Company again answered the Belt Company's pleading by stipulation (Rec. 266, 312), and again, on July 6, 1906, the Trust Company answered the bill of the Belt Company and its receivers (Rec. 461), filing the same by stipulation. (Rec. 467.) On June 25, 1910, the Trust Company recovered the final judgment against the Belt Company which is the basis of this proceeding.

In February, 1905, years after the alleged consolidation, the Trust Company stipulated that the Southern Company should come into the case (Rec. 164-166), and on March 5, 1905 (Rec. 186), it answered its intervening petition which set up the claim involved in this appeal. On May 20, 1905, the Trust Company answered the amended intervening petition of the Southern Company (Rec. 293), the amendment being made by stipulation (Rec. 267).

On March 15, 1905, the Trust Company brought suit in the circuit court of Jackson County, Missouri, against the Southern Company on thirty-three counts, being, in substance, the claim herein involved of the liability of the Southern Company for the debts of the Belt Company *and a similar claim for the debts of the Dock Company.* (Rec. 493-523.)

On the same date the Trust Company filed another suit in the circuit court of Jackson County, Missouri, against the Southern Company (Rec. 499, 528), setting up the alleged liability of the Southern Company for another debt of the Belt Company.

On July 2, 1906, the Trust Company brought suit against the Southern Company in the circuit court of Jackson County, Missouri, to recover by reason of the alleged indebtedness of the *Gulf Company* to the Trust Company, based upon substantially the same allegations. (Rec. 499, 535.) The three state court suits are still pending.

The Trust Company admits, by its pleadings, that the Belt Company is sufficiently alive to have a receiver, to have judgment rendered against it in this case pursuant to the stipulation above referred to, to have a deficiency judgment rendered against it in the foreclosure suit, to have its mortgage foreclosed in the foreclosure suit to which the Trust Company was a party, and to have its property conveyed by commissioner's deed to the Southern Company.

The Trust Company, by its pleadings and stipulations, admits that the Southern Company is sufficiently alive and in existence to respond to any claim which the Trust Company may be able to establish in this case, and is competent to issue its stocks and bonds, which the Trust Company received under the plan and now holds. It admits that so far from being extinct, the Southern Company was a proper party defendant to three suits filed in 1905 and 1906 in the state court, and also a proper party defendant to the Trust Company's answer to the Southern Company's intervening petition filed in 1905, which the court of appeals treated as a cross-bill.

The Trust Company would be more consistent if it would

be content with the claim, either (a) that the Southern Company has become consolidated and gone out of existence, in which event this suit must fail, or (b) that the Southern Company has remained in existence sufficiently to have the decree of the court of appeals against it affirmed by this Court, in which event there was no consolidation. It is not in a position to assert both of these conflicting claims successfully.

X.

The acquisition by the Southern Company of the stocks and bonds of the Belt Company and other companies under the reorganization plan and agreement did not operate as a consolidation of those companies.

The fact upon which the Trust Company mainly relies to support its charges of consolidation is the ownership by the Southern Company of the stocks and bonds of the Belt Company. If this constitutes a consolidation *de jure* or *de facto*, in whole or in part, it will be startling as well as important news to the railway interests of the country. It is a matter of common knowledge that there is hardly a railway system in the country in which the parent company does not own the stocks or bonds, or both, of the subsidiary companies; and no one hitherto has ever thought that this fact effected a statutory consolidation of the different companies.

It is true that as a result of the modified plan of reorganization, the reorganization committee became the holder, and afterwards the Southern Company became the owner, of a great majority of the stocks and bonds of the Belt Company. There was nothing unlawful in this. On the contrary, such ownership was expressly authorized and permitted by Section 3080, R. S. 1909, quoted *supra*, and it did not effect a consolidation.

In *Pullman Palace Car Co.* v. *Missouri Pacific Railway Co.*, 115 U. S. 587, it appears that the Missouri Pacific Railroad Company acquired and owned the capital stock of the St.

Louis, Iron Mountain & Southern, and the question arose as to whether the Missouri Pacific road controlled the Iron Mountain by ownership, lease or otherwise, and *the Missouri statute concerning consolidation of corporations was drawn in question.* The court held that both companies, notwithstanding such stock ownership, continued to be separate, independent companies, and that the obligations of one company were not enforceable against the other. If the position now taken by the Trust Company is correct, this Court should have decided that there was a consolidation of the Missouri Pacific and the Iron Mountain by virtue of ownership of stock, and the decision of the case would necessarily have been different.

In *Peterson* v. *Chicago, Rock Island & Pacific Railway Co.*, 205 U. S. 364, it appeared that the Chicago, Rock Island & Pacific Railway Company owned a controlling interest in the stock of the Chicago, Rock Island & Gulf Railroad Company, a corporation of the State of Texas. Service of summons was had upon an agent of the latter in an action against the former upon the theory that there was an identity of interests, or an agency, sufficient to warrant the proceeding. The court held that the attempted service was not sufficient to give jurisdiction, saying:

> This record discloses that the officers and agents of the Gulf Company control its management. The fact that the Pacific Company owns the controlling amount of the stock of the Gulf Company and has thus the power to change the management does not give it present control of the corporate property and business.
>
> The conduct and control of the business in Texas was intrusted to the Gulf Company. As the largest stockholder the Pacific Company had an interest in that business, but a separate corporation had been legally created in Texas, with authority to make contracts and control its own affairs and carry on its own business. This separate corporation had its own officers, a large amount of its own property, was responsible for its contracts and to persons with whom it dealt.

In *Atchison, Topeka & Santa Fe Railroad Co.* v. *Cochran*,

43 Kan. 225, it appeared that that company owned the capital stock of the Southern Kansas Railway Company. An action was brought against the Santa Fe to recover for personal injuries occasioned by the employees of the Southern Kansas. It was held that the fact that the Santa Fe owned the capital stock of the Southern Kansas did not render it liable in the action, the court holding where the rights and powers of a railroad in relation to a connecting road are those of a stockholder merely, the former, as such stockholder, is not liable for the negligence of the latter.

To the same effect see:

Commonwealth v. *Bridge Company,* 64 Atl. 909, 911.
Ulmer v. *Lime Rock Railroad Co.,* 57 Atl. 1001, 1006.
Exchange Bank v. *Construction Company,* 25 S. E. 326.
Jessup v. *Illinois Central,* 36 Fed. 735, 741.

There is no escape from the conclusion that the Southern Company had the lawful right to own and hold the stocks and bonds of the Belt Company, and that such ownership did not constitute a consolidation of the two companies. They both continued to exist, each one controlling its own property through its own officers until September 6, 1900, at which time receivers were appointed for the Belt Company. The receivers continued to operate the property until January 1, 1902, at which time the Southern Company, *as the purchaser at foreclosure sale* of the Belt property, received the commissioner's deed, entered into possession of the property, and has continued the operation ever since.

The master's conclusions on this branch of the case, which we believe correctly state the situation, are as follows:

> It would seem, then, that the Southern Company had the lawful right to own and hold the stocks and bonds of the Belt Company, and that such ownership of itself did not have the effect of constituting a consolidation of the two companies, as both corporations continued to exist, and each controlling its own property, through its own officers, until September 6, 1900, when the receivers were appointed for the Belt Company, and which receivers

continued to operate the property until January 1, 1902, at which time the Southern Company, as the purchaser at the foreclosure sale, received the commissioner's deed and entered into possession of the property and has continued its operation. (Rec. 842.)

XI.

The foreclosure of the mortgage upon the property of the Belt Company, the sale thereunder, and the purchase by the Southern Company, did not operate to establish a consolidation.

The Southern Company having become the lawful owner of a large majority of the securities of the Belt Company, as it was authorized to do by the statute of Missouri, and a default having occurred in the payment of the mortgage debt, a bill of foreclosure was filed by the trustee in the mortgage, a decree of foreclosure and sale rendered, the mortgaged property was exposed to public sale, and the Southern Company became the purchaser.

The bonds and other obligations deposited under the agreement and plan "shall not be deemed satisfied, released, or discharged by any delivery of new securities, but shall remain in full force and effect for all purposes." (Rec. 823.) The bonds of the Belt Company, therefore, were not "in practical effect, extinguished," as claimed by counsel in their brief, page 35.

There was nothing in this proceeding which directly, indirectly, or even remotely, came within the purview of Section 1077, R. S. 1909, providing for the consolidation of railroad companies. As above stated, the property of the Belt Company was taken by judicial process in a proceeding to which the Trust Company was a party and sold at public sale, and the proceeds were by the court distributed in accordance with established legal principles. The fact that, by stipulation, the foreclosure decree was without prejudice to the rights of the Trust Company does not alter the situation or convert an orderly judicial sale into a statutory consolidation.

There is little to be added to what the master has well said upon this branch of the case:

> It is not disputed that the respondent Trust Company was a party to the foreclosure proceedings, and that the decree of foreclosure was and is in full force and effect and is conclusive as against the respondent in respect to the existence of the mortgage, the indebtedness secured thereby, and its non-payment. *No issue has been made by the pleadings or otherwise as to the regularity or validity of the foreclosure sale, at which the intervenor acquired the mortgage properties and assets of the Belt and allied companies, forming the Belt system.* In the legal enforcement of the mortgage lien, securing the bondholders, the properties of these companies, respectively, were subjected to the payment of their bonded indebtedness, were sold at public vendue to the highest bidder, and the purchase price was paid therefor, as provided in and by the foreclosure decree made in this court, and, thereupon, the title to said properties was conveyed to the purchasers at such foreclosure sales. The proceeds of the sales were, as required by the decrees, paid into court, and there constituted a trust fund, in lieu of the property sold, and subject to distribution by the court, pursuant to the mortgage liens. (Rec. 845.)
>
> The master has endeavored to make a critical examination of all the authorities submitted by counsel on the consolidation issue, distinguishing, as best he could, the conclusions of the court in each case by reference to the particular points involved therein, so as to reach a proper conclusion as to the legal significance of the specific transaction entered into by the Southern and Belt Companies, pursuant to the reorganization plan and agreement, including the foreclosure sales of the properties comprising the Belt system. In his opinion, there was no consolidation effected by what was done by the corporations involved, but that the transaction, when considered in its entirety, was in fact a reorganization scheme, intended to bring about a certain union or combination of properties, by which combination additional strength would be given them as a whole, as they were all dependent upon each other for the present as well as future railroad advantages and benefits; but such combination or union of these properties was to be consummated only after their pur-

chase at the foreclosure sales under the mortgage liens thereon, thereby intending to first acquire the titles, pursuant to the contract liens on the properties, and then utilize the properties so purchased by uniting and combining them in one corporation, which would be able to realize better results from the joint operation of the roads concerned than had been done in their separate operations. (Rec. 849-850.)

The following cases are in point:

National Foundry Works v. *Oconto Water Co.*, 105 Wis. 48.
Hoard v. *Chesapeake & Ohio R. R. Co.*, 123 U. S. 222.
Dickey v. *R. R. Co.*, 122 Mo. 223.
Holton v. *R. R. Co.*, 25 Mo. App. 322.

XII.

The authorities relied upon by the Trust Company in aid of its claim of consolidation do not support its contention.

It should be constantly borne in mind that the charge made by the Trust Company is that a *statutory consolidation* was effected between the Southern Company and the Belt Company. With this charge in view, we proceed to consider the authorities relied upon in support of this contention.

The term "consolidation" is sometimes loosely used to describe *any* union of corporate interests or rights. As thus used, it is a word of indefinite meaning and is frequently employed vaguely to comprehend practically any relationship of corporations to each other.

In *Northern Securities Company* v. *U. S.*, 193 U. S. 197, the surrender to the Northern Securities Company of the capital stock of the Great Northern and the Northern Pacific Railway companies, and the issue in lieu thereof of capital stock of the Securities Company, is called a "consolidation" within the meaning of the anti-trust act.

In *Pearsall* v. *Railroad Co.*, 161 U. S. 646, it is held that to vest designedly in one person, or set of persons, a majority of

the stock of two competing lines of interstate railroad, is a "consolidation" within the meaning of the statute prohibiting the consolidation of the whole or any portion of the capital stock of a railroad corporation, with the capital stock or any portion thereof, of any other road having the same general direction or location.

In *East St. Louis Connecting Railway Company* v. *Jarvis*, 92 Fed. 735, it is held that a lease of a parallel and competing railroad for ten years is a "consolidation" within the meaning of the Illinois Constitution prohibiting the consolidation of parallel or competing lines. The court holds that:

> The term "consolidation," we think, must be construed to have been used in the sense of "join" or "unite."

No one would for a moment suppose that the "consolidation," referred to in the foregoing cases, was a statutory consolidation *such as renders the consolidated company liable for the debts* of the participating companies. These cases serve to illustrate the varying meaning of the word "consolidation," depending wholly upon the connection in which it is used.

We are only concerned, however, with a statutory consolidation which imposes upon the company resulting from the consolidation the liability for the debts of the constituent companies. It is confidently asserted that none of the cases cited by the Trust Company are applicable to the case under consideration.

They belong to the class of so-called "consolidations" where the property and assets of one corporation are taken over by another, *without judicial proceedings and without the payment of a consideration which may inure to the benefit of the creditors*, the effect of which is to impose upon the company receiving such property or assets, the liabilities of the conveying company to the extent, at least, of their value. The reason upon which this rule is based is most obvious. A corporation possesses certain property and assets, which are the basis of its credit, and to which the creditors look, and have a right to look, for the payment of their claims. Any arrange-

ment, whether by conveyance or merger or so-called "consolidation," or other legerdemain or vermiculation, whereby the property and assets of the company are removed apparently from the reach of creditors is a fraud upon them which equity will not tolerate, and hence a company which, without the payment of a consideration, receives and appropriates to its own use such property and assets is held to assume the liabilities of the company from which it receives them. This is loosely termed a "consolidation," but it is very far from a statutory consolidation, such as is charged in this case.

In *Shadford* v. *Detroit & Ann Arbor Railway*, 130 Mich. 300, the syllabus is as follows:

> The consolidation of a street railway company for the sole purpose of absorbing all the business and property of other street railway companies, brought about by the issue of stocks and bonds in the new company to the stockholders and bondholders of the old companies to replace their stock and bonds, which are surrendered and cancelled, and *without the payment of any consideration to the old companies for the transfer of their property*, constitutes a consolidation, and not a sale, and makes the new company liable for the debts of the old companies.

The court said:

> The Electric Company (the purchaser of the assets of the old company) paid *not a dollar* to the other companies as compensation for the transfers of all their properties to it.

Counsel for the Trust Company relies upon the case of *Chicago Ry. Co.* v. *Ashling*, 43 N. E. 373, where the St. Louis company conveyed all of its physical property and franchises to the Santa Fe company, *without consideration*, and without making any provision whatever for the payment of its debts. Mary L. Ashling recovered a judgment against the St. Louis company for the negligent killing of her husband and in a suit against the Santa Fe company it was held that the said conveyance amounted to a consolidation under the Illinois statutes. It is to be observed that the Illinois statute does not provide the method or manner in which consolidations are to

be effected and does not prescribe the steps to be taken. There is no definition of what constitutes a statutory consolidation. Furthermore, the Santa Fe company did not acquire the property of the St. Louis company as the result of a foreclosure sale, at which the purchase price was paid in court for the benefit of those entitled to it. It did not acquire the property as the result of a *bona fide* sale for the full value of the property, in which the consideration passed to the St. Louis company and stood in lieu of its property and so became subject to the claims of the creditors. It is perfectly apparent that the Ashling case would not have been regarded as a consolidation under the Missouri statute, in which the constituent companies go out of existence and a new company is created.

In *Barrie* v. *Ry. Co.*, 138 Mo. App. 557, there was presented the question of the liability of the lessor for the debts of the lessee where the property was re-transferred by the lessee to the lessor "without adequate consideration and where the evident purpose of such transaction was to avoid the liabilities of the lessee." It was held that the transferee under such circumstances became liable for the debts. The court is careful to say (l. c. 651) that it does not place its decision upon the ground that there was a consolidation.

In *Black* v. *Ry. Co.*, 110 Mo. App. 198, the case presented was that of a 99-year lease of railroad property. In a suit for damages brought upon the theory that the two companies had consolidated, the court instructed the jury to find for the defendant on the ground that no merger or consolidation of the two companies had been shown, and this was affirmed upon appeal. It is *not* held that the lease was a statutory consolidation.

Also *Many* v. *Surety Co.*, 103 Mo. App. 716, in which it appeared that the National Surety Company of New York had absorbed all the assets and assumed all the liabilities of the Surety Company of Missouri and was in all respects its corporate successor. It was not held that this was a statutory consolidation, but liability was placed upon other grounds.

In none of the cases cited by the Trust Company was there the important element of a foreclosure sale in which the mort-

gaged property was sold and the proceeds thereof distributed under the supervision of the court. They are all cases where the property was all swallowed up in the transaction and thus placed beyond the reach of creditors. The fact that the court of appeals in the Barrie case, and the Supreme Court in *Johnson* v. *United Rys.*, 247 Mo. 326, did not briefly dispose of the cases by saying that the transactions under consideration amounted to statutory consolidations is persuasive, if not conclusive, evidence of the correctness of our contention.

The Trust Company by virtue of the stipulation providing that the decree was without prejudice to it is in no better position than it would have been had it not been a party to the proceedings, and in that event it would not have been permitted to contend that the mortgage foreclosures and purchases were statutory consolidations. They were not so for the reasons: (a) they were not *intended* to be statutory consolidations, (b) there was neither a *full* nor *substantial* compliance with the requirements of the statute, and (c) they were reorganizations conducted under judicial sanction by which the reorganized properties passed to the purchasing company at foreclosure sales, and this effectively and conclusively *excludes* the conception of a statutory consolidation.

XIII.

The Trust Company is precluded by its laches from asserting its claim against the Southern Company.

The finding of the master (Rec. 871, 872) is that the Trust Company was barred by its laches from asserting its claim against the Southern Company. There was no exception in the lower court to the master's conclusion in this respect, or to his findings of fact upon which the conclusion is based.

The Trust Company's intimate connection with the reorganized companies, its familiarity with the plan of reorganization, and its accurate knowledge of all the proceedings

connected therewith, have been pointed out heretofore and need not be repeated.

The first assertion by the Trust Company of any claim against the Southern Company, based upon a charge of consolidation or of express contract, was made in March, 1905, more than five years after the plan of reorganization had been formulated and declared effective, five years after the organization of the Southern Company, and nearly four years after the Belt property had been conveyed to the Southern Company.

If the Southern Company were liable upon the theory of a statutory consolidation, or upon the theory that the reorganization plan and agreement amounted to an express contract for the benefit of the Trust Company, then the latter could have brought its *action at law* directly against the Southern Company at any time during the intervening period of more than five years after the plan had been declared effective. There was no necessity of waiting until judgment was first obtained against the Belt Company.

The intervening years, as the master found, were a period of great activity on the part of the Southern Company; its securities were listed on stock exchanges and sold and resold in the markets of this country, as well as in Europe; and its railroad properties were improved by the expenditure of large sums of money—all in ignorance of the Trust Company's concealed claims. Every consideration demanded that the Trust Company should act promptly and assert its claims, if it thought it had any. Doubtless the explanation of the Trust Company's inaction lies in the fact that its theories of consolidation and express contract were merely afterthoughts brought forward by counsel more than five years after this litigation was initiated, in an effort to bolster up the case.

We submit that this great and unexplained delay in the assertion of the Trust Company's claims against the Southern Company amounts to inexcusable laches.

The master's findings of fact and conclusions of law briefly and concisely dispose of the issue of laches adversely

to the Trust Company in the following language (Rec. 871, 872):

> In respect to the contention of intervener that the respondent is barred by laches from asserting its Belt indebtedness claim against intervener, it is well to reiterate that the reorganization agreement was promulgated November 7th, 1899, that the Southern Company took possession on January 1, 1902, of the properties formerly belonging to the Belt system, and, also, that the Trust Company failed to assert its claim against the Southern until it was done in this cause in 1905. The Southern securities, which were issued and exchanged for those of the Belt, were promptly listed on the New York Stock Exchange, as well as elsewhere, and, since then, have been sold and resold in this country and Europe, during the period intervening between the incorporation of the Southern in 1900 and the assertion, in 1905, of respondent's claim against it, as the respondents well knew. In the meantime, the Southern Company was engaged in working out the details of the reorganization plan, and developing its combined railway system, thereby appreciating the value of the very Southern bonds and stock acquired by the Trust Company under said plan. It is evident that, if the intervener should have been held liable for all the unsecured indebtedness of the constituent companies of the old Belt System, including the large amount claimed by respondent, the effect of such liability would necessarily have been to depreciate the value of all the Southern securities, and, to that extent, operate to the injury of the security holders.
>
> In view of the intimate connection and knowledge of respondent, as heretofore shown, with the practical working out of the reorganization scheme, and the large financial interests it had in the successful carrying out thereof, it is manifest that its conduct in the premises should not be of such nature as to be prejudicial to the rights of others interested in the Southern, and its securities, that is, should not be such as to influence or cause them to do things which they would not otherwise have done, provided the Trust Company, at the outset, had promptly asserted the claim in controversy, before the position of others interested had been materially influenced and changed by its conduct in the premises.

In reaching this conclusion, the Master is not unmindful of the controversy between the Trust Company and certain members of the Reorganization Committee in respect to the latter paying, or causing to be paid, the Belt debt to the respondent, all of which preceded the Belt foreclosure. In his judgment, the fact of such controversy accentuated the importance of active measures by the Trust Company against the Southern, and affords no reason whatever for the respondent's long delay in asserting its claim in this cause. In support of intervener's contention, the following authorities have been cited, and, in the main, they are influential in that direction:

New York, etc., Co. v. *Louisville, etc., R. Co.*, 97 Fed. 226.
Harriman v. *Northern Securities Co.*, 197 U. S. 244.
Carey v. *Houston, etc., Ry. Co.*, 52 Fed. 671.
Wenger et al. v. *Chicago, etc., R. Co.*, 105 Fed. 796.
Anthony v. *Campbell*, 112 Fed. 505.
Spencer v. *Seaboard Air Line*, 137 N. C. 107.

In *Wenger* v. *Chicago & E. R. Co.*, 105 Fed. 796, it was stated, in effect, that the holder of an unliquidated claim for damages against a railroad company was held barred, by laches, from the right to charge a liability upon a reorganized company, succeeding to the property, on the ground that it had issued the stocks and bonds to the stockholders of the old company, and the transaction had been completed, before the claim holder asserted his claim against the new company, though he had ample opportunity to do so.

In *Anthony* v. *Campbell*, 112 Fed. 212, Judge Thayer, delivering the opinion, said:

"A man cannot remain silent for three or four years, knowing that one corporation, of which he is a creditor, has wrongfully transferred its property to another, and that third parties are dealing with the new corporation, and trusting it on the supposition that the transfer was lawful, and then be heard to assert in a court of equity that because of the alleged unlawful transaction he has an equitable lien on all the corporate assets, which is superior to other creditors. Such conduct evinces an intention or a desire to profit by the mistakes of innocent third parties and ought not to be encouraged. * * *

In the present instance the testimony shows that the intervener took no action until nearly four years after he was advised of the transaction—a period of silence and inactivity which must be deemed more than sufficient to bar his right to equitable relief on the ground that he has a general lien."

In the opinion of the Master, the surroundings, conduct and laches of the Trust Company in this matter have been such as to preclude it, (a) from claiming that the reorganization scheme was fraudulent as against it, and, also, (b) from asserting its claim in controversy against the Southern Company.

XIV.

A review of the authorities relied upon by the Trust Company in support of its claim to the Central Improvement property.

The Trust Company relies upon *Humphreys* v. *McKissick*, 140 U. S. 304. There the question was whether certain elevator property passed under the after-acquired property clause of the St. Louis, Kansas City & Northern Railway Company. The Elevator Company was organized by certain officers of *five* railway companies. These companies each subscribed for an equal amount of the stock in the Elevator Company and the elevator was erected at a cost of $280,000. When completed, the elevator was leased to certain parties, who afterwards operated it as tenants of the Elevator Company. The elevator building was situated more than half a mile distant from the railroad of the mortgagor company and was erected on land *not belonging to the Company*, but leased from the Union Pacific Railway Company. The lower court directed the receivers of the mortgagor to deliver a proper assignment of the mortgagor and of themselves as receivers—it being stipulated that the mortgagor had no interest otherwise than as *stockholder* in the property of the Elevator Company.

The court held that the *stock* in the Elevator Company could not be an appurtenance to a road. The court adds:

> Had the elevator been constructed upon *property covered by the mortgage*, it might have been contended that it fell, to the extent of the one-sixth interest, under the mortgage, as one of the depots of the company. The term 'depot' in the mortgage is not necessarily limited to a place provided for the convenience of passengers while waiting for the arrival or departure of trains. It applies also to buildings used for the receipt and storage of freight, which, when received, is to be safely kept until forwarded by the cars of the company or delivered to the owner or consignee. Such a building, whether existing at the time of the mortgage, or constructed afterwards upon the *property of the company* covered by it, may pass under the mortgage as one of its depots, but will not pass as an appurtenance to the property previously existing.

It is obvious that the rule stated in the foregoing case is not in any way controlling in the present case. Here we are not concerned with a building erected upon leased ground at some distance from the railroad, to reach which the intervening tracks of some other company must be crossed. We are concerned here with *real estate itself* purchased with the funds of the Belt Company and Air Line for their corporate purposes respectively, to be used for right of way and terminals—the naked title being placed in the Central Company purely as a matter of convenience and under the erroneous supposition that by so doing the property would be free from the lien of the mortgages. Two results followed. First, an implied or resulting trust was created in favor of the company paying the money to acquire each piece of property, so that the Central Company held the legal title as trustee. Secondly, the properties fell within the description of the subsequently acquired property clause of the mortgages and the lien thereof immediately attached. In short, the companies furnishing the money became the beneficial owners of every interest in the property so purchased, and such ownership became impressed with the liens of the mortgages and afterwards passed to the

purchaser at foreclosure sale. We are not here dealing with appurtenances. The case falls within the rule clearly stated in *Guaranty Trust Co.* v. *Atlantic Coast Electric Co.*, 138 Fed. 517, and other cases heretofore cited.

The other cases cited by the Trust Company are not in conflict with this position. *Pardee* v. *Aldridge*, 189 U. S. 429, holds that "it was a *question of fact* whether the lots there in question were acquired for and pertaining to the operation of the railroad." The jury found this issue *against* the purchaser at foreclosure sale, and that finding was confirmed by the court upon the ground that it was properly a question of fact for the jury. The case is authority for our contention here that the master and lower court having both found that the properties in question came under the terms of the mortgage, their finding is *conclusive* upon that subject.

In *Smith* v. *McCullough*, 104 U. S. 25, a mortgage executed by a railroad company upon its then and after-acquired "property" contained a lengthy specific description of the kind and character of property sought to be mortgaged, not, however, including bonds. The court holds that the specific description qualified the word "property" so that municipal bonds owned by the Railway Company were not covered by the mortgage. The court adds:

> Had the draftsman of the instrument stopped in his description of the mortgaged property with the general words, 'and the present and after-to-be-acquired property of or in any manner pertaining to the Linaus branch and all the right, title and interest therein,' there would be more force in the position taken by the appellant.

The case of *Boston Railroad Co.* v. *Coffin*, 50 Conn. 150, decided in 1861, also involved the construction of the language used in the after-acquired property clause of the mortgage. The language employed contained the following phrases: "That may be used in the location of said railroad"—"used as a part of said railroad"—"appertaining thereto"—"necessary for the

construction, operation or security thereof"—"necessary for the completion and operation of the road."

The court places its decision to a large extent upon the provisions of the Connecticut statute which disabled the Railway Company from holding lands not "necessary or convenient" for its purposes. The court said:

> The words "necessary or convenient" as used in the charter and mortgage should have a liberal construction and should include all that has been found to be reasonably necessary or convenient for the operation of the road since its construction.

In *Dinsmore* v. *Railroad Co.*, 12 Wis. 725 (1860), the language of the after-acquired property clause in a mortgage was construed and held not to cover a tract of 285 acres of woodland situated some seven miles from the railroad, although the land was purchased and used by the company for the purpose of supplying the road with timber and fuel.

XV.

A consideration of the Trust Company's claim that the property of the Belt Company was a trust fund to which the creditors were entitled in priority to the stockholders.

Although protesting that the plan of reorganization was a lawful, valid, and honest plan, not only by its terms, but in the manner in which it was executed and carried into effect, yet the Trust Company, in their brief (p. 28), casually refer to the Boyd case, quote from it, and refer to

> —the general proposition underlying this case, that the stockholders of the Belt, whether by agreement among themselves or by agreement with the bondholders, could not appropriate to themselves the assets of the company and leave any creditors unpaid.

Counsel studiously avoid any express claim that the so-called "creditor's equity" was fraudulently diverted from them

to stockholders, as a ground of recovery in this cause, for they fully realize that the Trust Company's participation in the plan spells disaster to that theory; but they seek to inject into their argument the doctrine of the Boyd case by referring to it incidentally, not as a ground of recovery, but under the thin disguise of an answer to what they erroneously refer to as the contentions of the Southern Company and of the master. We make no objection to the insidious manner in which it is sought to introduce this issue into the case, but it is not inappropriate to point out that it is not in harmony with the oft-repeated protestations in the Trust Company's brief that the plan of reorganization was an honest one, and that, therefore, the principles of the Boyd case are not invoked as a ground of recovery in this Court.

But the Trust Company is not in a position to say that the property of the Belt Company was a trust fund to which creditors were entitled in priority to the stockholders. That principle is only available to *non-assenting* creditors. So far as the Trust Company is concerned, it *assented* to the exchange of Southern stock for Belt stock, and the transaction was thereby shorn of any trust relation. As to the Trust Company, every paragraph in the plan was valid and binding, and so were all the steps taken pursuant to the plan, such as the exchange of stocks and bonds, the foreclosure proceedings, the foreclosure sales, the purchases by the Southern Company, and the delivering possession to it of the railroad properties involved. The law attaches no trust to the entire transaction, or to any part or parcel of it, in favor of a *consenting* creditor such as the Trust Company.

XVI.

The master's finding of the value of the Belt property was not based on the amount bid at the foreclosure sale.

It is not now claimed, and never has been claimed, that the amount bid at the foreclosure sale of the Belt property was, in the judgment of the master, controlling evidence of its value.

It is true, however, that the Trust Company, as the master found (Rec. 853), "though a party to the foreclosure proceedings, has not at any time objected to the regularity thereof, or to the *sufficiency* of the amounts received for the properties sold."

We do claim that the master had before him in the evidence contained in the record, *all* of the elements which may be properly considered in the valuation of railway properties, all as stated in our brief, p. 142 *et seq.*, and that the master, upon a consideration of all of this evidence, reached the conclusion that the fair value of the property did not exceed the bonded indebtedness of the Belt Company, which was $1,000,000. The master does not attach any significance to the amount of the bid at the judicial sale. His finding is based upon other competent and legal testimony.

Counsel say, p. 37, that the stocks of the Southern Company were issued as fully paid and non-assessable. There is *nothing* in the record to support this statement. It is then argued that it must be assumed that the value of the property was the face value of the securities issued against it, and counsel quote the constitutional provision of Missouri to the effect that:

> No corporation shall issue stocks or bonds, except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void.

This Court has held that this constitutional provision, contained in the Constitution of Arkansas, does not apply to the

issue of stocks and bonds in the reorganization of railroad properties (*Memphis Ry. Co.* v. *Dow*, 120 U. S. 287).

Furthermore, the Trust Company was fully acquainted with all the details and purposes of the reorganization, and the terms and considerations on which the stock was issued, and became a stockholder itself. It is, therefore, in no position to urge that the face value of the securities of the Southern Company is any evidence of the value of the Belt property.

Madison Bank v. *Alden*, 129 U. S. 372.
Cunningham v. *Holley*, 121 Fed. 720.
Berry v. *Rood*, 168 Mo. 316, 334.
Meyer v. *Milling Co.*, 192 Mo. 168, 191.
Whitehill v. *Jacobs*, 75 Wis. 474.
First National Bank v. *Mining Co.*, 42 Minn. 327.
Adamant Mfg. Co. v. *Wallace*, 16 Wash. 614.

We again respectfully submit that the decree of the court of appeals should be reversed, and that the decree of the circuit court should be affirmed.

SAMUEL UNTERMYER,
SAMUEL W. MOORE,
Solicitors for Appellant and Petitioner.

December, 1915.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Appellant,

v.

GUARANTY TRUST COMPANY, CENTRAL IMPROVEMENT COMPANY, CARBON STEEL COMPANY OF KANSAS CITY SUBURBAN BELT RAILROAD CO.,

Appellees.

No. 39

Appeal from the Circuit Court of Appeals for the Eighth Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Appellant,
vs.
GUARDIAN TRUST COMPANY, CENTRAL IMPROVEMENT COMPANY, CAMBRIA STEEL COMPANY AND KANSAS CITY SUBURBAN BELT RAILROAD CO.,
Respondents.
No. 85

Appeal from the Circuit Court of Appeals for the Eighth Circuit

BRIEF, STATEMENT AND ARGUMENT FOR THE GUARDIAN TRUST COMPANY

STATEMENT OF THE CASE.

This is an appeal from the Circuit Court of Appeals for the Eighth Circuit, the substantial parties to which are, the Kansas City Southern Railway Company, Appellant, and the Guardian Trust Company, Respondent. The Central Improvement Company is also an

Appellee, but is only incidentally involved in the controversy.

Among the parties to the litigation in its earlier stages, and necessary to be considered on this hearing, are the Cambria Steel Company, a corporation of the State of Pennsylvania, and the Kansas City Suburban Belt Railroad Company, called the Belt Company, a corporation of the State of Missouri.

Other corporations appearing in the history of the litigation, although not as parties, are the Kansas City, Pittsburgh and Gulf Railroad Company, called the Gulf Company, and the Port Arthur Channel and Dock Company, called the Dock Company.

The Gulf Company owned a line of railroad extending from Kansas City, Missouri, to Port Arthur, Texas, on the Gulf of Mexico.

The Belt Company owned the terminals used by the Gulf Company at Kansas City.

The Dock Company owned the terminals used by the Gulf Company at Port Arthur.

The Belt, Gulf and Dock Company, each of them, had outstanding bonds secured by mortgage upon its properties, and the financial situation was thought by those in control to justify a reorganization of these companies and the properties. This was undertaken by a committee of the holders of the bonds and stocks of the companies, and the method of it is set out at large in the report of the master (Rec., pp. 813, 824).

We must dissent at once from what is said by the appellant in the opening of its brief under the head of

The Main Question Presented by This Record.

The Trust Company contends that the plan of reorganization in addition to making provision for the stocks and bonds of the old companies, contemplated and provided for the payment of all the general creditors, and was an honest and lawful plan of reorganization, and the Circuit Court of Appeals so held.

The Southern Company, the offspring of the plan, contends that the Trust Company as an unsecured creditor is seeking to impose a liability for the indebtedness of one of the old companies to it, upon the Southern Company, "based upon the alleged fraudulent character of the reorganization plan under the rule of Northern Pacific Railway Co. v. Boyd, 228 U. S. 482," in the face of what it alleges to be certain conceded facts.

The Trust Company insists that the only fraud in the case was the refusal to perform the promise of the plan and the Circuit Court of Appeals so held.

As to the facts said to be conceded we have to say: It is conceded that the Trust Company as a bondholder and stockholder in the old companies, participated in the plan, but it is not conceded that save for the plan it would have lost its old stock.

It is not conceded, but is expressly denied that the plan contains a covenant by which the Trust Company agreed not to hold the new company for the debts of the old companies.

It is conceded that the Southern Company acquired the formal legal title to the properties of the old com-

panies at foreclosure sales had as formal incidents of the plan of reorganization and no more than this is conceded or is the fact as to such sales.

It is not conceded and it is not the fact that the "fair market value" of the Belt property at the time of the reorganization and foreclosure did not exceed the mortgage indebtedness against it.

The Plan of Reorganization

had as its declared "ultimate purpose the unification of the main line and terminals into one ownership and under one management" (Rec., p. 814), to be accomplished by having a new company, to be known as the Southern, acquire the stock and bonds of the old companies and as well their properties in fee (Rec., p. 815), and this might be done, "with or without foreclosure of either or all of said properties" (Rec., p. 823).

The Results to be Attained

were thus set forth in the plan (Rec., p. 815):

a. The new company would own the main Gulf line and the stocks and bonds of the Terminal Companies. These stocks and bonds to be pledged under the new first mortgage to be created.

b. **The payment of the floating debt and the existing Car Trust obligations.**

c. Adequate provision for working capital for future requirements.

d, e, and f. Other advantages that need not be detailed.

The Financial Scheme.

The new company was to issue $30,000,000 of bonds, $21,000,000 of preferred stock and $30,000,000 of common to be disposed of as follows (Rec., pp. 815-821).

Bonds:

Gulf bondholders at the rate of 75 per cent of their holdings	$18,000,000
Belt bondholders, at the rate of 133 per cent of their holdings	1,330,000
Subsidiary Company bondholders	3,867,500
To be sold for the necessary cash requirements of the new company	3,000,000
To be reserved for the future requirements of the new company	3,802,500
Total	$30,000,000

Preferred Stock:

Gulf bondholders, at the rate of 50 per cent of their holdings	$12,000,000
Gulf stockholders, who pay ten dollars on each share of stock deposited by them—at the rate of 10 per cent of their stock holdings	2,400,000
Bondholders of Belt and Constituent Companies, at the rate of 25 per cent of their holdings	1,012,500
Belt Company stockholders, at the rate of 25 per cent of their holdings	1,187,500

Dock Company bondholders, at the rate of 50 per cent of their holdings	817,500
To be sold for the necessary cash requirements of the new company	3,000,000
Unappropriated	582,500
Total	$21,000,000

Common Stock:

To Gulf stockholders, who paid in $10 per share—par for par	$24,000,000
To Belt stockholders, at the rate of 75 per per cent of their holdings	3,562,500
To Dock bondholders, at the rate of 50 per cent of their holdings	817,500
To Dock stockholders, at the rate of 75 per cent of their holdings	1,181,250
Unappropriated	438,750
Total	$30,000,000

So the new company would have, in addition to the stocks, bonds and properties of the old companies, cash and its own securities as follows, viz:

Cash	$2,400,000
Bonds	6,802,000
Preferred Stock	3,582,000
Common Stock	438,750

As to these assets the plan provided that $3,802,500 of bonds were for "the future requirements of the com-

pany'' which ''included such extensions, betterments, and new equipments as might be required by the business of the company'' (Rec., p. 820).

The Debts of the Old Companies

were to be provided for by the sale of $3,000,000 of bonds and $3,000,000 of preferred stock expected to realize $3,500,000 and by the $2,400,000 cash received from Gulf stockholders, this fund of $5,900,000 to be applied as follows (Rec. pp. 820, 821.):

For payment of car trusts and interest adjusted to date of payment, say	$1,900,000
For payment of floating debts	475,000
For payment of receiver's certificates	800,000
For payment first mortgage coupons, Due April 1, 1899	575,000
Working capital and expenses of reorganization	2,150,000
Total	$5,900,000

This left $582,500 of preferred stock and $438,750 of common unappropriated in any way.

All of these estimates as to indebtedness were too

low. Payments actually made on these several accounts were as follows (Rec., p. 860):

Car Trusts	$2,192,580.40
Coupons	891,913.41
Receiver's Certificates	821,543.74
Floating Debt	1,164,172.56
Total	$5,070,210.11

The amount estimated was $3,750,000.

One paragraph of the plan provided that:

> "**Any obligation in the nature of floating debt or otherwise against any company or property embraced in said plan, either as proposed or carried out, or any securities held as collateral for any such obligation, may be acquired or extinguished or held by the Committee at such time, in such manner, and upon such terms as they may deem proper for the purpose of carrying out this agreement,** and nothing in said plan and this agreement contained is intended to or shall constitute any liability or trust in favor or in respect of any such obligation acquired or extinguished or held by the Committee" (Rec., p. 823).

Another that:

> "It shall be the special duty of said Committee, which they are hereby fully authorized and empowered to perform, to prepare and adopt a plan for the reorganization of the Kansas City, Pittsburgh & Gulf Railroad Company, and its property, and also, if necessary, for the reorganization of the

Kansas City Suburban Belt Railroad Company, and the Port Arthur Channel & Dock Company and their properties, and for the consolidation of said corporations, if such consolidation can be lawfully made and is found to be practicable, either with or without foreclosure of either or all of said properties, or by means of the acquisition of the stock or other securities of either or all of said corporations, or in any other manner that may be deemed by said Committee to be most practicable and feasible; **and said Committee are authorized to negotiate with bondholders, creditors and stockholders of said companies, or either or all of them, in devising and carrying out said plan, etc.**" (Rec., p. 823).

A third that:

"The depositors hereby irrevocably request the Committee to endeavor to carry into practical operation any plan so adopted, and this agreement in its entirety, or in part, to such extent and in such manner as the Committee shall deem to be for the best interests of the depositors in the consolidation or acquisition and unification of the properties finally embraced in the readjustment * * * **to purchase at any time and at such prices as they shall deem proper, or to pay, compromise, or settle with the holders of coupon notes or other indebtedness, or car trusts or other obligations of any of the said companies * * * and to apply for that purpose any money received from the sale of stock or obligations of any new company to be formed** * * * with plenary powers to enter into ar-

rangements for decrees or for facilitating or hastening the course of litigation, or in any way to promote the consummation of said plan, etc., etc." (Rec., p. 824).

The plan of reorganization was carried into effect. The Southern Company first acquired the stocks and bonds of the old companies, and later at foreclosure sales the legal title to their physical properties. In the case of the Belt Company the Southern acquired practically all of its stock and bonds prior to April 1st, 1900, and from and after that date the officers and directors of the Belt were nominees of the Southern Company (Rec., p. 810).

By the terms of the plan the Southern Company was liable for all obligations incurred by the Committee in accomplishing the reorganization (Rec., p. 865).

The Situation as to the Belt Company.

The Belt Company had a capital stock of $4,750,000 and a bonded debt of its own of $1,000,000. Affiliated companies, the Union Terminal, Consolidated Terminal and Air Line had outstanding mortgages on their properties for $2,000,000, $750,000 and $300,000 respectively. The Belt in practical effect, through stock ownership, held the equity in these properties.

By the reorganization there was paid for the bonds of these four companies and for the stock of the Belt which carried with it the stock of the other three companies, in securities of the Southern as follows:

For the $1,000,000 of Belt bonds $1,330,000 of Southern bonds and $250,000 of preferred stock.

For the $2,000,000 of Union Terminal bonds $2,000,000 of Southern bonds and $500,000 of preferred stock.

For the $750,000 of Consolidated Terminal bonds $750,000 of Southern bonds and $187,500 of preferred stock.

For the $300,000 of Air Line bonds $300,000 of Southern bonds and $75,000 of preferred stock.

For the $4,750,000 of Belt stock $1,187,500 of Southern preferred and $3,562,500 of Southern common.

In addition the Belt Company had outstanding indebtedness of about $900,000 as to which such provision was made as is hereinbefore set forth.

The Situation as to the Trust Company.

The Trust Company held securities of the old companies as follows (Rec., p. 867):

Gulf Company bonds	$ 642
Gulf Company stock	1,327
Dock Company bonds	325,000
Dock Company stock	438,900
Union Terminal bonds	410,000
Air Line bonds	42,000
Belt Company stock	76,972

In addition the Trust Company held an indebtedness against the Belt Company on notes and open account, amounting to about $500,000 and it held stocks and

bonds and other property belonging to the Belt Company as security for this indebtedness.

It also held some unpaid coupons pertaining to its Union Terminal bonds (Rec., p. 454).

The Trust Company assented to and participated in the plan of reorganization and received for the stocks and bonds of the old companies held by it, stocks and bonds of the Southern Company in the measure prescribed by the plan.

The coupons held by it were also paid and as well a part of the indebtedness on notes and open account. The greater part of this latter indebtedness, amounting to $360,000, was not paid, first upon the ground that it was not a valid obligation of the Belt Company, and later upon the ground that neither the reorganization Committee nor the Southern Company was liable therefor.

On September 1st, 1900, the indebtedness of the Belt Company to it being overdue, the Trust Company gave notice that it would, on September 7th, sell some of the collateral that it held.

The Cambria Company

had sold and delivered rails to the Belt Company during the years 1897 and 1898 to the extent of about one hundred thousand dollars and held its note for this amount secured by collateral of the same character as that held by the Trust Company (Rec., p. 672).

The Pleadings and Proceedings.

On September 6th, 1900, the Cambria brought suit against the Belt on this note, recovered judgment, issued execution, had the writ returned *nulla bona*, filed a creditor's bill against the Belt and the Trust Company, applied for and had receivers appointed for the Belt and applied for and got a temporary injunction prohibiting the Trust Company from disposing of any of the Belt collateral held by it. The Belt and constituent companies, creatures of the Southern, appeared in these proceedings on the first day and consented to what was done (Rec., pp. 3-31).

On September 6th, 1900, the trustee of the Belt mortgage brought suit to foreclose and prayed for and got receivers appointed for the Belt property and an injunction against the Trust Company to prevent any sale or disposition of the Belt collateral held by it (Rec., p. 98).

Thenceforth justice traveled with a leaden heel and has been fifteen years in reaching this tribunal.

The Cambria Bill

alleged that while the Trust Company asserted a heavy indebtedness against the Belt, the Trust Company was in fact heavily indebted to the Belt, and it wanted an accounting and a judgment for the Belt against the Trust through which it could realize on its own judgment against the Belt.

The bill was brought by the Cambria Company "as

well for itself, as for the benefit of all other creditors and persons interested in said Belt Company, similarly situated, and willing to become parties to this action and contribute to the expense thereof'' (Rec., p. 18).

No such other creditor ever appeared although in the suit thus begun a decree was not reached in the Circuit Court until June 25th, 1910.

Trust Company's Answer.

November 5th, 1900, the Trust Company answered the Cambria bill denying its adverse allegations and vindicating its own claims against the Belt Company. It further charged in terms that the suit was a collusive one, brought at the instance of the Southern Company which had paid or promised to pay Cambria's debt and to secure it against liability for costs. It also set up that under and by virtue of the reorganization of the Dock, Gulf and Belt companies, the Southern Company was liable for the indebtedness of the Belt (Rec., pp. 33-69).

Formal Replication

to this answer was filed by the Cambria Company on December 3rd, 1900.

Proceedings in the Cambria Case.

Just what was done during the next year does not appear from the record in this court, but from and after November 20th, 1901, Cambria permitted its allies in the litigation to conduct the active operations

and for that reason asked to be relieved and was relieved by the Circuit Court from the payment of costs incurred after that date (Rec., pp. 889 and 914).

The decree of the Court, pursuant to the Master's report, dismissed the Cambria bill and that company took no appeal but acquiesced in an adjudication that on its face meant the total loss of a claim of $100,000 with ten years' interest (Rec., pp. 903-904).

Meanwhile the Trust Company had continuously asserted the liability of the Southern Company for all Belt indebtedness, and for that to the Cambria it was unquestionably liable, but Cambria never asserted such liability in any legal proceeding.

The Court of Appeals said that "it is difficult to wink so hard as not to see that the Cambria suit was in reality the suit of the Southern Company."

The Belt Foreclosure.

In this suit the Trust Company made repeated application for leave to defend, and to set up the liability of the Southern Company for the Belt debts, which was denied, upon the condition, however, made a part of the decree of foreclosure, that the decree should "be without prejudice to and shall not bar the right of the Guardian Trust Company or its receiver, to plead and insist in any litigation now pending or hereafter brought, that the Kansas City Southern Railway Company, by virtue of the manner in which it was organized, or for any other reason is legally or equitably

liable for and bound to pay the unsecured debts of the Kansas City Suburban Belt Railway Company, etc., etc." This was on November 6th, 1901 (Rec., p. 867).

Proceedings by Belt Company and Its Receivers.

At some time not disclosed by the record, the Belt Company and its receivers filed a cross-bill in the Cambria suit. It is not contained in the record and was withdrawn or dismissed (Rec., p. 890).

November 20th, 1901, they filed an ancillary bill which was largely a replica of Cambria's bill (Rec., pp. 97-113). Cambria on December 16th, 1900, admitted the ancillary bill to be true (Rec., pp. 156-157). It was answered by the Trust Company on December 9th, 1901 (Rec., pp. 115-155).

March 22nd, 1905, the Belt and its receivers filed an amended and supplemental ancillary bill (Rec., pp. 201-265). The Trust Company answered this June 1st, 1905 (Rec., pp. 312-382).

July 2nd, 1906, the Belt and receivers filed a second amended and supplemental ancillary bill of complaint (Rec., pp. 392-460), which was answered by the Trust Company on the same day (Rec., pp. 461-467).

Formal replications to the answers of the Trust Company were filed.

Proceedings by the Southern Company.

On February 7th, 1905, it was stipulated that the Southern Company should become a party to the suit

"either as a joint complainant, or by bill of intervention as it may elect" (Rec., p. 164).

February 27th, 1905, the Southern Company filed its petition of intervention (Rec., pp. 166-186), and the Trust Company answered March 7th, 1905 (Rec., pp. 186-201).

May 1st, 1905, the Southern Company filed its amended petition of intervention (Rec., pp. 267-291) which was answered by the Trust Company May 20th, 1905 (Rec., pp. 292-312).

Formal replications to the answers of the Trust Company were filed.

These various polyonymous bills and petitions of the Cambria, the Belt and its receivers and the Southern Company made elaborate charges against the Trust Company to the effect that it was heavily indebted to the Belt Company and on various grounds sought to deprive it of the Belt collateral which it held and moreover to get judgment against it for the amount alleged to be due from it to the Belt.

By its answers the Trust Company met the allegations against it, in each and all asserted its claims against the Belt Company, its right to the collateral held by it, and the liability of the Southern Company for the Belt debts.

In the answers to the bills of the Belt Company and its receivers, the Trust Company prayed judgment for what might be found due to it upon an accounting, but in the answers to the petitions of intervention by the

Southern Company the only relief prayed for was the dismissal of the petitions.

Suits in the State Courts.

In 1905 and 1906 the Trust Company instituted suits at law in the State courts of Missouri against the Southern to recover from it the Belt indebtedness. These suits were enjoined by the Circuit Court, but on appeal the injunction was dissolved by the Court of Appeals, 146 Fed. 337. Later a second injunction was obtained by the Southern against the prosecution of these suits and this injunction was also dissolved on appeal by the Circuit Court of Appeals on April 2nd, 1909. See 171 Fed. 43.

The Master's Report.

During the long pendency of the case before the Master, testimony to the extent of 36,000 typewritten pages was taken, but none of this, save some excerpts in the report, is contained in the record before this Court.

May 2nd, 1910, the Master made his report in which he found in favor of the Trust Company on all its claims against the Belt, save as to three items, and recommended judgment accordingly (Rec., p. 888). He found against all the claims made by the several complainants on behalf of the Belt against the Trust Company. He found in favor of the Southern Company that lands of the Central Improvement Company whose stock was held by the Trust Company as collateral to the Belt debt passed to the Southern Company under

the after acquired clause of the Belt mortgage (Rec., p. 887), and further (Rec., p. 887) "that the Southern Company is not liable in any way for the floating indebtedness of the Belt Company."

Exceptions.

The Trust Company filed exceptions to the report so far as it was adverse (Rec., pp. 892-894). The exceptions as to the finding on the liability of the Southern for the Belt debts are challenged as formally defective and insufficient to save the question for review, and they will be set out at length under the appropriate head of the argument.

The Decree.

The report of the Master was approved in all things on June 25th, 1910, and judgment and decree were entered accordingly. The judgment was for $639,658.56. As the claims were ten and more years old, the judgment is in large part made up of interest (Rec., pp. 903-915). The collateral held by the Trust Company was adjudged to be rightfully held by it as security for the debt but the value was taken out of the 1,120 shares of the stock of the Central Improvement Company by awarding its lands to the Southern Company. The decree absolved the Southern Company from any liability for the Belt debts.

From this decree only the Trust Company and the Central Improvement Company appealed. The assignments of errors need not be considered unless in

connection with the exceptions to the Master's report alleged to be insufficient.

The Case in the Court of Appeals.

The Court of Appeals, overruling the objections to the formal sufficiency of the exceptions to the Master's report, considered the case upon its merits and upon each of two hearings decided the questions involved in favor of the Trust Company. Central Improvement Co. v. Cambria Steel Co., 201 Fed. Rep. 811, and same case, 210 Fed. Rep. 696. Copies of the opinions have been filed here. On the second hearing the Court in view of all the circumstances of the litigation, the expense incurred and the great delay already suffered, gave affirmative relief to the Trust Company notwithstanding the informality of the pleadings.

The Appeal to This Court

challenges the right of the Trust Company to review the report of the Master or the decree of the Circuit Court on the ground of the insufficiency of the exceptions to the report and asserts that no liability for the Belt indebtedness was assumed for or by the Southern Company; that the Trust Company is estopped from alleging any such liability because of its participation in the plan of reorganization, and by a covenant that it would not hold the new company for the debts of the old; that the Belt property was not worth the mortgage indebtedness against it and so the Trust Company was not injured by the reorganization; and that

in any event the Trust Company should in the measure of its recovery be limited to such equitable terms as this Court may think should have been offered to creditors under the reorganization. It also insists that the Central Company lands were subject to the Belt mortgage and that the Trust Company had no right to such lands as against the mortgagee.

It will avoid repetition to set forth the facts of the case in the course of the discussion of the several questions involved.

It was contended by the Southern Company in the Circuit Court and the Court of Appeals that the Trust Company was barred by

Laches.

We had supposed that this contention was abandoned in this court, but find that the brief of the appellant deals quite extensively with the opinion of the Court of Appeals on this subject under the head of "supplemental statement to correct certain misconceptions on which the Court of Appeals based its decision."

Without following appellant throughout the details of this statement we call attention to some facts which amply justify the conclusion of that Court that there was no sleeping upon its rights by the Trust Company and that the great delay in this case was in truth occasioned by the Southern Company and its allies.

The Trust Company made claim for a large amount against the Belt Company and the Southern and was

interested in the prompt payment of the claim, for it was itself placed in the hands of a receiver in the course of this litigation.

It sought to get payment of the claim before any litigation was begun in June, 1900, but an investigation of the accounts was insisted upon on behalf of the Southern Company (Rec., p. 863).

Payment not having been made on September 1st, 1900, the Trust Company gave notice that on the 7th day of September, 1900, it would sell certain collateral that it held.

On the 6th of September, 1900, the Cambria filed its suit and on the same day receivers were appointed for the Belt Company, and a restraining order was issued preventing any sale of the collateral by the Trust Company (Rec., pp. 28-31). A temporary injunction followed upon this which was not dissolved until June 25th, 1910 (Rec., p. 904).

The bill of the Cambria Company was answered by the Trust Company on November 5th, 1900 (Rec., p. 32). The Belt Company and its receivers filed a cross-bill some time before November 12th, 1901, which was withdrawn or dismissed on that date.

Meanwhile the Trust Company endeavored to become an active party to the Belt foreclosure suit but was denied the right (Rec., p. 867).

November 20th, 1901, the Belt Company and its receivers filed an ancillary bill (Rec., p. 97); an amended and supplemental ancillary bill on March 22nd, 1905

(Rec., p. 201), and a second amended and supplemental ancillary bill July 2nd, 1906 (Rec., p. 392).

These bills were all promptly answered by the Trust Company.

The Southern Company did not appear in its own name until February 7th, 1905, filing its petition of intervention February 27th, 1905 (Rec., p. 166), and its amended petition on May 1st, 1905 (Rec., p. 267).

The appellant says that some of these various bills were filed pursuant to stipulation. So be it. But that did not make them the bills of the Trust Company, nor did it make the delay in presenting them the delay of the Trust Company. And in stipulating that they might be filed instead of resisting the filing, the Trust Company simply prevented further delay.

And it is quite apparent that the great mass of the 36,000 typewritten pages of testimony must have been taken on issues presented by the Southern Company and its allies and determined against them.

Other criticisms of the opinion of the Court of Appeals are met in the course of the argument and need not be noted here.

There is a motion by appellee to dismiss the appeal. As to this we refer to the brief which accompanies the motion.

POINTS AND AUTHORITIES.

I.

The property of the Belt Company was a trust fund to which the creditors were entitled in priority to the stockholders.

Central Improvement Co. v. Cambria Co., 201 Fed. Rep. 811;
Same v. Same, 210 Fed. Rep. 696;
Northern Pacific Ry. Co. v. Boyd, 228 U. S. 482.

II.

The amount bid at the foreclosure sale of the Belt property was no evidence of its value.

Investment Registry v. C. & M. E. R. Co., 212 Fed. Rep. 594;
Northern Pacific Ry. Co. v. Boyd, 228 U. S. 482;
Section 8, Article 12, Constitution of Missouri;
Section 962, R. S. of Missouri, 1899;
Shickle v. Watts, 94 Missouri 410;
Moffit v. Hereford, 132 Missouri 513;
Louisville Trust Co. v. Louisville Railway Co., 174 U. S. 674.

III.

The plan of reorganization provided for the payment of the debts of the old companies.

IV.

The estimate as to the floating debt was not intended as a limitation upon the amount to be paid under the plan.

V.

The provision for the payment of debts made by the plan was not limited by the interests of the bondholders.

VI.

There was no exclusion of creditors who were also bondholders and stockholders.

VII.

All the creditors save the Trust Company were paid and the Trust Company was paid in part.

VIII.

The Trust Company was entitled to enforce the provisions of the plan as a contract made for it's benefit.

Second National Bank v. Grand Lodge, 98 U. S. 123;

Johns v. Wilson, 180 U. S. 440;

Section 1729, R. S. of Missouri, 1909;

Meyer v. Lowell, 44 Missouri 328;

Beattie Mfg. Co. v. Clark, 208 Ibid 89.

IX.

There was no covenant by the Trust Company that it would not hold the new company for any of the debts of the old.

Webster v. Ins. Co., 53 Ohio State 558;

Hobbs v. McLean, 117 U. S. 567;

United States v. Central Pacific, 118 U. S. 235;
Noonan v. Bradley, 9 Wall. 394.

X.

The Trust Company not barred as a creditor by participating in the plan as bondholder and stockholder.

XI.

The Southern Company liable as being a consolidation of the old companies.

Section 1059, R. S. of Mo. 1899;
Leavenworth County v. R. R. Co., 134 U. S. 688;
State ex rel. v. Lesueur, 145 Mo. 322;
Evans v. Interstate, Etc., Co., 106 Mo. 594;
Wells v. Electric Co., 108 Mo. App. 607;
Barrie v. United Railways Co., 138 Mo. App. 557;
Johnson v. United Railways Co., 247 Mo. 326;
C. S. F. & C. Ry. Co. v. Ashling, 160 Ill. 373;
Shadford v. Detroit, Etc., Ry. Co., 130 Mich. 300

XII.

The "Equitable Terms of Recovery" now suggested by the Southern Company are very inequitable.

XIII.

The lands of the Central Improvement Company did not pass under the after acquired property clause of the Belt mortgage.

Humphreys v. McKissock, 140 U. S. 304;
Pardee v. Aldridge, 189 U. S. 429;
Smith v. McCullough, 104 U. S. 25;

Railroad v. Coffin, 50 Conn. 150;
Densmore v. Railroad, 12 Wis. 649.

XIV.

Even though the exception to the Master's report did not formally and directly challenge the correctness of his finding, which was one of law, that the Southern Company was not liable for the indebtedness of the Belt Company, nonetheless in the circumstances of the case it was competent and proper for the Court to consider and determine the question upon its merits.

Guardian Trust Co. v. K. C. Southern Co., 201 F. R. 811;
Central Improvement Co. v. Cambria Co., 210 F. R. 696;
Sheffield Ry. Co. v. Gordon, 151 U. S. 285;
17 Enc. Pl. and Prac., 1048;
2 Daniel Chanc. Pl. and Prac., 1314;
Himley v. Rose, 5 Cranch 313;
Burke v. Davis, 81 Fed. 907;
Celluloid Mfg. Co. v. Cellulite Mfg. Co., 40 Fed. 476;
Gordon v. Lewis, 2 Sumner 143;
Brooks v. Robinson, 54 Miss. 272;
Haymond v. Murphy, 65 W. Va. 616;
Webster v. Cadwallader, 133 Ky. 500;
Lehman v. Powe, 95 Miss. 446;
Von Phalen v. Winterbotham, 203 Ill. 202.

XV.

There is no reason of law, policy or morals for preferring stockholders to general creditors in the reorganization of railroad properties.

ARGUMENT.

I.

The property of the Belt Company was a trust fund to which the creditors were entitled in priority to the stockholders.

The so-called reorganization of the Dock, Gulf and Belt Railroads meant the liquidation of these old proprietary companies, by agreement of their bondholders and stockholders. They formed a new company, the Southern, which acquired the bonds and stocks of the old companies by issuing in exchange therefor its own bonds and stocks. After it had thus acquired the stocks and bonds it acquired the legal title to the physical properties of the old companies at foreclosure sales under the mortgages securing their bonds as contemplated in the plan of reorganization.

There were some provisions of the plan relative to floating debts, but it is insisted by the appellant and it was reported by the Master that these were exclusively for the benefit of the bondholders and stockholders of the old companies, who became the stockholders of the new company and that the creditors could take no advantage of them. In other words, the reorganization eliminated the general creditors.

The Belt Company had a bonded debt of $1,000,000, a floating debt of several hundred thousand dollars, a

capital stock of $4,750,000, and against these liabilities and this capital stock it had a valuable railroad property, and owned the stock of other companies.

Under the reorganization as carried out the bondholders of the Belt got $1,330,000 of Southern bonds and $250,000 in Southern stock, preferred. Its creditors other than the Trust Company, were all paid and its stockholders got $4,750,000 of Southern stock, 25 per cent preferred and 75 per cent common. Then the Southern foreclosed the Belt mortgage and bought in the property for the face of the bonded debt, leaving a deficiency on account of unpaid interest and this it is said left nothing for the unpaid general creditor.

The railroad which once belonged to the Belt Company now belonged to the Southern; those who had been Belt bondholders were now bondholders of the Southern and those who had been stockholders of the old company were now stockholders of the new, and all in due proportion, but there was no transference of general creditors. Same railroad, same bondholders and same stockholders, but a new railroad company and no general creditors.

This is what the petitioner and the Master say was accomplished and they say further that it is valid and binding upon the creditors.

We deny that this was intended to be done, and we deny its legality if it was done. And first as to the legal proposition.

Accepting for the present the view that nothing in

the plan of reorganization was intended for the benefit of the general creditors of the Belt, and we have the fact in the liquidation of the Belt Company that there was $1,187,500 of Southern preferred and $3,562,500 of Southern common stock paid to the Belt stockholders as such and for their stock, which had and could have no value save as it represented the equity, over and above the bonded and other debt, in the Belt railroad. These Southern stocks in fact paid for this equity in the Belt property, were assets of the Belt Company and subject to the payments of its debts, but this fund was taken from the creditors and divided among the stockholders. It was done by people who dealt with themselves in a dual relation as both purchasers and sellers of the same property. This was true when the exchange of stock was made and it was equally true when the Southern bought the railroad itself at the foreclosure.

We do not question that what the bondholders got was fairly their due, but what was paid above this by the Southern Company, belonged, to the extent of their debts, to the general creditors unless they were otherwise provided for. And the Circuit Court of Appeals so held on both hearings of this case. Central Improvement Co. v. Cambria Steel Co., 201 Fed, Rep. 811, and same case, 210 Fed. Rep. 696. At the time the first opinion was delivered the Boyd case had not been decided by this Court, but before the opinion in the second case was announced the decision in the Boyd case

had been handed down. Northern Pacific Ry. Co. v. Boyd, 228 U. S. 482. In view of the very thorough consideration given to the question in that case, a discussion or even citation of authorities is unnecessary and we shall content ourselves with such quotations from the opinion of Mr. Justice Lamar as are pertinent to the different phases of the case at bar. It is said, page 502:

> "Corporations, insolvent or financially embarrassed, often find it necessary to scale their debts and readjust stock issues with an agreement to conduct the same business with the same property under a reorganization. This may be done in pursuance of a private contract between bondholders and stockholders. And though the corporate property is thereby transferred to a new company, having the same shareholders, the transaction would be binding between the parties. But, of course, such a transfer by stockholders from themselves to themselves cannot defeat the claim of a non-assenting creditor. As against him the sale is void in equity, regardless of the motive with which it was made. For if such contract reorganization was consummated in good faith and in ignorance of the existence of the creditor, yet when he appeared and established his debt, the subordinate interest of the old stockholders would be still subject to his claim in the hands of the reorganized company. Cf. San Francisco & N. P. R. Co. v. Bee, 48 Cal. 398; Grenell v. Detroit Gas Co., 112 Mich. 70, 70 N. W. 413. There is no difference in principle if the contract reorganization, instead of be-

ing effectuated by private sale, is consummated by a Master's deed under a consent decree."

This is conclusive upon the general proposition underlying this case, that the stockholders of the Belt whether by agreement among themselves or by agreement with the bondholders, could not appropriate to themselves the assets of the Company and leave any creditors unpaid.

II.

The amount bid at the foreclosure sale of the Belt property was no evidence of its value.

The foreclosure proceedings do not alter the case for as carried out they were the merest formality. The Southern Company at that time owned practically all of the bonds and stocks of the Belt Company. It was at once, so far as interest was concerned, the complainant and the defendant in the action.

The Trust Company, it was argued by counsel for the Southern before the Court of Appeals, "did not intervene at any time in the Belt foreclosure suit. **It was made a party defendant in the foreclosure bill solely for the purpose of establishing by judicial decree that it had been removed as trustee under the mortgage.**"

It did make repeated endeavors to become a party for the purpose of making full defense to that suit and asserting all its rights therein but upon objection by the complainant was excluded from so doing.

It was confessedly no longer trustee in the Belt mort-

gage, it did not deny the validity or priority of the bonded debt, and so it was held that the rights it claimed as against the Southern could be conserved otherwise and this was provided for by the stipulation which was made a part of the decree of foreclosure (Rec., p. 867). This stipulation was intended to and did operate to prevent the Belt foreclosure proceeding from being a bar against the Trust Company in this or any other litigation in respect of the liability of the Southern Company for the Belt Company debt.

In fact the real foreclosure had already been accomplished. The consideration to be paid for the Belt properties was fixed by the plan of reorganization, creditors to be paid in money, bondholders to receive new bonds and stocks, and stockholders to receive new stocks, and all payments had been made, except to the Trust Company as to which a dispute had arisen —how much, if anything, was due to it and whether in fact it was not largely indebted to the Belt Company.

The Master found (Rec., p. 853) that "there is no sufficient proof in the record to show that the Belt properties, sold under the mortgage foreclosures, were worth anything in excess of what they brought at the sale; **and in the absence of such proofs, the Master finds that the amounts, for which they were respectively sold, was and is their fair market value at that time.**"

The amount bid at the foreclosure sale was one million of dollars, the face of the bonded debt. This was

the only bid made and it was made by the Southern Company, which both owned and owed the debt and both bought and sold the property. Under such circumstances the auction is a farce. As was said by the Circuit Court of Appeals of the Seventh Circuit in Investment Registry v. C. & M. E. R. Co., 212 F. R. 594, *l. c.* 610:

> "If, in Northern Pacific Ry. Co. v. Boyd, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931, an outside combination, in competition with the reorganization committee, had been confirmed as the purchaser at $61,500,000 we can hardly conceive that Boyd would have been permitted to go behind the sale. But, because the purchaser had created the masterful situation of controlling the sale, because the purchaser was not a stranger but the virtual owner of the property exposed for sale, neither the principle of the 'stability of judicial sales' nor 'compliance with the forms of law' nor the intent to commit 'no fraudulent act' was sufficient to stop a court of equity from inquiring whether an 'undue or unfair advantage' had been taken."

But the Master made another finding based not upon the absence, but upon the presence of proofs and these of the most cogent character. He reports:

> "The union, or combination, of all the roads of the Belt System and Gulf road into the Southern Company, pursuant to the reorganization scheme, created and gave to the reorganized system a much larger value than was the aggregate value of all

said roads as separate institutions, managed as they were prior to the date they were sold to the reorganization committee; and, further, that, by reason of the additional value given to said properties as parts of the reorganized railroad system, the Southern Company was enabled to issue its thirty million dollars of bonds, twenty-one million of preferred stock and thirty million of common stock, the whole aggregating eighty-one million, par value, and approximately more than four times the amount paid by the committee for said properties at the foreclosure sales thereof" (Rec., p. 853).

When this union or combination of the properties was effected and by the very act of effecting it, the Southern Company became the owner of the bonds and the bonds were thereby in practical effect extinguished. The Company could get the legal title either by having the old companies execute a deed thereto, or it could proceed by foreclosure. But the bid it made at the foreclosure sale no more than the consideration it might express in the deed would change the fact that the Belt equity was believed to be worth $4.750,000 of Southern stock and that this large value was in fact paid therefor. And there is no intimation anywhere that there was a diminution of this value between the time when it was appropriated by the stockholders and the time when the railroad itself was sold under foreclosure.

The Master, however, is of opinion that this value

was an incident of the plan of reorganization and so might be disposed of as the authors of the plan saw fit, give it to the stockholders if they chose, even though the creditors were left unpaid. He says:

> "That, for their mutual protection and self interest, the bondholders interested in all the railroad companies involved, had the right to combine together for the purpose of acquiring all the properties thereof, and then uniting them in one system, and without consulting either the stockholders or creditors of the constituent companies owning such railroads; and, furthermore, that it was competent for the bondholders to use the stocks and bonds of the new company as they saw fit, provided, that it is not shown that in so doing, it was part of their scheme to give something of value to the stockholders that should have gone to the creditors" (Rec., p. 853).

And as he finds nothing in the record to show that "the reorganization scheme in any way deprived the unsecured creditors of any rights they would otherwise have had in case such scheme had never been consummated," he concludes that it was entirely proper to exclude the general creditors from any benefits of the reorganization.

The value which supported so large an issue of stock the Master found was a value which the Belt road had as a terminal of the Southern and which it might not have posessed as a disrupted fragment of the system. Be that as it may, the value inhered in the Belt prop-

erty. It had been and in fact was a part of the system, the whole of which was made up of the Belt, the Gulf and the Dock roads. The combination of the properties was not even a new thought, but a development of the existing status. The reorganization plan dealt with the three properties as constituting one system, and the formal foreclosure of the separate parts, affected neither the value of the property nor the rights of the various parties thereto. As was said in the Boyd case, *l. c.* 504, "any device, whether by private contract, or judicial sale under consent decree, whereby stockholders were preferred before the creditors, was invalid."

In the Boyd case the reorganization agreement recited expressly that the property to be purchased was agreed to be "of the full value of $345,000,000 payable in fully paid non-assessable stock, and the prior lien and general lien bonds to be executed and delivered" thereunder.

The equivalent of that recital is in the present case. The stocks here issued were issued as fully paid and non-assessable. The Constitution and statutes of Missouri prohibited this unless it was for value received. Section 8 of Article 12 of the Constitution provides, that:

> "No corporation shall issue stocks or bonds, except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void."

The statutes of Missouri, in force at the time, Section 962, R. S. 1899, repeat the Constitutional provision.

As these provisions of the Constitution and statutes are construed by the Supreme Court of Missouri, when the stock is paid in property, the property must be the fair equivalent in value of the stock issued therefor. Shickle v. Watts, 94 Mo. 410. It follows from this that in the absence of direct testimony the market value of stock in a Missouri corporation is presumed to be its par, and the Supreme Court so holds. Moffit v. Hereford, 132 Mo. 513.

The issuance of stock in the present case as fully paid was tantamount to the agreement in the Boyd case that the property acquired was of the full value of the securities against it. If it was not substantially so, there was a gross fraud upon the State in the reorganization and the Southern Company may not invoke the fraud upon the State to protect it against the consequences of the fraud upon the Trust Company.

So for the purpose of this case the equity in the Belt Company stands at the value of the stocks, preferred and common, issued against it. And here again is in point what was said in the Boyd case, *l. c.* 508:

> "The fact that at the sale, where there was no competition, the property was bid in at $61,000,000, does not disprove the truth of the recital, and the shareholders cannot now be heard to claim that this material statement was untrue, and that as a fact there was no equity out of which unsecured creditors could have been paid, although there was a value which authorized the issuance of $144,000,000 fully paid stock. If the value of the road jus-

tified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control. In either event it was a right of property out of which the creditors were entitled to be paid before the stockholders could retain it for any purposes whatever."

But there is in this case substantial evidence that the stock of the Southern Company possessed substantial value. The stockholders of the old Gulf Company were not permitted to come in under the plan unless they paid ten dollars a share on their stock. Turning in ten shares of old stock and paying in one hundred dollars in cash the Gulf stockholder got ten shares of Southern common and one share of preferred. Turning in ten shares of common stock the Belt stockholder got seven and a half shares of Southern common and two and a half shares of preferred. Manifestly then the ten shares of the Belt common were worth more than the ten shares of Gulf common plus one hundred dollars of cash, for they were worth two and a half shares of Southern preferred as against one allowed to the Gulf stock plus the cash and nearly as much Southern common as well. So the Court of Appeals held very properly that the Belt shares must have been worth at least as much as the cash per share which the Gulf shareholder paid in, making a total of $475,000, and in reality were worth much more. The appellant in its brief deals with this estimate of the Court of Appeals at

times as if it was an estimate of the full value of the Belt stock, but it is put by the Court as an absolutely irreducible minimum of value.

The market reports show a much greater value. The petition for certiorari states at page 10 that "the present market value of the preferred stock (Southern) is $57.50. On that basis the value of the preferred stock alone issued to Belt shareholders is $682,812.50. The market value of Southern common at the lowest quotation at the same time was $23 per share, or for the entire amount issued to Belt stockholders $818,375, making a total value received by the Belt shareholders of $1,501,197.

As we are in the market, let us go back to the time of reorganization, eliminating all prospects, back to the year 1900, when the debt to the Trust Company stood at $360,000. The average market price of the preferred stock for the year was $33.75 and for common $10.87 which meant to the Belt shareholders.

11,875 preferred shares at $33.75	$400,781.25
35,625 common shares at $10.87	387,243.75
Total	$788,025.00

Again more than twice the amount of the unpaid Belt indebtedness. If the highest quotations for 1900 are taken the value paid to the Belt shareholders would stand at a million dollars.

And aside from market quotations and presumptions, the plan of reorganization itself shows that the Belt

property had a great and distinctive value as related to the securities outstanding against it. The Belt Company was in better financial condition than any other of the old companies. Its bonds and stocks were paid for at a much higher rate than those of any other company.

It is said in appellant's brief, page 148, "that the stock of the Southern Company represented six companies having a total bonded indebtedness of $29,685,000, of which the Belt Company with its bonded indebtedness of $1,000,000 was three and one-third per cent. **It is quite possible, and in the light of the finding of the Master as to the value of the Belt property, practically conclusive, that whatever value attached to the stock of the Southern Company which was received by the Belt Stockholders was derived from the five companies other than the Belt Company.**"

This is in the very teeth of the facts. The plan of reorganization is an agreement of the bondholders and stockholders of all the companies, and it fixed the relative values. The Southern Company issued in exchange for the bonds of the old companies $23,197,500 of its own bonds and of this amount $1,330,000 or 5.7 per cent instead of 3.1-3 were issued to Belt bondholders. It issued $17,417,500 of preferred stock in exchange for bonds and stocks of the old companies and of this the Belt people got $1,437,500 or 8.2 per cent instead of 3 1-3. It issued in exchange for stock and bonds of the old companies $29,561,250 of its common stock and of

this Belt shareholders got $3,562,500 or more than 12 per cent and not three and one-third. These actual percentages of allotment cannot by any sort of sophistry be equated down to three and one-third.

And this is not all. Three other companies are to be taken into account as constituents of the Belt, for the Belt owned all their common stock and so whatever value there was in the equities in their property gave value to the Belt stock. These companies were the Union Terminal, the Consolidated Terminal, and the Air Line. The bondholders of the Union Terminal got for their $2,000,000 of bonds a like amount of Southern bonds and $500,000 of Southern preferred stock. The bondholders of the Consolidated for their $750,000 of bonds got a like amount of Southern bonds and $187,500 of Southern preferred. The bondholders of the Air Line for $300,000 of bonds got a like amount of Southern bonds and $75,000 of preferred stock. So taking all the Belt Terminal properties and the holders of bonds and stock against them got of the Southern bonds and stocks issued in exchange for old stocks and bonds, more than fourteen per cent of the bonds, more than twelve per cent of the preferred stock and more than twelve per cent of the common.

As compared with the securities of the other companies those of the Belt were held at a large premium, and the equities in its properties were held to be more valuable than the equity in any other property. The Belt did not derive value from the other companies but gave value to them.

There is a good reason for what is called reorganization rather than strict foreclosure in the case of railroad properties. The bonded debt is large, millions in amount and beyond the ability of a single individual to deal with. And it can be continued as the bonded debt of the new company. But every interest should be conserved in the order of its priority. And the creditor by solemn covenant stands ahead of the stockholder and to exclude him from the plan while including the stockholder is a palpable fraud. And so as was observed by Mr. Justice Brewer in Louisville Trust Co. v. Louisville Railway Co., 174 U. S. 674,, *l. c.* 683, "no such proceedings can be rightfully carried to consummation which recognize and preserve any interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation."

What is appropriate to be done in any case must depend upon the facts of that case, but when in any case, the reorganization excludes, as the appellant here insists, any creditor altogether, while admitting stockholders to its benefits, the scheme to that extent is illegal, and the creditor so excluded has a claim against the new company for the full amount of his debt, unless it be shown that assets of the old company to that extent chargeable with his debt, did not exist.

And the bid made by the new company at the foreclosure sale in a friendly and formal proceeding is of no significance in this connection and does not dis-

prove the statement of value made by the issuance of large blocks of fully paid stock, and again as said in the Boyd case, *l. c.* 508, "If the value of the road justified the issuance of the stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purpose of control. In either event it was a right of property, out of which the creditors were entitled to be paid before the stockholders could retain it for any purpose whatever."

III.

The plan of reorganization provided for the payment of the debts of the old companies.

The Court of Appeals decided that the plan of reorganization was not fraudulent in fact, but made provision for payment of the debts of the old companies.

Three principal companies and some subsidiaries were dealt with. The most important of the three was the Gulf, with its line of railroad, extending from Kansas City to Port Arthur. It was financially embarrassed and reorganization was deemed expedient. The Dock Company and the Belt Company must be taken into account, because they owned the terminals used by the Gulf. The reorganization was among other things to be a simplification of the relations between the three companies. It was to result in one company, which directly, or through stock holding, was to own the three, and one set of securities only, bonds and stocks of the new company, were to be issued, the bonds

and stocks of the old companies all to be taken up by the new. Foreclosure of the mortgages of the old companies might or might not be had, and in any event, were mere incidents, since provision was made in advance as to the disposition of the securities of the new company.

In addition to the stocks and bonds the plan took account of the floating debts of the old companies.

These three general interests, bonds, stocks and floating debts were duly provided for.

The bondholders, as such as a class were all to receive in exchange for their bonds, stocks and bonds of the new company. There were three separate interests of the bondholders, those of the three old companies, the Gulf, the Belt and the Dock. The Belt properties, relatively to the bonds and stock outstanding against them, were deemed the most valuable and so the holders were dealt with more liberally than were the holders of Gulf and Dock bonds, but so far as each of the old companies was concerned, its bondholders were dealt with exactly alike. Each got the same alloted ratio of the new securities. There was no sort of discrimination between them on any ground whatever. Individuals as such were not considered at all. The securities of the new company were simply issued in consideration of and in exchange for the bonds of the old. All of the bondholders were satisfied with the arrangement and there is none here to complain.

A like course was pursued with respect to the stock-

holders of the old companies. They got stock of the new company for their stock in the old. The holders of the Belt stock fared better than the holders of stock in the other companies, but again as to each of the old companies there was no discrimination between the holders of the stock. The dealing was not with individuals as such. The stock of the new company was simply issued in consideration of and in exchange for the stock of the old. All the stockholders were satisfied with the arrangement and there is none here to complain.

The floating debts were to be paid. The plan announced in terms that one of the results to be attained by it was "(b) the payment of the floating debt and the existing car trust obligations," (R. 815). And it made provision for this to be done by the new company. It set aside $3,000,000 of new bonds "to be sold for the cash requirements of the new company" (R. 816). And so, too, $3,000,000 of the new stock (preferred), was "to be sold for the necessary cash requirements of the new company" (R. 817).

It was estimated that these securities would yield $3,500,000 in cash and to this was added the $2,400,000 cash paid in by Gulf stockholders, making a fund of $5,900,000 to meet cash requirements.

These requirements were the obligation to pay the debts of the old companies, present working capital and the expenses of reorganization. The estimates as to these were thus stated in detail in the plan. (R. 820-821.)

For payment of car trust and interest adjusted to date of payment, say	$1,900,000.00
For payment of floating debts	475,000.00
For payment of receivers' certificates	800,000.00
For payment first mortgage coupons due April 1, 1899	575,000.00
Working capital and expenses of reorganization	2,150,000.00
Total	$5,900,000.00

Here again, as in the case of the stocks and bonds, the plan dealt with the obligations rather than with the individual holders. The floating debts were to be paid and not any particular creditor.

Had these estimates of the amounts required for the particular purposes specified been accurate, there could remain no doubt that the purpose of the plan was to pay all debts.

The bonds and stocks of the old companies were fixed and known quantities and so the apportionment of securities to these was made with exactness.

As to the indebtedness the estimates were all too low, and payments were actually made as follows:

Car trust certificates	$2,192,580.40
Floating debts	1,164,172.56
Receivers' certificates	821,543.74
First mortgage coupons	891,913.41
Total	$5,070,210.11

The car trusts, receivers' certificates and first mortgage coupons we may presume were all paid. There is no suggestion of any outstanding. And apparently the floating debts, except that to the Trust Company, were all paid, for no creditor came into the Cambria suit, and after ten years of standing invitation to present claims the master reported:

> "So far as this record shows, the only other indebtedness (than that of Cambria) against the Belt Company was on account of the deficiency judgment rendered in favor of the Provident Company, trustees in the Belt Mortgage, that is outside of the claims of the Trust Company against the Belt (R. 664).

The deficiency judgment in practical effect a judgment in favor of the new company against itself, was not within the contemplation of the plan, and the Cambria indebtedness had undoubtedly been taken care of in some way.

In proceeding to pay indebtedness beyond the amount of the estimates, the committee on reorganization were acting in conformity with the plan and not in contravention of it.

The thirteenth paragraph of the agreement provided that "**any obligation in the nature of floating debt or otherwise** against any company or property embraced in said plan, either as proposed or carried out, or any securities held as collateral for any such obligation may be acquired or extinguished or held by the Com-

mittee at such time, in such manner, and upon such terms, as they may deem proper for the purpose of carrying out this agreement, etc, etc" (R. 823).

Another paragraph authorized the Committee "to negotiate with bondholders, creditors and stockholders of said companies, or either or all of them, in devising and carrying out said plan" (Rec., p. 823).

Still further (Rec., p. 824), the depositors, that is, the bondholders and stockholders of the old companies, irrevocably request the committee "to purchase at any time, and at such price as they shall deem proper, or to pay, compromise or settle with the holders of coupon notes, **or other indebtedness**, or car trust **or other obligations** of any of the said companies . . . . **and to apply for that purpose any money received from the sale of stock or obligations of any new company to be formed.**"

The Master himself finds that the plan provided for the payment of the debts and reports:

> "The reorganization plan certainly then provided for the possible payment of floating debts to the extent of, at least $475,000, and out of the proceeds to be derived from the disposition of the securities of the Southern Company, and from the assessment on the Gulf participating stockholders. It is shown in the record that more than one million dollars was paid out on account of floating debts, the particulars of which are hereinafter stated."
>
> "The reorganization plan clearly shows that the

new securities, to be issued by the new company, 'will be disposed of as hereinafter stated' and that 'by this means,' that is, such disposition of the new securities, 'the following results will be attained,' that is, 'the payment of the floating debt and the existing car trust obligations,' thereby clearly meaning that, from the proceeds of the disposition of the new securities, the floating debt and existing car trust obligations were to be paid'' (Rec., p. 821).

IV.

The Estimate Of The Floating Debt Was Not Intended As a Limitation Upon the Amount to Be Paid Under The Plan.

If the estimate as to these classes of indebtedness was designed as a limitation upon the amount to be paid in one class it was so in all the classes, for the terms of the plan were the same as to each, and did not discriminate in any way.

It is somewhat singular that car trusts should be underestimated $292,000, for one would think that the books would show these with exactness, and so as to coupons which were underestimated $317,000. The underestimate however did not qualify the obligation to pay all the car trusts and coupons outstanding and the committee and its successor did not so believe. They paid and paid in full and so as to receivers' certificates.

As to floating debts the discrepancy between the estimates and actual payment was nearly $700,000. It

was natural that it should be greatest here. In this class would be personal injury and other unliquidated claims, and it would be mere conjecture what must be paid on their account. Moreover, the estimate was of the extent of the fund probably required, and many of the liquidated debts were no doubt secured by collateral. The Trust Company had collateral through the use of which it reduced the indebtedness to it from about $500,000 to $360,000. The Cambria Company also had collateral and of the same kind as that held by the Trust Company (Rec., p. 672).

Where a debt was paid by the use of the collateral the estimate would not be drawn upon at all, and if the debt was paid out of the estimate, the release of collateral would replenish the fund to the extent of its value.

The contemporaneous action of the committee construed the plan. They went on regardless of the estimate and paid every claim except that of the Trust Company. And for their action they had explicit authority in the irrevocable request of the bondholders and stockholders to buy, compromise or settle any indebtedness of the companies "and to apply for that purpose any money received from the sale of stock or obligations of any new company to be formed."

If the estimate was a limit, how was it to be applied? Was it to be first come, first served? Or was it at the pleasure of the committee, whether the limit should be observed at all? They were dealing with rights upon

one side and it could not be a matter of caprice upon the other. They had ample funds to meet every obligation. They had funds far beyond the estimate of these particular demands. They had unappropriated to any purpose $582,500 of preferred stock and $438,750 of common. And they had a reserve of $3,802,500 of bonds for future requirements also available for the payment of debts. Nor does it appear that the fund designated for cash requirements of the new company was exhausted. Certainly it was not a sufficient answer to a creditor to say, "we cannot pay you, although we have the money to do so, because we have already paid out all that we thought would be needed to pay our debts."

V.

The provision for the payment of debts is not limited by the interests of the bondholders.

In the reply brief supporting the petition for certiorari, page 6, counsel undertook to limit the scope and effect of the plan in its provisions for paying debts, saying that "the Southern Company and the Reorganization Committee actually paid $1,164,172.56 of the floating debt of all the companies, for the purpose of discharging underlying liens and making the new mortgage a first lien upon all the properties."

This is repeated in various forms at pages 16, 39 and 40 of the main brief. On page 39 of the main brief they quote the master as finding that "the purpose of the appropriation of $475,000 for the payment of float-

ing debt was * * * to make provision for the payment and discharge of such obligations as the committee find necessary to discharge, in order to relieve the properties to be included in the Southern mortgage from any liens claimed thereon or from any interference as a matter of business policy" (Rec., p. 860).

And again at page 40 they say: "It also appears from the findings of the master (Rec., p. 861) that at no time did the committee in making such estimate (of $475,000) contemplate or include therein the indebtedness of the Belt Company to the Trust Company."

But what is thus quoted is not a finding of facts by the master, as a reference to the record will show. It is his statement of what interested witnesses said was their purpose, and said after this controversy had arisen and in the course of the trial of this case. But it is not for them under such circumstances to construe the plan, that is to be done by its own terms and if we go beyond that by what was done by the parties at the time.

And this construction is manifestly absurd. The plan was for the benefit of stockholders more than for that of bondholders. The latter had nothing to lose by strict foreclosure, which if it did not give them their money, would give them the entire property discharged of all claims except such, if any there were, which were underlying liens on the property. The plan was devised to save something for stockholders, who were the very last in right and as to whom all debts, bonded or float-

ing, secured or unsecured, were charges against and virtually liens upon the property. The debts and all of them must be gotten out of the way, paid or settled, before the shareholders could come in for any interest and in recognition of this fact, it was provided in the plan that one of the results to be attained by it, second only to the grand purpose of bringing all the properties "under one corporate ownership, management and control" was "the payment of the floating debt."

VI.

No Exclusion of Creditors Who Were Also Bondholders and Stockholders.

The Trust Company was at the same time, a bondholder, a stockholder and a creditor. If the Trust Company stood alone in that triple relation and it was intended to exclude it as creditor it would have been excluded by name. If there were others in the same category the exclusion would have been by designation of the class. But the Trust Company is not barred by name, nor is any creditor barred by designation of being also a bondholder or stockholder.

The exclusion must then inhere in the very nature of the situation. But what reason is there, when framing a plan of reorganization, which deals with and provides for, bondholders, and all of them as bondholders, stockholders and all of them as stockholders, and creditors, and all of them as creditors, for excepting from any provision of the plan applicable to bondholder,

stockholder or creditor, a person who is at once bondholder, stockholder and creditor? Let the debt be what it may, on account for supplies furnished, money loaned or a judgment recovered because of a personal injury sustained. The very same bonds, the very same stock and the very same debt, held by different persons would be protected by the plan. A person holding stock in the Belt Company would get an equivalent amount of stock in the new company and a person who had lost his leg as a consequence of the Belt Company's negligence would be compensated for the injury, and if the person who lost his leg was also a stockholder, why must he either give up his stock or bear his personal injury without compensation. We see no reason in the nature of the case for imposing such an alternative, and none such is expressed in the plan.

VII.

All Creditors Save the Trust Company Were Paid, and the Trust Company Was Paid in Part.

The conduct of parties under an agreement is cogent evidence of their purpose in making the agreement.

In this case the floating debts save a large balance due to the Trust Company were paid, and payment to the Trust Company was refused in the first instance on the ground that nothing was due and that on the contrary the Trust Company was indebted to the Belt. A refusal upon this ground was no evidence of a purpose not to discharge all just obligations.

The fact however that the floating debts were paid

is challenged and the assertion of the fact is said to be without support in the record.

In the first place, the presumption in the absence of evidence to the contrary is that the floating debts of the constituent companies were paid, as otherwise the payments to the stockholders were fraudulently made.

Secondly, $1,164,172.56 was in fact paid on account of those debts (Rec., p. 860), and the presumption is that there was no arbitrary or capricious refusal to pay any debt believed to be just.

Thirdly, as to the Belt Company, and with that this case and its record are primarily concerned, the evidence shows that in February, 1900, its floating debt was approximately $900,000, of which something like $500,000 was then due to the Trust Company. The Trust Company by sale of collateral reduced the indebtedness to itself to $360,000. This, however, left about $400,000 due to third parties, of which $100,000 was due to the Cambria Company. Here was about $300,000 due to parties other than Cambria or the Trust Company. What was done as to this?

By the first day of April, 1900, the Southern Company had come into full control of the Belt Company, owning then practically all of its bonds and stocks, and it put its own people in control (Rec., p. 592). It also removed the Trust Company as trustee under the Belt mortgage, thus leaving the Provident Company as sole trustee.

On September 6, 1900, the Cambria Company brought

its suit based upon the promissory note of the Belt Company, got judgment upon it the same day and upon the same day filed a creditor's bill against the Belt and the Trust Company in which it alleged that the Trust Company was heavily indebted to the Belt, and besides held valuable collateral belonging to the Belt. This suit was brought by Cambria in its own behalf and as well for the benefit of all other creditors of the Belt similarly situated, etc. (Rec., p. 18).

Of such other creditors there were $300,000 in amount, **unless they had been previously paid.**

For all unpaid creditors then, except the Trust Company, there were now two sources to which they might look for payment, the Southern Company, which was undoubtedly liable, and the Trust Company, which was liable to the extent of its indebtedness, if any, to the Belt.

The invitation of the Cambria Company to creditors to join with it, stood open for ten years, but no one accepted it and on May 21st, 1910, the master reported:

> "The Cambria Steel Company, a judgment creditor of the Belt brought the original bill against defendants for the benefit of all Belt creditors who might wish to join therein. It was an action at law on a promissory note, dated January, 1900, and upon which judgment was afterwards rendered against the Belt Company, and from which it appears that the Cambria Company was a subsequent creditor whose debt had arisen long after the dates of the transactions which are complained of in the

second ancillary bill; and so far as this record shows, the only other indebtedness against the Belt Company was on account of the deficiency judgment rendered in favor of the Provident Company, trustee in the Belt mortgage, that is, outside of the claims of the Trust Company against the Belt'' (Rec., p. 664).

The deficiency judgment referred to was not part of the $300,000 outstanding in February, 1900, for it was not then in existence. What had become of this $300,000? The only inference fairly to be drawn from the facts as reported by the master is that the claims had been bought, paid, settled or compromised as provided in the plan of reorganization.

And now, as to the claim of the Cambria Company, reduced to judgment and on which its creditor's bill was based.

The judgment was obtained by consent. This does not impeach the validity of the original claim, which is indeed conceded on every hand. If the Cambria's bill was a true bill it had a right of recovery against the Trust Company, but only upon that condition. It had an undoubted right of recovery against the Southern Company.

On the day that Cambria filed its bill the trustee in the Belt mortgage filed a bill of foreclosure and on the same day and at the same time receivers were appointed of the Belt properties and injunctions granted against the disposition of Belt collateral by the Trust Company in both cases.

The Belt receivers first filed a cross-bill in the Cambria case, but this was withdrawn or dismissed. By stipulation filed November 20th, 1901, the receivers of the Belt Company and the Belt Company assumed active charge as complainants. On the same day they filed their ancillary bill and it was agreed, the Cambria Company consenting, that on the accounting between the Belt Company and the Trust and without further pleading, judgment should be rendered for the Trust Company and against the Belt Company, or **vice versa**, as the result of the accounting might require. The Cambria reserved the right to subject any judgment against the Trust Company to the payment of its own judgment against the Belt and to the use in its own behalf at the final hearing of any testimony taken in the case (Rec., pp. 890, 891).

Thenceforth the litigation on the complainant's side was conducted by the Belt Company, the instrument of the Southern until February 27, 1905, when the Southern came into the open with its bill of intervention, for the master reports as to this that all costs incurred by the Cambria Steel Company prior to the date of the stipulation had been paid and "from that date the accounting and taking of the testimony has been as between parties other than the Cambria Steel Company, and pursuant to such stipulation. Counsel for the Cambria Steel Company contends that no costs after that date should be taxed to that company" (Rec., p. 889).

The Cambria bill was dismissed as without merit,

but its prayer as to costs was granted (Rec., p. 914), and with this small measure of relief it seemed to be content for it acquiesced in the decree.

And yet, apparently, it had lost a valid claim of $100,000, with ten years' of accumulated interest.

And it had for nearly the entire period, ten years, of the pendency of its suit for the recovery of that claim from the Trust Company, taken no part in the conduct of the accounting upon the result of which its claim as against the Trust Company depended.

And while its claim as against the Trust Company depended upon the result of an accounting that involved from 10,000 to 12,000 items and the taking of 36,000 pages of testimony (Rec., pp. 579, 580) that same indebtedness upon known and admitted facts was a valid claim against the Southern Company.

The Cambria Company undoubtedly was protected by the Southern, not only against the costs of the litigation, but also against the loss of its claim, and so the Court of Appeals well said (Rec., p. 1045), "it is difficult to wink so hard as not to see that the Cambria suit was in reality the suit of the Southern Company."

And, so we repeat that all the floating debts of the Belt Company were paid, as it was intended originally they should be, except that to the Trust Company, and this drawn into controversy originally upon the ground that it was not a meritorious claim, was later resisted upon every ground that could be alleged against it.

Repudiation of the debt to the Trust Company was

an afterthought, a result of the controversy over the amount of that debt, for, as the record shows, the counter demands of the Southern and of the Belt enlarged with the progress of the litigation.

It must be remembered that when the plan of reorganization was pending, the debt of the Belt to the Trust Company was about $500,000 (Rec., p. 755) Under the contention now made by the Southern Company the Trust Company renounced this entire indebtedness. Counsel say, Brief, p. 95, that the Trust Company "in claiming under the plan of reorganization and accepting the benefits which it created for it at the expense of creditors, * * * thereby waived the assertion of its rights as a creditor independent of the plan and in antagonism to it." And yet on October 23, 1900, when the Southern Company had been for seven months in full control of the Belt, and when there was outstanding an injunction against the Trust Company enjoining the sale of any of the Belt collateral the Trust sold some of the collateral and received for it the sum of $110,250 which was credited on the Belt debt (Rec., p. 772). This must have been done by consent and not in violation of the injunction for the transaction is dealt with both in the master's report and in the final decree as a perfectly proper one (Rec., pp. 772 and 905).

Among the collateral held by the Trust Company to secure the payment of its Belt claims was 19,997 shares

of Union Company stock and 4994 shares of Air Line stock. Recognizing the validity of the Trust Company's claim to that extent and that it held these stocks as collateral thereto, the reorganization committee on June 6th, 1900, authorized the Mercantile Trust Company to pay $35,000 for these stocks which was done (Rec., p. 769), and the payment credited on the Belt indebtedness. At this time the Southern Company had been organized, had acquired the stocks and bonds of the Belt Company and had been in full control of that company for more than two months, its own nominees being the directors and officers of the Belt Company.

The master reports that "the primary investors in the Belt property, and who were specially active in putting through the reorganization plan" understood the transactions of the Belt with the Trust Company, **"and there has never been any complaint on the part of any of them as to such transactions"** (Rec., p. 672). The complaints, he says, all arose after the controversy between John W. Gates and others, the culmination of the controversy being the Bierce suit, in which a receiver was appointed for the Trust Company, and the suit by the Cambria. In the course of this litigation the Southern Company filed a bill of intervention on February 27, 1905, and in this alleged that the Trust Company had no right to hold as collateral the Union and Air Line Company stock mentioned above, that it in fact belonged to the Southern Company, having passed to it under the after acquired property clause

of the Belt mortgage at the foreclosure sale, and demanded from the Trust Company an accounting of the stock or its value (Rec., p. 185). And yet the Southern at the time it filed this bill owned this very stock, having nearly five years before bought it from the Trust Company through the reorganization committee, but of this no hint in the bill. This action of the Southern Company is but one of the evidences of its change of position as to its obligations under the reorganization plan and agreement.

VIII.

The Trust Company Entitled to Enforce the Provisions of the Plan as a Contract Made for its Benefit.

The master found that the Trust Company was not entitled to enforce the provisions of the plan for the payment of debts, because:

> "Neither the bondholders, stockholders, nor the Reorganization Committee owed any legal or equitable duty to the Trust Company, unless such duty can be implied in some way from the reorganization plan and agreement. The Trust Company as a creditor was not intended to be, and was not in fact, a party to the reorganization agreements, though it received benefits therefrom in the exchange of its old securities for the new ones of the Southern Company; nor does the evidence in the record show that it ever changed or altered its position in any way on account of said floating debt provisions" (Rec., p. 856).

He invokes the rule, simply one of procedure, that a person who is neither a party nor privy to a contract may not sue to enforce terms which are for his benefit, and cites the case of the Second National Bank v. Grand Lodge, 98 U. S. 123, in which the general rule is declared and applied. But this very case states that "there are confessedly many exceptions" to the rule. And, "one of them, and by far the most frequent one, is the case where under a contract between two persons, assets have come into the promisor's hands or under his control, which in equity belong to a third person. In such a case it is held that a third person may sue in his own name." There is a general review of the cases involving the rule in Johns v. Wilson, 180 U. S. 440, and it is announced that the question of the remedy in such a case was to be decided by the law of the place where the suit was brought," *l. c.* 448. The Missouri Code, section 1729 R. S., of Mo. 1909, provides that, "every action shall be prosecuted in the name of the real party in interest," and from the beginning this provision has been liberally construed.

In Meyer, et al. v. Lowell, 44 Mo. 328, the agreement was between the vendor and purchaser of a stock of goods. It was endorsed on the back of a statement of account and was as follows: "Having purchased the stock of goods of J. W. Horr. * * * I hereby assume the within account of May, Weil & Co. (the plaintiffs), so far as the same may be correct * * * and obligate myself to pay the same, or so much thereof as I may

be bound for in six months from date." The Court held that "the plaintiffs may maintain an action in their own name against the defendant upon the contract sued upon. This result involves no injustice to the defendant, but simply holds him to accountability upon his undertaking, according to its evident purpose and intent."

In the recent case of Beattie Mfg. Co. v. Clark, 208 Mo. 89, *l. c.* 106, the Court says:

> "Whatever the rule may be in other jurisdictions it has been uniformly held by this Court that a contract upon a valid consideration, made between two or more persons for the benefit of a third party, may be enforced by the party for whose benefit it is made, if he adopts it after it is made, though he is not named in the contract or may not have known of it at the time."

The contract here in question was made upon a valid consideration. It was for the acquisition of the railway properties by the Southern Company, the various interests in the property, of bondholders, stockholders and creditors to be paid for by the Southern, the bondholders and stockholders in Southern securities and the creditors in money. As such it was a valid contract, giving to everybody his due, and the entire wrong in the situation results from the refusal of the Southern Company to perform the contract as to the indebtedness of the Belt to the Trust Company.

That the Trust Company was a party to the contract

is beyond question, and is indeed, strenuously insisted upon by the appellant. But the Trust Company is divided into three parts—bondholder, stockholder and general creditor. It signed, so it is said, only as bondholder and stockholder, and so as creditor is not a party and yet construing the contract as excluding creditors, it is contended that the Trust Company as creditor may not enforce its claim, being barred therefrom because it signed the contract as bondholder and stockholder. We do not believe that the Trust Company is thus divisible and with such effect.

The Trust Company, not a fraction of it, signed the agreement and became a party to it, believing with right that it was to be paid thereunder, and payment being denied, sought to enforce it.

In the first pleading filed by it, the answer to the bill of the Cambria Company, it asserted that it was part of the plan of reorganization, "to pay off and discharge all of the floating and other unsecured obligations of all of the old companies," and that securities enough of the Southern Company were sold to accomplish this, but that the Reorganization Committee and the company "have wrongfully withheld said money and have unlawfully and fraudulently refused to apply the same to the purpose for which it was raised, to-wit, to the payment of the floating and unsecured debts and obligations of the Kansas City Suburban Belt Railroad Company, and the other companies * * * amalgamated * * * under said plan of reorganization"

(Rec., p. 40). And in its subsequent pleadings, answers to ancillary bills and petitions of intervention, it asserted and reasserted this obligation of the Southern Company in various forms.

IX.

There Was No Covenant By the Trust Company in the Plan of Reorganization That It Would Not Hold the New Company for Any of the Debts of the Old Ones.

A provision of the plan relied upon by the Southern Company as relieving it from liability for the debts of the old companies is as follows:

> "No right is conferred, nor any trust, liability or obligation (except the agreements herein contained in favor of the holders of certificates of deposit hereunder) is created by this agreement or the plan, or is assumed hereunder, or by or for any new company in favor of any bondholder or any other creditor or any holder of any claims whatsoever against the said companies, nor in favor of any company now existing or to be formed hereafter, whether such claim be based on any bonds, coupons, stocks, securities, lease, guaranty or otherwise, with respect to any security deposited under this agreement or any moneys paid to or received by the committee, or by the depositor hereunder, or with respect to any property acquired by purchase at any foreclosure sale, or with respect to any new certificates to be issued hereunder, or with respect to any other matter or thing" (Rec., p. 823).

What is the meaning of this cryptic paragraph? Appellant says in the main brief that it is a covenant by the Trust Company "that it would not hold the new company for the debts of any of the old ones," page 124. In the brief supporting the petition for certiorari, page 24, it is said to be "a distinct and unequivocal caveat that no claims against the old company could be enforced against the new company." But the words of counsel in which he now frames the covenant and the caveat are not to be found in the paragraph, nor are any other words plainly bearing a like import.

And counsel seems to be of opinion after all that the paragraph is not plain and unequivocal, for he says, page 131, that "it is a new doctrine that before the plan is subject to criticism, it must affirmatively show upon its face that creditors will not be paid." But fair dealing requires if it was the purpose that creditors should not be paid that this purpose should be affirmatively shown upon the face of the plan and not cleverly concealed in a mass of verbiage.

We agree with counsel, page 128, of his brief, that "when there was no legal obligation to pay there could be no legal presumption that payment would be made," but the converse of the proposition is true, that when there is a legal obligation to pay there is a legal presumption that payment will be made."

When the stockholders of the old company transformed themselves into the stockholders of the new and brought over to the new all the properties of the old

there was, without more, a legal obligation to pay all debts of the old companies and a legal presumption that they would be paid. If by the transformation it was intended to repudiate the debts, that intention should be made plainly manifest.

No unsuspicious mind reading the plan as formulated would have read in it any purpose of repudiation. In the forefront of it, blazoned as a result to be attained by it, was "the payment of the floating debt and the existing car trust obligations," and this is followed by the provision of ample means for the payment, and this again by grants of power to the committee iterated and reiterated through three paragraphs to buy, pay, compromise or settle any and every kind of indebtedness.

There is no agreement in this paragraph by anybody to renounce any right he may have, and if there is any renunciation it is the result of assent to a repudiation of obligations contained in the paragraph.

But there is no such repudiation. No right or liability is created by the plan, "except the agreements therein contained in favor of the holders of certificates of deposit thereunder." Only this, and nothing more. No right existing independently of the agreement is disavowed or renounced.

The provision is a very broad one. It is not confined to the Trust Company, indeed, the Trust Company is not mentioned in it, but includes everybody, bondholders, and all other creditors and, whether the claim be

based on bonds, coupons, stocks, securities, lease, guaranty, or otherwise. If it means what counsel say, then it means that the new company proposed to acquire the properties of the old companies under the plan without paying car trust certificates of more than two million dollars, coupons of nearly a million, receivers' certificates of more than eight hundred thousand dollars and other claims of more than a million, which are none of them provided for as held under the certificates of deposit, but are provided for under the floating debt provisions of the plan.

The agreements as to the holders of certificates of deposit relate to the apportionment of the bonds and stocks of the new company between the holders of the bonds and stocks of the old companies, and so if we accept the significance imputed by counsel to this paragraph, we not only ignore, but we eliminate everything else from the plan and agreement. Under his construction the plan becomes this, and nothing more, that the Southern Company will be formed with a certain capitalization of stocks and bonds which in certain ratio will be issued in exchange for the stocks and bonds of the old companies, the title to the physical properties of the old companies then to be secured by foreclosure proceedings in which the new company will be both plaintiff and defendant, with a **caveat**, that no car trusts, no coupons, no floating debt of any kind and not even receivers' certificates will be paid. If this was the plan it was a fradulent one. And the fraud

was a deliberate one, for the fraudulent purpose was but obscurely indicated in an involved and verbose paragraph, while an honest purpose to pay all creditors of the old companies was blazoned in every other paragraph of the plan. It is a peculiar feature of this case that fraud is brought into it, not by accusation, but by confession, and that the purpose of the confession is the accomplishment of the fraud.

If the purpose of the paragraph was to exclude the payment of any valid debt of the old companies, then its purpose was to exclude them all, for it speaks in the most general terms and includes "any bondholder or any other creditor or any holder of any claims whatsoever against the said companies," without qualification as to his participation in the agreement.

Ineffective the bar would be as to creditors who were not bondholders or stockholders. Was it the intent to discriminate against debts held by the bondholders and stockholders? The paragraph contains nothing of a discriminatory nature. If such was its intention, why was any provision made for paying matured coupons, $575,000 estimated therefor and $891,913 actually paid on account of them? The record does not disclose by whom all the coupons were held, but it is a fair presumption that they were held largely by the owners of the bonds of which the coupons were a part. And it does disclose, page 887, that the Trust Company held some coupons and that they were paid by the Reorganization Committee.

Bondholders and stockholders may also have held car trusts and receivers' certificates, and certainly if they did, they were entitled to be paid.

The interpretation now sought to be put upon the plan violates every recognized rule of construction.

It takes one paragraph and construes it into absolute repugnance to every other paragraph of the agreement and to the purpose declared by the agreement itself. The preliminary announcement of the plan and all the provisions as to purchase, payment, settlement and compromise of claims, which mean anything but repudiation and renunciation are eliminated.

The stock interest of the Trust Company in the Belt was relatively small, $76,972 par value, to be paid for in Southern stock. Its valid claims against the Belt amounted to $360,000, to be paid in cash. It did not intend to yield the larger claim to secure the smaller, and those with whom it dealt knew this. "It is a rule of law as well as of ethics, that where the language of a promissor may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was understood by the promissee." Webster v. Ins. Co., 53 Ohio State 558. And in the same case it is said that "if it be left in doubt, in view of the general tenor of the instrument and the relations of the contracting parties, whether given words were used in an enlarged or restricted sense, other things being equal, that construction should be adopted which is most beneficial to the promisee."

And these rules are peculiarly applicable here. The plan dealt not with individuals, but with classes, or rather with things. It offered to the bondholders, and to every one of them, new bonds upon no other condition than that he should surrender his old ones, and to every stockholder it offered in the same unconditional way, new stock for his old, and to the creditor it offered payment. And why should there be any discrimination against the man who was both a bondholder and a general creditor? His right in either relation is as high as that of any other person of his class.

The law of the land enters into every contract as a part of it and the presumption is that parties intend an observance of the law and not a disregard of it, and it is a rule of interpretation that where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted. Hobbs v. McLean, 117 U. S., 567, *l. c.* 576. If this plan was as contended a contract between the bondholders and the stockholders to exclude the creditors it was plainly unlawful. And the construction of the contract which preserves the good faith of the parties will be preferred to that which involves bad faith by one of them. U. S. v. Central Pacific, 118 U. S. 235.

The agreement was framed by the Committee of Reorganization, the forerunner of the Southern Company, and here is pertinent what was said in Noonan v. Bradley, 9 Wall. 394, *l. c.* 407:

"If there were any doubt as to the construction which should be given to the agreement of the intestate, that construction should be adopted which would be more to the advantage of the defendant, upon the general ground that a party who takes an agreement prepared by another, and upon its faith incurs obligations or parts with his property, should have a construction given to the instrument favorable to him; and on the further ground that when an instrument is susceptible of two constructions—the one working injustice and the other consistent with the right of the case—that one should be favored which standeth with the right." (Mayer v. Isaacs, 8 Mees & W. 612).

But it is to be further observed that the Trust Company is not asserting any right created or conferred by the plan, but one that existed before and aside from it, although it is recognized in and confirmed by the plan.

The plan dealt with three classes, bondholders, stockholders and creditors. Bondholders and stockholders must be made parties to the plan, for in the dealing with them, the plan was outside their legal rights. As to the bondholders there was not to be a foreclosure and sale and payment of their bonds out of the proceeds, but a new company was to be formed and they were to exchange their old bonds for bonds of this company. This required their assent and so they were invited to become signatory parties to the plan. The stockholders were not to distribute among themselves such of the assets of the old company as might

be left after paying bondholders and creditors, but were to get stock in the new company and so they were invited in and asked to subscribe to the plan. But the creditors were to get their strict legal due, they were to be paid. And so they were not asked to sign the agreement. It was not at all necessary that they should do so.

If now the Trust Company, which was a bondholder, creditor and stockholder, had first presented its claim as creditor and been paid, or, suing upon it, had recovered judgment, and had then presented its bonds and stock for exchange, it would certainly have been entitled to the same allotment of new bonds and stocks as its fellow-bondholders and stockholders. But the order in which it asserted its rights would not determine the rights themselves. And so if it had sold its stocks and bonds and had not entered into the agreement at all, it could certainly have still enforced its claims on account of the Belt indebtedness and its assignee could have asserted every right which a bondholder and stockholder might have. There was no repugnance in the three relations and so the rights in each, might have been asserted separately by different individuals or together by one and the same person. If the provision under discussion did not create the right nor destroy it, neither could it take away any existing legal remedy upon it.

X.

The Trust Company Not Barred Because Participating in the Plan as Bondholder and Stockholder.

Counsel for the petitioner inquire, "How can it (the Trust Company) approve the transaction (plan of reorganization) sufficiently to receive the benefits therefrom and then disapprove it to the extent necessary to collect its debt? Shall it be permitted to approbate and reprobate at the same time?"

The answer is very simple, the Trust Company approves entirely of a plan which dealt fairly with bondholders, stockholders and creditors and dealt equally with the members of each class. It disapproves the refusal to perform the promise of that plan in its own case as a creditor.

The plan did not create the rights of either bondholders, stockholders or creditors. These existed before the plan was formed and must be respected by the plan. It was determined that there was enough in the properties to satisfy the bondholders, pay the creditors and give something substantial to the stockholders of the old companies and in this view the plan was framed. It proposed bonds of the new company for bonds of the old, payment of the floating debts of the old company and stock of the new company for stock of the old. New bonds were issued to take up all the old bonds, an ample fund was provided to pay the debts, and new stock was issued to take up all the old stock.

The Trust Company was a bondholder, a stockholder and a creditor of the old companies and it approved the plan. It approved the plan as to the bonds and accepted its allotment of new bonds; it approved the plan as to stock and accepted its allotment of stock; and it approved the plan as to floating debts and is ready to accept payment of the debt as provided by the plan.

But the payment of the debt to it is refused and on the ground that the plan was fraudulent. No bondholder, no stockholder and no creditor makes this objection. It is made only by the new company, the Southern, for whose benefit and in whose behalf the plan was made and which is equitably bound to the consummation of the plan. And the objection is made by way of confession and to accomplish the only fraud possible under the plan and that is the failure to consummate it. Let the debt to the Trust Company be paid and the plan will be accomplished and there will have been no fraud. Every bondholder, every stockholder and every general creditor will have been treated precisely as every other bondholder, stockholder and creditor was treated.

This manifestly equitable result is all that is involved in the Trust Company's contention, and in it there can be neither a fraud devised nor a fraud participated in by it. As bondholder it got only what every bondholder got and as bondholder it got no part of the $2,400,000 in cash, the $3,000,000 of bonds and the $3,000,000 of preferred stock set aside specifically

for the payment of creditors, to say nothing of the $3,802,502 of bonds set aside for the future cash requirements of the Company, or the $582,000 of preferred and $438,750 of common stock of the new company issued above all estimated requirements. And as stockholder it got nothing of any of these reserved funds.

Counsel say that "the reorganization plan operated to give the Trust Company as **stockholder** a benefit, a portion of which (and perhaps all) was already its own as a **creditor** of the Belt Company. Why was the Trust Company not compelled to make an election between the acceptance of a benefit (as stockholder) under the instrument, and the retention of its equity (as creditor) already its own, which was attempted to be disposed of in favor of third parties (stockholders) by virtue of the same instrument?"

The vice of this argumentative interrogatory is that it has no basis in fact. The plan did not necessarily imply that the property after satisfying bondholders, was sufficient only to pay creditors, and that therefore anything given to stockholders was taken from creditors. In such a case it might well be that a person who was both stockholder and creditor should take as creditor, for the assets belonged to creditors and to them alone. But the present case is different. Here were three heaps of securities and money, one labelled bondholders, another general creditors, and a third stockholders. And there was enough in each, and no-

body, bondholder, stockholder or creditor says otherwise. Only the Southern Company which provided the three heaps and which would get what may be left in any of them when the demands upon it are satisfied, makes complaint and its complaint is that it never intended one of the heaps for the purpose indicated by its label, that it always meant to keep that heap for itself.

Participation in the plan according to its terms involved no inconsistency and required no election on the part of any one who was alike bondholder, stockholder and general creditor. Between these relations themselves there is no repugnancy. There is no reason of law or morals why the stockholder of a company may not lend it money upon its bonds and also upon its general credit. Did the plan create any repugnancy? Certainly not among the relations themselves. Suppose there had been no case of the same individual being bondholder, stockholder and creditor, would not the plan **carried out according to its terms,** have resulted in the payment of every bondholder, stockholder and creditor, each after his kind? And if there had been refusal to pay, as provided by the plan, any individual of either class, how could that refusal have been justified? He was equitably entitled to share on the same terms with the fellows of his class, and here was the money, or the bonds or the stocks provided for him.

What difference does it make, when we are dealing

with the same plan that one person was alike bondholder, stockholder and creditor? The plan dealt with the liabilities of the old companies and provided assets enough for the new company to take up those liabilities. And it dealt with the holders of these liabilities as classes or groups, viz; bondholders, stockholders and creditors, and not as individuals. No persons were named or otherwise designated. How then could any repugnancy of relation result simply because one person had a place in two classes?

And how easily the repugnancy if it existed could have been removed. The creditor who was also a stockholder could sell his stock or his claim and then both must be paid. It certainly was designed to pay some debts of the old companies, or at least such was the representation. The presumption is that it was intended to pay all of them, because it excluded none and there appeared to be no reason for excluding any. Any person, bondholder, stockholder or creditor, be he but one or be he all of these, reading the plan had the right to assume that he was a beneficiary of the plan in each relation. The wrong of this case is not in making, but in breaking the agreement. But says the petitioner, "whenever the plan or action taken under the plan became fraudulent as to creditors, the duty immediately devolved upon the Trust Company, to elect whether to accept the benefits of the fraudulent scheme, or to retain them if they had been already received." But the scheme was not fraudu-

lent and never became so, the only fraud was in the refusal by the Southern Company to carry out the scheme. And that fraud is attempted only against the Trust Company. There is not an iota of evidence in the record to show that the various provisions of the plan for the payment of debts were mere false pretenses, to be thrown off as soon as they had served the purpose for which they were made. There is not an iota of evidence in the record to show that any creditor, other than the Trust Company was left unpaid. And the presumption is that the Southern Company, save as it may be made to appear otherwise, honestly performed its honest agreement. "The duty to tender back the fruits of an illegal and fraudulent transaction upon the discovery of fraud is an imperative duty, and is an indispensable condition to the maintenance of any action based upon the fraud" say counsel, but under what code of law or ethics is the refusal of a man to pay his debt, an act of fraud by the creditor, requiring atonement by **him**?

Here was a proposal to liquidate three companies, through means of a new company which was to take over all their properties. Of course it must pay for those properties. A direct sale for a monied consideration was out of the question, so a plan of reorganization was devised. Bondholders, creditors and stockholders of the old companies were concerned, with priority of right in the order named. The bondholders and stockholders met and agreed upon a plan. The new

company formed by them was to have a capitalization of $81,000,000 of which $30,000,000 was in bonds. The bonds and stocks of the old companies were to be acquired by exchange for bonds and stocks of the new company. This was really a dealing of the bondholders and stockholders with themselves, sloughing off the old corporate forms and taking on a new. Then the new company, under foreclosure proceedings, was to acquire legal title to the physical properties.

Of the eighty-one million dollars of the bonds and stocks of the new company there was reserved from the distribution among the old bondholders and stockholders

Of bonds	$6,802,500.00
Of preferred stock	3,582,500.00
Of common stock	438,750.00

And to be added to this fund there was $2,400,000 in cash, proceeds of an assessment made by the stockholders of the old Gulf Company. This large reserve of money, bonds and stocks was available for any uses of the new company. It was designated to be used for "the cash requirements of the new company" and for "the future requirements of the new company." Most of it, $3,000,000 of bonds and $3,000,000 of preferred and the $2,400,000 of cash was designated to be used for the cash requirements of the new company, which were specified to be payment of car trusts, payment of floating debts, payment of receivers' certificates, payment of coupon notes and working cap-

ital and expenses of reorganization. The future requirements of the company meant such extensions, betterments and equipments as the business of the company might require, and to this $3,852,500 in bonds was devoted. There remained $582,000 of preferred stock and $438,750 of common not designated for any particular use. All this reserve was available for the payment of the general floating debts, most of it was designated as for that purpose and the Committee and the new company were authorized to use it or its proceeds so far as necessary for that purpose and the payment of these debts was proclaimed as one of the primary purposes of the plan or scheme of reorganization.

The amount of the reserve which it was estimated in the plan, would be required for the payment of debts was, it is true, less than the amount of those debts as that proved to be in carrying out the plan.

But that this estimate was not designated as a limitation of the amount to be paid is made manifest by a number of considerations. No words of limitation were used in this connection. Certainly the intention was to pay all car trusts, receiver's certificates and coupon notes. And yet there was a substantial underestimate as to these. And they are yoked with the other floating debts in every provision of the plan. The lowest estimate made was naturally of the floating debts. The uncertainty was as to these; no one could tell to what extent claims made were valid, and

in many cases collateral was held, the release of which would replenish the fund. In addition to all this, the Committee on Reorganization were expressly authorized to acquire and hold or extinguish "any obligation in the nature of floating debt or otherwise" (Rec., p. 823) and to "purchase, pay, compromise or settle with the holders of coupon notes or other indebtedness, or car trusts or other obligations of any of the said companies * * * and to apply for that purpose any money received from the sale of stock or obligations of any new company to be formed" (Rec., p. 824).

Here was a lifting of the limit and devotion of the entire reserve, nearly eleven millions of bonds and stocks and $2,400,000 of cash to the payment of debts if need be. And the Committee acted accordingly and did buy, pay, compromise or settle all claims except that of the Trust Company.

What was there in this to advise any stockholder that the intention was not to pay all creditors and that therefore as an honest man he could not avail himself of the plan? Certainly some creditors were to be paid, and why not all? What principle of exclusion inhered in the situation or was suggested by the plan? Absolutely none. The plan would not be fair and could not be sustained against attack, if it did not deal alike with the members of each class of liability holders, giving bond for bond, stock for stock, and paying valid claims as provided by the plan.

If from a plan of such comprehensive scope it was

intended to exclude any, the exclusion should have been expressed in unmistakable terms. If it was intended to exclude the Trust Company as such, it should have been named in the plan. But had this been attempted it would have been futile. The Trust Company would have been entitled none the less to payments of its debt and to get its share of stocks and bonds equally with the other bondholders and stockholders. Nothing so palpably unjust and futile as this was attempted and the Trust Company assented to the plan because it could read nothing of the kind therein.

If it was intended to exclude as general creditors all those who were also bondholders and stockholders, it would have been equally futile and unjust. The other bondholders and stockholders, the members of each class got their allotment of bonds and stocks unconditionally, bonds for bonds, and stock for stock and nothing more. The plan must deal equally with every class, and could not impose onerous conditions upon a few which were not imposed upon others in like case.

The Trust Company had no reason for believing that by sharing in the plan as bondholder and stockholder it forfeited its right as creditor. It was not sharing in a plan which despoiled creditors for the benefit of stockholders. Under this plan the equity in the property was not appropriated by the stockholders, except so much of it as remained after constituting an ade-

quate fund for the payment of all debts. So the Trust Company was not bound to elect, any more than other creditors, whether it would assert its claim as bondholder, or stockholder or as creditor.

The plan was an honest one in its terms, and it never became a dishonest one for there never was a change in its terms. Nor did any "action taken under the plan become fraudulent as to creditors," so that "the duty immediately devolved upon the Trust Company to **elect** whether to accept the benefits of the fraudulent scheme, or to **retain** them if they had been already received" as the appellant contends. The wrong in this case is simply the refusal to pay the debt due the Trust Company in accordance with the promise of the plan, and the fraud in this, is the fraud of the Southern Company in which the Trust Company is not an accomplice, but the victim.

We take no refuge behind the technical requirements of the law of estoppel and find it unnecessary to considered the distinction between estoppel and quasi-estoppel. That the plan was fraudulent in the beginning and so plainly so that all who participated were chargeable with knowledge of the fraudulent purpose, or that there was a secret purpose of fraud to be worked out in its execution and that the Trust Company shared in this purpose, is not to be accepted upon the mere confession of the Southern Company, belated, unsupported and thoroughly disproven, when the very purpose of the confession is to accomplish the

purpose that is confessed. When the Trust Company is paid, the plan will have been fully accomplished and no wrong will have been done to any one.

XI.

The Kansas City Southern Railway Company liable as being a consolidation of the Gulf, Belt and Dock Companies.

The Southern Company is liable for the debts of the old companies, the Gulf, Belt and Dock as being in fact a consolidation of them. The Statute of Missouri in force at the time, Section 1059, R. S. of Mo. 1899, is as follows:

> "Any two or more railroad companies in this state, existing under either general or special laws, and owning railroads constructed wholly or in part, which when completed and connected will form in the whole or in the main one continuous line of railroad, are hereby authorized to consolidate in the whole or in the main, and form one company owning and controlling such continuous line of road, with all the powers, rights, privileges and immunities, and subject to all the obligations and liabilities to the state, or otherwise, which belonged to or rested upon either of the companies making such consolidation."
>
> "In order to accomplish such consolidation, the companies interested may enter into contract fixing the terms and conditions thereof, which shall first be ratified and aproved by a majority in interest of all the stock held in each company or road proposing to consolidate, at a meeting of

the stockholders regularly called for the purpose, or by the approval in writing, of the persons or parties holding and representing a majority of such stock. A certified copy of such articles of agreement, with the corporate name to be assumed by the new company, shall be filed with the Secretary of State, when the consolidation shall be considered duly consummated, and a certified copy from the office of the Secretary of State shall be deemed conclusive evidence thereof. The board of directors of the several companies may then proceed to carry out such contract according to its provisions, calling in the certificates of stock then outstanding in the several companies or roads, and issuing certificates of stock in the new consolidated company, under such corporate name as may have been adopted."

"Provided, however, that the foregoing provisions of this section shall not be construed to authorize the consolidation of any railroad companies or roads, except when by such consolidation a continuous line of roads is secured, forming in the whole or in the main in the same general direction; and provided, it shall not be lawful for said roads to consolidate in whole or in part, when by so doing it will deprive the public of the benefit of competition between said roads. And in case any such railroad companies shall consolidate or attempt to consolidate their roads contrary to the provisions of this article, such consolidation shall be void, and any person or party aggrieved, whether stockholder or not, may bring action against them in the Circuit Court of any county through which such road may pass, which Court shall have jurisdiction in the case and

power to restrain by injunction or otherwise. And in case any railroad in this State shall hereafter intersect any such consolidated road, said road or roads shall have the right to run their freight cars without breaking bulk upon said consolidated road, and such consolidated road shall transact the business of said intersecting or connecting road or roads on fair and reasonable terms."

"Before any railroad companies shall consolidate their roads under the provisions of this article, they shall each file with the Secretary of State a resolution accepting the provisions thereof, to be signed by their respective presidents and attested by their respective secretaries, under the seal of their respective companies, which resolution shall have been passed by a majority vote of the stock of each, at a meeting of the stockholders to be called for the purpose of considering the same, sixty days' public notice of the time, place and purpose of such meeting having been given by advertisement in some newspaper printed in the county where the general offices of said company or companies of this State are situated."

As contained in the statutes the section is not divided into paragraphs and we have made the division only for the sake of convenience in the consideration of it.

The first paragraph prescribes the conditions under which consolidation may be made and the effect; the second prescribes how it may be done; the third prescribes conditions under which it may not be done;

and the fourth prescribes a preliminary step in the consolidation proceeding.

The stress of the statute is upon the physical conditions under which consolidation may take place, which are stated both affirmatively and negatively. In the first paragraph it is provided that there may be consolidation of the companies whenever their lines of railroad "when completed and connected will form in the whole or in the main one continuous line of railroad" and in the third paragraph authority is in terms withheld to consolidate under other conditions and it is forbidden to consolidate when so doing "will deprive the public of the benefit of competition between said roads."

This third paragraph also provides that any consolidation "contrary to the provisions of this article * * * shall be void."

The article prescribes the conditions of consolidation and also provides a mode. It is not, as this Court has pointed out in Leavenworth County v. C. R. I. & P. Ry. Co., 134 U. S. 688, well arranged. The fourth paragraph should logically be the second and with what stands as second comprehend all the provisions of the statute respecting the mode of consolidation. We would have then a statement of the conditions under which consolidation might be made and the effect of it, the mode in which it was to be done, the conditions under which it was not authorized, and finally the declaration that a consolidation contrary to the provisions of the article should be void.

In the case just cited, the terms of the fourth paragraph of the section, providing that before any railroad companies consolidate their roads they shall file resolutions accepting the provisions of the article, had not been complied with and it was contended that as a consequence the attempted consolidation was void, and that the liabilities incident to consolidation had not been assumed, but Justice Blatchford, speaking for the Court, *l. c.* 698, said:

> "It will be observed that this is the last provision in the statute, though the thing ordered to be done is one of the first steps required in the process. It is also a provision which may well be held to be directory, and designed to secure evidence that each of the companies intending to consolidate recognize the statute as the sole authority for such consolidation, and their obligation to be governed by its provisions. If the other essential provisions of the Act were complied with, it does not necessarily follow that the whole proceeding would be void for failure to comply with this direction of the Act. It is argued, however, that by the express language of the statute it is declared that, 'in case any such railroad companies shall consolidate or attempt to consolidate their roads contrary to the provisions of this Act, such consolidation shall be void, and any person or party aggrieved, whether stockholders or not, may bring action against them in the Circuit Court of any county through which such road may pass, which Court shall have jurisdiction in the case and power to restrain by injunction or otherwise.'

This sentence does not come after but before the provision concerning the resolution accepting the law under which consolidation is made. In the orderly succession of ideas, this concerning the accepting the provisions of the statute was not in the mind of the draftsman when the provision making the consolidation void was penned. On the other hand, the limitation that the companies which are authorized to consolidate are only those whose roads when united 'will form in whole or in the main one continuous line of railroad,' and that this authority 'shall not be construed to authorize the consolidation of any railroad companies or roads, except when by such consolidation a continuous line of road is secured, running in the whole or in the main in the same general direction,' and 'it shall not be lawful for said roads to consolidate in the whole or in part, when by doing so it will deprive the public of the benefit of competition between said roads,' immediately precedes the declaration that any attempt to consolidate contrary to the provisions of this Act shall be void. It is the consolidation of such roads as do not form when so consolidated one continuous line, but may be made up of parallel and competing lines, which is forbidden and declared to be void. The language of the remedy prescribed by the statutes indicates that it is for the violation of this principle that it is given. The Court of the county in which the road lies or through which it passes, not that where the company has its organization or offices, shall have jurisdiction, and the remedy shall be to restrain the company by injunction or otherwise. It is the continuity or par-

allelism of the roads, the benefit of competition by roads between the same points, which is to be secured. And it is clear that the Legislature was not so much interested about the companies and their amalgamation into one company as they were that rival roads and competing roads should not be consolidated and brought under the same control. I doubt very much whether the Legislature intended to declare that even for a violation of this principle, much less of any of the other mere details of the mode of accomplishing this consolidation, it should be absolutely void, void *ab initio*, void anywhere and under all circumstances, but only, as the word 'void' is so often used in legislation and in written agreements, that it should be voidable: that if on investigation the roads were of that character which the statute forbids to be consolidated, the proper Court could so declare and annul and avoid the consolidation."

In the present case the conditions under which consolidation is not only permitted but viewed with manifest favor, all existed. There was a main line and two terminals. They had been operated in conjunction although under separate corporate control. The main line company was insolvent. Stockholders of the three companies and the bondholders as well, desired to unite the three lines and make one of them under one management and one ownership, in other words, consolidate the roads and the companies and to do this, they got together through a committee, and made an agreement, the performance of which accomplished the consolidation of the roads and the companies. The agreement in terms provided:

"That it was 'Necessary for the protection of the interest of the holders of the stocks and bonds' of said companies that they should be 'by means of consolidation or stock control, or in some way, united and legally placed under the practical management, direction and control of one corporate organization, with, if possible, but one class of encumbrance secured upon the whole system and one set of shareholders' " (Rec., p. 821)

A further provision of the agreement was:

"It shall be the special duty of said Committee which they are hereby fully authorized and empowered to perform, to prepare and adopt a plan for the reorganization of the Kansas City, Pittsburg & Gulf Railroad Company, and its property, and also, if necessary, for the reorganization of the Kansas City Suburban Belt Railroad Company, and the Port Arthur Channel & Dock Company and their properties, and for the consolidation of said corporations, if such consolidation can be lawfully made and is found to be practicable, either with or without foreclosure of either or all of said properties, or by means of the acquisition of the stock or other securities, of either or all of said corporations, or in any other manner that may be deemed by said Committee to be most practicable and feasible; and said Committee are authorized to negotiate with bondholders, creditors and stockholders of said companies, or either or all of them, in devising and carrying out said plan, etc." (Rec., p. 823).

The consolidation could lawfully be made, for the requisite physical conditions existed, and it was to be

made in any way deemed by the Committee to be most practicable. Method was of no concern to them, but results were wanted.

And they got the results, and the very results intended by the statute, the unification of the three connecting lines of railroad and one company, and that a new corporation "owning and controlling such continuous line of road, with all the powers, rights, privileges and immunities, and subject to all the obligations and liabilities to the state, **or otherwise**, which belonged to or rested upon either of the companies making such consolidation."

The Supreme Court of Missouri in State ex rel. v. Lesueur, 145 Mo. 322, *l. c.* 328, said:

> "We are of the opinion that the consolidation, when completed in the manner provided, does create a new corporation just as effectually as any other mode allowed by our laws. It will be observed that new stock in a new company issues in lieu of stock in the old companies and a new corporate name is assumed. The new corporation owns all the property, whereas the companies only owned each its own part. The circumstance that the new company remains liable for all the contracts of the old companies does not militate against our conclusion that the statute creates a new corporation but is entirely consistent therewith. By the consolidation the old companies are dissolved and a new corporation formed."

So in the present case we had as a result of the consolidation a new company which assumed a new name

and stock in this new company was issued in lieu of stock in the old companies, and the new company owned all of the property of which the old companies each owned a part.

As to the old companies the Court said in Evans v. Interstate Rapid Transit Ry. Co., 106 Mo. 594, *l. c.* 601:

> "Ordinarily the effect of a consolidation of two or more companies into one is a dissolution of all of them and the creation of a new cmpany. But legal proceedings properly commenced against a corporation are not affected by the expiration of the charter before the determination of such proceedings. Lindell v. Benton & Kennerly, 6 Mo. 361. So where one corporation is consolidated with another while a suit is pending against it, the suit does not abate."

The old companies continue in a perfunctory state of existence for purposes related to the past, but they are dead to the future. A suit against one of the old companies may be continued into judgment or the plaintiff may proceed against the new company. Wells v. Electric Co., 108 Mo. App. 607.

That what was done in this case was a virtual consolidation under the statute results from the fact that it could lawfully be done only under the conditions prescribed and for the purposes designed by the statute. The only authority for what was done is Section 1059 of the Missouri Statutes. One company cannot issue its stock for the entire capital stock of another com-

pany except as a means of consolidation under the conditions prescribed by the statute. It can absorb another company in that way, or in any other, only when the result will be a connected and continuous line of railroad. There was here no sale of the roads by the old companies to the new.

In Barrie v. United Railways Co., 138 Mo. App. 557, the Transit Company was a lessee of the Railways Company. It surrendered its lease and all its property to the United Railways Company, without however making provision for the payment of its liabilities incurred on account of personal injuries, while shareholders of the Transit Company received two shares of Railway stock for each five shares of Transit held by them. There was a very considerable holding in common of the shares of the two companies and the directories were practically identical. The Court held that the transaction under the circumstances was in no sense a sale. It said, *l. c.* 656:

> "Tested then, by universally accepted definitions of the essentials of a sale, this transaction was in no sense a sale. There were not two parties to the transaction. The agent was on both sides of the deal, if it had two sides. There was no meeting of two minds; there was but one mind, one body, a common directorate, controlling, carrying out, even originating the whole transaction; there was no buyer, no seller. All there was in this transaction was the abandonment of the use, of the control, management and possession of the

property by the very same parties under one name, and the taking over of it by the same parties in another name. That is no 'bargain and sale' and does not place the taker in the position of a purchaser."

The facts of the present case are much stronger against the suggestion of bargain and sale. The entire transaction from beginning to end was conducted by the shareholders and bondholders of the old companies with themselves. The only negotiation was between these bondholders and shareholders to determine their respective shares and interests in the deal. This being settled, the Committee representing them, did everything. They organized the new company and issued its bonds and shares to the old bondholders and shareholders, who became *eo instanti* the bondholders and shareholders of the new company. The parties simply, and literally, traded with themselves old bonds and old shares for new. The old companies got nothing. Their bondholders and stockholders got the entire consideration that should have gone to the old companies had the transaction been one of bargain and sale between the old companies and the new. The foreclosure sales which followed were the merest formalities. The new company held the bonds of the old companies and it held their stock, and there was nothing adverse in the foreclosure proceeding. At the end of it all the new company had all the properties and the old companies had nothing. But

the shareholders of the old company were now the shareholders of the new and not by bargain or sale, but by mere transformation.

The transaction being a virtual consolidation the legal consequences follow. Dealing with this phase of the matter the Court in Barrie v. United Railways, *supra*, said, *l. c.* 649:

> "Nor was the transaction under the tripartite agreement intended to assume the form of a consolidation of the two companies. The statute, R. S. 1899, Sec. 1059, expressly provides that on a consolidation of two or more railroad companies, the consolidated body assumes and becomes liable for all of the obligations of each of the constitutive corporations. This general liability which the statute cast on the act of the consolidation was to be avoided, if possible. Our courts have invariably enforced this liability where a consolidation has been effected. They have even treated an act as in law a consolidation, where consolidation was not formally made. Thus a lease by one railroad to another of all its property, for a term of 99 years was held, in Black v. Railroad, 110 Mo. App. 198, to be practically and in law a consolidation and merger of the two companies, its effect being to subject the two roads so consolidated to the liabilities of each.
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> "In Manny v. National Surety Co., 103 Mo. App. 716, this Court held that where one company had absorbed all the assets and assumed all the liabilities of another, the act was to be treated as a con-

solidation, and the absorbing company held liable on a bond given by the one absorbed. In this Manny case, however, there was an express assumption of all liabilities by contract."

A number of Missouri adjudications are cited by the Court to sustain its view. The Barrie case was decided by the Court of Appeals, not the Court of last resort in Missouri, but it has the sanction of our highest tribunal, for in Johnson v. United Railways Company, 247 Mo. 326, where the same transactions were involved, the Court put the question, "Was Barrie v. Railroad Co., 138 Mo. App. 557, well ruled"? and answered, "We hold it was and adopt the opinion in that case, its statement of fact, its conclusions of law and its reasoning bodily as our own."

In Illinois there was a statute authorizing the consolidation of connecting companies and another authorizing one company to purchase the road of another provided the lines were not competing. In the case of C. S. F. & C. Ry. Co. v. Ashling, 160 Ill. 373, the question was whether the transaction involved was a consolidation or a sale. The notices of intended action and the proceedings of the corporation were more in conformity with the statute providing for purchase and sale than with that providing for consolidation. But the Court said, page 380, "We must look to the results accomplished rather than to means, steps or procedure by which those results have been attained." In fact the St. Louis Company conveyed its property

by deed to the Santa Fe Company in consideration of one dollar paid to the St. Louis Company and the assumption by the Santa Fe Company's of the St. Louis Company's bonded debt and the issuance by the Santa Fe Company of its stock dollar for dollar to the shareholders of the St. Louis Company in exchange for their stock. The Court said, *l. c.* 380:

> "The resolutions and deed of conveyance provided that, in addition to the consideration of one dollar, to be paid by the Santa Fe Company, and the assumption and payment of the bonded indebtedness of the St. Louis Company, the Santa Fe Company should issue its stock to the stockholders of the St. Louis Company, dollar for dollar, in exchange for their stock in the latter company. The effect of this part of the transaction was to incorporate in the Santa Fe Company the stockholders of the St. Louis Company, combining all the stockholders of each company in one. This was an act of consolidation, and not by any means necessary to a mere purchase and sale. If the transaction could be distinguished from a consolidation as a mere purchase and sale, to be regarded as a fair one (and it should be so regarded for the purpose of the argument), the St. Louis Company itself, and not its individual stockholders, should have received all the consideration for the property conveyed, so that it would have the equivalent of the property sold with which to meet the obligations and liabilities which it had created or incurred. True, this is not a creditors' bill to reach assets improperly diverted, or to set

aside an alleged fraudulent sale, and no question is raised as to the good faith of the transaction, but we must consider all the elements of the transaction in order to determine whether there was a consolidation or not. By the transaction, the St. Louis Company was left without property, corporate rights, or franchises of any kind, and without stockholders. All of these were transferred bodily to the Santa Fe Company, and became united, respectively, with the property, rights, franchises, and stockholders of the latter company. Why was this not a consolidation of the St. Louis Company with the Santa Fe Company? There is no magic in words. Merely calling the transaction a purchase and sale would not prevent it from being a consolidation. It cannot be supposed, from the nature of this transaction, that it was expected that the St. Louis Company should continue its active corporate existence after divesting itself of all its property, corporate rights and franchises, and stockholders."

In Shadford v. Detroit, Etc., Ry. Co., 130 Mich. 300, a street railway company was organized to acquire the business and property of all other street railway companies and this was accomplished by issuing the stocks and bonds of the new company to the stockholders and bondholders of the old companies in exchange for their old stocks and bonds, the old companies getting nothing for their properties. This it was held was a consolidation and not a sale even though the statutes did not authorize a consolidation. The Court said:

"It is urged that the acts under which these companies were organized do not authorize a consolidation, and therefore any attempted consolidation would be illegal and void. In this case the conclusion applied to this proposition is that the defendant is not in position to raise the question if there was **in fact** a consolidation between the Ann Arbor Street Railway Company and Ann Arbor & Ypsilanti Street Railway Company, and the Ann Arbor & Ypsilanti Electric Railway Co., and between the last company and the defendant the latter cannot deny its liabilities. * * * The legality of its **organization cannot be attacked collaterally in suits by and against it, based upon dealings with it.** * * * So long as the State chooses to recognize its validity by keeping silence, it is a corporation *de facto*, although not *de jure*, and liable the same as any other corporation in its dealings with others. * * * Did the transaction between these companies constitute **consolidations or sales?** * * * The **stockholders**, managers and directors of the old companies were the parties **who created and organized** the Electric Company and who **transferred all the stock to the new company**. The directors of the two old companies all become stockholders in the new, and most of them, as well, bondholders. The Electric Company paid not a dollar to the other companies as compensation for the transfers of all the properties to it. **The arrangement left the two old companies without assets and without business.** They were virtually out of existence by the arrangement. * * * Under defendant's contention their cred-

itors had no remedy except by suit in equity to compel the stockholders to pay assessments to the full value of their stock, or to reach the stock and bonds of the Electric Company which had been received by the stockholders of the old companies upon the theory that they were assets of those companies. * * * We think that **the law will not permit such a transaction upon the theory of a sale.** * * * The law will not permit the creditors of two corporations to be deprived of the assets of such corporation in payment of their debts and turn them over to suits in equity against the stockholders when the union or consolidation of another corporation is effected without the passage of a dollar or other valuable consideration between the corporations themselves."

As there was not in the case at bar a sale by the old companies of their railroads to the new company, there was a merger or consolidation, through which the new company acquired the properties of the old, the stockholders of the old companies reserving to themselves all their interests and becoming in due proportion stockholders of the new corporation, and the legality of this consolidation may not be denied by the corporation which owes to it its existence and has derived from it all its property and powers and neither may it disclaim the consequences which the statute authorizing the consolidation imposes upon it, which are that along with "all the powers, rights, privileges and immunities" of the old companies it must accept "all

the obligations and liabilities to the State or otherwise" which rested upon either of them.

XII.

Suggested Equitable Terms of Recovery.

The Southern Company delayed the Trust Company in the establishment of its claim for ten years by what we have the warrant of the Court of Appeals for characterizing as vexatious and harassing litigation. Nor did it stop with that. Appeals to the Circuit Court of Appeals and appeals from that Court have added five years more to the delay. During all these fifteen years there has never been the proffer of a dollar, but always a denial and contest of any liability whatsoever. And now, if at the end of the litigation, the liability is confirmed by the Court of last resort, the Court is asked not to enforce payment, but to make adjustment and "prescribe such equitable terms as should have been offered at the time of the reorganization if the Trust Company's claim had been liquidated." The accumulation of interest during the delay has doubled the amount that is due, and this makes it more inconvenient than ever to do complete justice. So it is proposed to eliminate the interest which the law allows to a delayed creditor and substitute for it something in the nature of discount to the reluctant debtor. The concrete suggestion is that the Trust Company shall be paid the face of its claim in preferred stock of the Southern Company at par as of the date of the re-

organization. This with the dividends paid and interest on the dividends would come to three hundred thousand dollars or more dependent upon the time chosen for ascertaining the market value of the stock, but in any case the amount suggested is less than half of what is due.

But the plan of reorganization did not liquidate the debts in preferred stock. It paid them in cash. Every other creditor was so paid and paid at the time. And the Trust Company is entitled to be so paid.

Moreover, the shareholders of the Belt Company received for their shares one-fourth of the par in preferred stock and three-fourths in common and every creditor was entitled to priority as against them. But aside from this, there was an ample reserve fund at the time of the reorganization to pay all creditors in full and upon that reserve the Trust Company relied to be paid as all other creditors were paid.

It is not a principle of chancery jurisprudence that wilful delay is tantamount to partial performance, and that the rights of the Trust Company have been denied and contested for fifteen years, is not an equitable reason for limiting its redress to less than half its just measure.

XIII.

The Lands of the Central Improvement Company did not pass under the after-acquired property clause of the Belt mortgage.

The Central Improvement Company was a corporation with an authorized capital stock of $200,000, di-

vided into 2,000 shares. Of this 1,407 shares were issued and outstanding, and of this 1,120 shares which had belonged to the Belt Company were in July, 1899, pledged by the Belt Company to the Trust Company as collateral security for the Belt's debts. The property of the Central Improvement Company consisted entirely of land. The final decree of the Circuit Court was that the shares of stock pledged by the Belt Company to the Trust Company should be by the Trust Company subjected to the payment of the Belt's debt; but the decree also provided that all of the property of the Central Company now held by it should be conveyed to the Southern Company. Thus the kernel of the nut was awarded to the Southern Company and the shell was awarded to the Trust Company.

The Central Company was organized for the purpose of holding lands which were acquired in connection with the railroad enterprise but which were not intended by the companies to come under the mortgages of the defendant railroads. These were lands either bought or leased for the purpose of erecting for the railroads or for some vendee, industrial plants with the view to increasing the traffic of the roads; or lands acquired for the use of terminal yards for switching, in view of both present and future necessity, or lands purchased in part for providing the right-of-way where the entire tract was bought for about the same price as the right-of-way would cost, and after carving out the right-of-way the surplus was conveyed to and held by the Central Improvement Company.

Some lands of this character had been acquired by a predecessor of the Central Company known as the State Realty Company which sold them to the Central Company at their actual cost, and the stock of the State Realty Company (which was held by the railroads) was exchanged for stock in the Central Improvement Company. Thereafter the Central Company made the purchases and acquired the lands itself. In the case of each particular tract of land, the custom of conducting the business was that the Central Company would make requisition on the railroad company adjacent to the land thus to be acquired, for the necessary funds to pay for the land to be purchased, and this railroad company would then issue to the Central Company its voucher to cover the price and the expenses incident to the purchase. The Central Company would then issue to this railroad company its stock in an amount of even hundreds of dollars of par value closest to the sum thus advanced by the railroad company, and to make that amount even, in hundreds of dollars of par value, either the Central Company would issue its voucher for the remainder in excess of the even hundred of dollars or would issue to the railroad company stock up to the necessary hundred of dollars and collect from it the difference between the amount of stock so issued and the additional amount paid in by the company on the purchase in question.

Taxes, insurance and other fixed charges accruing

after the time the land was taken by the Central Company were paid out of the funds in the Central Company's treasury and charged to profit and loss. The financial resources of the Central Company were derived from the moneys contributed by the railroads to purchase the land, and also derived from the rents and sales of buildings on the property purchased by it. This income was disbursed for general purposes and applied to the payment of expenses of all the real estate without any discrimination whatever; that is to say, rents received from the property originally purchased with funds of the Belt would be applied to the payment of taxes or other expenses on the property acquired by the funds of the Pittsburg & Gulf Company, and vice versa. The Central Improvement Company also borrowed money on one tract of the land securing it by mortgage. Upon its maturity this mortgage was purchased by the Southern Company and is now held by it and stands unreleased on record.

Upon all of these facts, it was and is contended by the receiver of the Central Company and by the Trust Company for him, that the lands of the Central Improvement Company did not fall within the terms of the after-acquired property clause of the Belt mortgage, and that the decree of the Circuit Court was erroneous in directing the conveyance of these lands to the Southern Company.

The facts of this case are almost identical with the Wabash Elevator case, Humphreys v. McKissock, 140

U. S. 304. The Wabash, with other roads, subscribed to the capital stock of the elevator company which, with the proceeds of the stock subscribed, constructed an elevator near the tracks of the various roads for the sole purpose of handling grain to be transported over the roads. In a contest between the receivers of the Wabash, appointed generally, and a receiver of the Wabash property described in the foreclosure proceeding, it was contended that the Wabash Company possessed a separate interest in the property of the elevator corporation, but this Court held that the elevator company was of independent existence and the railroad company had no personal interest in the elevator company's property which it could mortgage and that the railroad company was a mere stockholder in the elevator company. The Master seeks to distinguish between that case and the one at bar on the ground that the record in the present case shows that the specific properties desired by each road were paid for by each company, while in the Wabash case there were undivided interests. But such a distinction is not authorized by the decision in the elevator case and is furthermore in conflict with the fact found by the Master that in the conduct of the affairs of the Central Company after the purchase of its different lands the expense of maintenance was paid out of the treasury of the company and that the income of the company derived from rents and sales of the property went into the common treasury and was disbursed for different

purposes and applied to the expense of all the real estate without discrimination.

Furthermore, by the great weight of authority it is competent for a railroad company to purchase lands and hold them free of the lien of the after-acquired purchase clause of the mortgage when they are purchased under the circumstances and for the purpose and with the intention which prevailed in the present case. Pardee v. Aldridge, 189 U. S. 429; Smith v. McCullough, 104 U. S. 25; Railroad v. Coffin, 50 Conn. 150; Densmore v. Railroad, 12 Wis. 649.

The facts that the Belt never made claim to the Central properties, although the first of them was bought in 1895; that neither the Southern Company nor the Reorganization Committee made claim to these properties until February 27, 1905, when the intervening petition was filed; that the Southern Company bought and holds, so far as the record discloses, a mortgage executed by the Central Company conveying one of the properties in question—all point to the conclusion, which the Court should have drawn upon the facts found by the Master, that the Southern Company was barred by its laches and especially by its acts from the assertion that the properties of the Central Company were included within the lien of the after-acquired property clause of the Southern's mortgages.

XIV.

Even though the exception to the Master's report did not formally and directly challenge the correctness of his finding, which was one of law, that the Southern Company was not liable for the indebtedness of the Belt Company, none the less in the circumstances of the case it was competent and proper to consider and determine the question upon its merits.

The exceptions to the report of the Master finding the Southern Company not liable for the indebtedness of the Belt were framed in the view that there should have been no finding upon that issue, because,

a. The Master found that the intervening petition of the Southern Company was not maintainable by reason of laches.

b. The finding was unnecessary to the determination of the case upon the facts found by him and so the incorporation of the finding in the decree would be unnecessary and immaterial.

c. No relief was asked against the Southern Company and the other defenses of the Trust Company to the petition of intervention had been found to be valid.

d. In the injunction proceeding of the Southern Company against the Trust Company to enjoin the suits at law in the State courts, the Circuit Court of Appeals had decided that the personal liability of the Southern Company was not in issue in this suit, saying: "The liabiilty of the Southern Company to pay the debts which the Trust Company alleges in the ac-

tion at law it has promised to pay, is not in issue and cannot be determined in the suit in equity, and the State court has no jurisdiction over and cannot interfere in those actions in personam with the specific property which is the subject of litigation in the Federal Court " (171 Fed., *l. c.* 50).

e. Under the law and the evidence as reported by the Master, requiring the dismissal of the original Cambria bill, the Southern Company was not entitled to relief under its intervening petition and that petition should have been dismissed (Rec., p. 894).

Counsel for the Trust Company were evidently of opinion that the question of the personal liability of the Southern Company for the Belt debts was not involved in the litigation inaugurated by the Cambria Company.

The bill of the Cambria Company, the ancillary bills of the Belt Company and its receivers, and the intervening petitions of the Southern Company, denied any indebtedness on the part of the Belt to the Trust Company, asserted on the other hand a large indebtedness on the part of the Trust Company to the Belt and sought as a remedy a judgment in behalf of the Belt against the Trust Company and a release by the Trust Company of the Belt collateral.

As against this the Trust Company asserted its claims against the Belt Company and its right to the Belt collateral and as a remedy sought a judgment against the Belt Company and a dismissal of the injunctions which forbade its sale of the collateral. It

did allege the personal liability of the Southern Company, but not as a ground of affirmative relief.

For affirmative relief it had brought its suits in the State courts. By supplemental bill in the Circuit Court the Southern Company enjoined the suits in the State courts. In this proceeding the Southern Company insisted that the issues presented by the Trust Company in the State court cases were involved in the present, the Cambria suit, the contention and the argument upon it being thus stated by the Court of Appeals:

> "That the indebtedness of the Belt Company to the Trust Company, and the cancellation of the notes which evidence a part of that alleged debt which the Trust Company claims was assumed by the Southern Company, are at issue, and will be ultimately determined upon the accounting in the equity suit, and they argue that if those issues should be determined against the Trust Company in that suit there would be no basis for the alleged assumption of a debt of the Belt Company by the Southern Company, or for any judgments against them."
>
> (Guardian Trust Co. v. K. C. Southern Ry. Co., 171 Fed. Rep *l. c.* 46.)

And to this the Court answered (*l. c.* 50):

> "The liability of the Southern Company to pay the debts which the Trust Company alleges in the actions at law it has promised to pay, is not in issue and cannot be determined in the suit in

> equity, and the state court has no jurisdiction over and cannot interfere in those actions in personam with the specific property which is the subject of litigation in the federal court."

Counsel for the Trust Company thought this settled the matter and framed the exception to the Master's finding accordingly.

It is obvious, however that the Trust Company did not yield its contention as to the Southern Company's liability. Counsel had asserted it elaborately in all their answers in the Federal Court and by the suits in the State Court. Had they intended to acquiesce in the Master's findings they would not have excepted at all. But they did except and very elaborately but upon what the Circuit Court of Appeals later determined was too narrow a ground.

When the pending suit came before the Court of Appeals, counsel for the Southern Company, arguing that the exception was insufficient and that the Trust Company should therefore be turned away without redress, said:

> "The decision of the question of the Southern Company's liability for the debts of the Belt Company was necessary to a disposition of the case. The defense pleaded by the Trust Company to the effect that the Southern Company had assumed or become liable for the indebtedness of the Belt Company was, if true, a perfect answer to the intervening petition. It said in substance to the Southern Company—'Even though you

may have the legal or equitable title to the collateral securities or to the properties represented by them, yet they were pledged by the Belt Company to secure its indebtedness, you assumed and agreed to pay that indebtedness and a court of equity will not award you possession of the securities until you discharge your own obligation. Any relief to you must be conditioned upon your payment of the Belt Company's indebtedness' " (201 Fed. Rep. *l. c.* 817).

As to the formal insufficiency of the exception the Court agreed with counsel and said with respect to their opinion in the injunction suit:

"This contention that if the Southern Company had become liable for the indebtedness of the Belt Company to the Trust Company that was a perfect defense to the intervening petition of the Southern Company is sound and unanswerable, and after a careful review of the record in this case this court holds, and it decides, that the issue whether or not the Southern Company was indebted to the Trust Company for the debt of the Belt Company to the Trust Company was a material and decisive issue between the Trust Company and the Southern Company in this case which it was the duty of the Master and the Court below to consider and decide. The remarks of this Court in **Guardian Trust Co. v. Kansas City Southern Ry. Co.**, 171 Fed. 43, 96 C. C. A. 285 that 'The liability of the Southern Company to pay the debts which the Trust Company alleges in the actions at law it has promised to pay is

not an issue and cannot be determined in this suit in equity,' upon which counsel rely, must be construed, as must all opinions of the Courts, in the light of the facts and the issues then in hand. The issue before the Court in that case was whether the causes of action in the State Court were so identical with the cause of action theretofore pending in the Court below that an injunction should be issued to stay the prosecution of the actions in the State Court. This Court held that the suit in the Circuit Court was in equity, that it related to the title and ownership and the right to a conveyance of certain specific property, while the actions at law brought by the Trust Company against the Southern Company in the State Court where purely **in personam** to recover the alleged debts of the Southern Company, that in the suit in equity the same relief was not sought as in the actions at law and that the prosecutions of the actions at law in the State Court constituted no interference with the suit in the Court below. There was nothing in the decision in that case in conflict with the conclusion which has now been reached'' (201 Fed. Rep. *l. c.* 818).

The Court did not agree, however, that for a technical inaccuracy of this sort, the Trust Company was to lose its case altogether, if it was a just one and that appeared as matter of law upon the face of the Master's report. There was an exception to the finding and there could be no question but that counsel deemed the finding to be contrary to the right of the case.

A question is raised as to how the reference to the master was made, appellant insisting that the Court of Appeals was in error in saying that upon the issues before it the reference had been made by the Court upon its own motion. Brief, p. 185. On p. 183 it is said that "there is nothing in the record to indicate that the issues made" on the first intervening petition were referred to the master, and on p. 185 that there was no reference made on the filing of the ancillary bill of the Belt Company and its receivers.

All this is in direct contravention of the record. The statement of the Court of Appeals is not "wholly erroneous," but entirely correct. After the ancillary bill had been filed and answered and some exceptions to the answer had been sustained it was ordered by the Court that "the cause shall stand referred to Shannon C. Douglas as special master to take the proofs and report the same, with his conclusion thereon to this Court, in connection with the issues in the original cause herein, and matters heretofore referred to him in the original suit herein, at the earliest practical date" (Rec., 161).

This referred the entire case and it was done by the Court upon its motion.

In the order granting leave to the Southern Company to file its petition of intervention and providing for answer thereto, the Court further ordered "that the issues so made shall stand referred to Honorable Shannon C. Douglas, Special Master, to take

the testimony thereon and make report with all convenient speed" (Rec., 166).

And again when leave was given to the Belt Company and its receivers to file the amended and supplemental ancillary bill of complaint the Court on its own motion ordered that it "stand referred to, etc., etc.," (Rec., p. 266).

The only consent to a reference was on the filing of the amended intervening petition of the Southern Company, (Rec., 267), and as to this the Court of Appeals said correctly that "the stipulation that the new issue made by the amended intervening petition should be referred to the Master was a stipulation made with reference to that issue; that issue was decided by the master in favor of the Trust Company, and is not before us for review" (201 Fed. Rep. 825).

So the Trust Company is not limited in its right of review by any consent given to the reference to the master.

But even if the reference had been by consent, the findings of the Master as to matters of law were subject to review even though the exceptions to them were defective in form.

An exception is not the source of a right. The purpose of exception is to promote the convenience and dispatch of judicial business. The case having been referred to a Master and reported back to the Court, the parties are required to make their objections to the report, to point out what they complain of as

wrong, and so bring the contention before the Court within the narrowest compass reasonably possible. Exceptions serve the same purpose as assignments of error on appeal. They are both aids to the Court and neither of them pitfalls for litigants. Wilful neglect of or wanton indifference to their reasonable requirements may well forfeit the right to be heard, but when there has been an earnest and diligent striving to comply with the rules, when the divergence from the prescribed course is but slight, and the result, to say the very most, of a mistake, easily made, as to what is the prescribed course, all hope of redress is not cut off. It is the rule of this Court, notwithstanding its requirements of specifications of error, "that the Court at its option may notice a plain error not assigned or specified." And such is the rule of the Court of Appeals of the Eighth Circuit and of appellate tribunals generally.

Exceptions to a Master's report are in the nature of assignments of error. Here we have a case triable *de novo*, presenting not a question of fact, but one of law, involving the merits of the controversy, where the contention of the party throughout has been against the Master's finding, where the exception as made plainly indicates that he is still against it and believes it to be wrong, and the exception if technically perfect could do no more than this, and the Court is asked to strip the suitor of the redress gained after fifteen years of stubborn litigation and turn him helpless and hopeless away from its bar.

The general rule undoubtedly is that what is not excepted to in the Master's report will not be reviewed by the Court, but it is also undoubted "that if the report of the Master is clearly erroneous in any particular, it is within the discretion of the Court to correct this error" Sheffield Railway Co. v. Cordon, 151 U. S. 285, *l. c.* 291. Counsel for the Southern cite 17 Enc. Pl. and Prac. 1047 as containing the best statement of the general rule, but the very next paragraph to that which they quote informs us that "in some jurisdictions, however, errors which appear on the face of the report may be taken advantage of without exceptions. And it has been held that where the Master by his report states the facts correctly, but errs as to the legal conclusions, the party against whom he errs is not required to except to the report, but may bring the question to the attention of the Court upon further directions" (17 Enc. Pl. and Prac. 1048).

Daniel in his Chancery Pl. and Prac., 2nd Vol. 1314, states that "there are cases in which, under particular circumstances, it (the Court) will relax its rules and permit exceptions to be filed after the report has been absolutely confirmed."

In Himely v. Rose, 5 Cranch, 313, it was decided that it is not necessary to take exception to the report of auditors, if the errors appear upon the face of the report.

The general rule with its qualification as stated by Daniel is approved by the Court of Appeals of the

Seventh Circuit in Burke v. Davis, 81 Fed. 907, *l. c.* 910, where it is said:

> "In the absence of exceptions to the report, there can be no inquiry into the correctness of the Master's findings of fact; but whether the proper decree was entered upon the report is nevertheless open to consideration. The Master's mistaken apprehension of the legal consequences of the facts reported, as Daniel states it, 'may be opened to further directions, without exceptions' 2 Daniel Ch. Prac. p. 1310; Hayes v. Hammond, 162 Ill. 133, 44 N. E. 422."

Wallace, J. in Celluloid Mfg. Co. v. Cellulite Mfg. Co. 40 Fed. 476, *l. c.* 477, says that the general rule "does not preclude the defendant from being heard upon a question of the correctness of the legal conclusion reached by the Master."

Mr. Justice Story in Gordon v. Lewis, 2 Summer, 143, says:

> "Whatever may have been insisted upon before the Master by way of argument or objection, is considered as waived or abandoned, if it is not made matter of exception, unless, indeed, it manifestly appears upon the face of the report itself, that the Master has committed an error, which ought to be corrected."

Other cases recognizing the qualification of the general rule, are:

Brooks v. Robinson, 54 Miss. 272;

Haymond v. Murphy, 65 W. Va. 616;

Webster v. Cadwallader, 133 Ky. 500;
Lehmann v. Powe, 95 Miss. 446;
Von Phalen v. Winterbotham, 203 Ill. 202.

The liability of the Southern Company for the indebtedness of the Belt Company is asserted in six elaborate pleadings filed in this suit and in two suits instituted by the Trust Company in the State Court, and we submit that it should not be held to have been waived, abandoned or lost, upon mere hairsplitting considerations as to the formal sufficiency of an exception to a Master's report, especially so, where the form of the exception was determined by what counsel conceived to be the scope and effect of a previous ruling of the Court made in the same case and with relation to the same subject.

The suggestion of hardship upon the other side is wholly without force. The parties complainant, the Cambria Company, the Belt Company and the Southern Company, did not and could not believe that the Trust Company had waived the claims of liability upon which the value of its judgment against the Belt Company so largely depended. They had no right to speculate upon the possibility that the Trust Company had erred in a mere matter of procedure, and then insist that the error, however trivial, was irremediable because they had speculated upon it. A gambling hazard does not commend itself to a Court of justice.

More than this, why should a decision favorable to the Southern Company upon the question of liability

induce that company, or the Cambria or the Belt, not to appeal the judgment against the Belt Company. They had all contended that the Trust Company was heavily indebted to the Belt and they were, each of the three, interested to recover the amount of that indebtedness. Besides, even though the Trust Company was not indebted to the Belt, they were interested none the less to prevent any judgment for the Trust Company against the Belt, because the Trust Company held as collateral, certain assets of the Belt which it must give up if its claims against the Belt were invalid. So there was and could be but one reason for not appealing from the judgment against the Belt and that was that there was no question of its propriety.

In truth, as the Court of Appeals said, the Cambria suit was not in good faith, but that company and the Belt were used simply as aids to the Southern in its contest against liability for Belt indebtedness. The Cambria had two strings to its bow. The Southern Company was liable to it beyond a preadventure. It was not estopped from asserting that liability for it had not shared in the plan of reorganization. The Trust Company could be liable to it only through indebtedness to the Belt Company. The question of liability of the Trust Company was one of fact and when the fact was ascertained the liability did not exist. The liability of the Southern Company, one of law upon conceded facts was never asserted by Cambria, although it was asserted for ten years by the Trust Company in Cambria's own suit. Cambria simply made

common cause with the Southern against the Trust Company. They began proceedings against it on the same day, the 6th of September, 1900 and they ceased their aggressions on the same day, ten years thereafter, the day when the judgment for the Trust Company, a barren one as they hoped, was entered.

XV.

There is no reason of law, policy or morals for preferring stockholders to general creditors in the reorganization of railroad properties.

The petition for certiorari like the brief on the appeal states that we base our case on "the alleged fraudulent character of the re-organization plan." This, as we have shown, is a misstatement of our position.

The petition further states that this is in the face of four conceded facts, when in truth the alleged facts are either not conceded at all or conceded only with such qualifications as entirely change their significance.

And many vital and fundamental questions it is said should be answered in order that protracted litigation in other cases may be avoided.

These questions, as put by petitioner, are:

> (a) "May a security holder exchange his securities under a plan of reorganization, and having done so, may he afterwards, notwithstanding the doctrine of estoppel, election and ratification, and without making restoration, recover from the new company for the debts of the old one, for the sole

reason that stockholders are given an interest in the new company?''

If the doctrine of estoppel, election and ratification is involved, of course, it may not be ignored. We say there was no estoppel and no requirement to elect.

(b) ''Is it competent for a security holder who accepts the plan and exchanges his old securities for new ones to enter into a valid covenant to waive the assertion of any and all other claims against the new company by reason of his dealings with the old company.''

Such a covenant undoubtedly might be made upon a good consideration, but no such covenant was made.

(c) ''If a court shall hold, in some subsequent proceeding, that the terms offered to a non-assenting creditor fell short of being ''equitable,'' will the court prescribe and enforce terms which it finds should have been offered, or will the creditor be entitled to enforce a money judgment against the new company for the face of his claim and accumulated interest? Can the reorganization committee invoke the judgment of some court to determine what will constitute 'fair terms' or must it act at its peril?''

No question as to a non-assenting creditor is here involved. We assented to a plan under which all other debts were paid and that provided for the payment of the debt to us, and we ask only that we be dealt with as all other creditors were and according to the promise. It is too late now to rescind the plan and to ask the Court to formulate a new one.

(d) "If the existence of a creditor be unknown at the time and he subsequently appears and brings suit against the new company, or if his debt is disputed at the time, but is afterwards established, will the court permit the new company to offer the creditor such equitable terms as would have constituted a 'fair offer' at the time of the reorganization, or shall his debt and accumlated interest be paid."

The existence of the creditor here in question was known, and his rights cannot be impaired by the fact that he was hindered and delayed for fifteen years in establishing the validity of that debt. A "fair offer" in this case would be what was offered to every other creditor.

(e) "May a bondholder decline to come into a reorganization in which stockholders receive any benefit, accept his distributive share of the proceeds of the foreclosure sale, credit the same upon his bond and recover the balance against the new company, realizing both principal and interest in full, thus making it impossible to induce bondholders to come into any reorganization?"

This is a moot question. There is no such bondholder before the Court.

(f) "What rule is to govern the 'issuance on equitable terms, of income bonds or preferred stock' to non-assenting creditors? Should preferred stock or income bonds at par equal the face of the creditor's debt? If not, how should the pro-

portion or ratio of stock or bonds to debt, as well as the relative value of securities and debt, be determined?"

Also a moot question. There was no preferred stock or income bonds issued or proposed to be issued on equitable or inequitable terms to non-assenting creditors. The Trust Company is now the only creditor in the case and asks only that it be paid as the plan promised and as other creditors were paid.

(g) "If stockholders are assessed as a condition to participation in the plan, may creditors also be assessed in a similar manner as a condition to the issuance to them of income bonds or preferred stock? Will creditors be denied relief, as stockholders are, if they fail to pay their assessment?"

A moot question. Nobody was assessed in the Belt case. The bondholders got new bonds and stock. The stockholders got new stock in equal amount and 25 per cent of it preferred. The creditors were all paid, save the Trust Company. How is the question put by petitioner involved in these facts?

(h) "If in an 'adversary proceeding' it is determined that the valid mortgage indebtedness of the debtor equals or exceeds the fair value of the debtor's property so that there is, in fact, no equity out of which the debt can be satisfied, will the new company, nevertheless, be required to satisfy the debt if it issues its stock in exchange for the stock of the old company?"

Also a moot question. There was no such adversary proceeding and on the contrary an agreement by all the bondholders and stockholders that the Belt properties had a value sufficient to justify the issue of new bonds to take up the old bonds against it, to pay all the debts of the old company and in addition sustain an issue of valid full paid and non-assessable stock of the new company to the extent of $4,750,000.

That there are now five railway companies in the hands of receivers in the Eighth Circuit may be true, but this Court will not enter into a conference with financiers to determine how best the stockholders of these companies can be served at the expense of creditors.

Friends of the Court have gathered to this case in great numbers, but not as friends of the unsecured creditors. And the purpose of these friends is to have it determined that to be unsecured is to be insecure and without protection whatever.

The Santa Fe friends say that there has been brought against them by an income bondholder an ill-founded and twenty years' belated suit to which "we do not regard the decision of the Circuit Court of Appeals in the above entitled cases (the cases at bar) as at all applicable." Then why burden this case with an irrelevant intervention? Is it simply to emphasize the fact that the unsecured creditor is the outlaw of railroad finance, whom it is lawful for anyone to despoil.

The Frisco people are here and say that they con-

template reorganization and so desire a deliverance from the Court "for the protection of those purchasing railroad securities" but they say nothing as to protection of the unsecured creditor.

The Orient Company also contemplates reorganization and with commendable candor tells the Court that "unless the stockholders can be invited to participate in a reorganization, based on the purchase of new securities for additional money, **without having the reorganized company thereby assume payment of the debts of the old company, the reorganization will necessarily result in eliminating the stockholders. It is of the utmost importance to the interests of the stockholders that before any such plan is promulgated, the law on this subject shall be definitely settled.**"

But this company has not one word to say in behalf of its general creditors who are prior in right to those stockholders. The appeal to the Court is to ascertain how the unsecured creditor may securely be eliminated.

The Wabash Pittsburgh Terminal Railway Company is even more blunt in the statement of what it wants, and says that "it is important that there be no doubt as to the legality of the reorganization or as to the validity of the securities which the reorganized company will issue, **and that the creditors of the present companies shall not be permitted to assert their claims against the new company.**"

There is no friend of the Court appearing either for the general creditor or for the general public. These

interests must protect themselves. What is sought is a way of reorganizing railroad companies which will secure something of value to the stockholders while leaving general creditors unpaid, something that is based upon nothing when a creditor asserts his claim, but based upon solid values when the public is concerned in respect of rates and charges. Reorganization by elimination of general creditors, and this done legally and honestly, is the great desideratum. They invoke the morality of Sam Slick, the clock maker of Slickville, Connecticut, as he preached it to his townsman, Expected Thorne, whom on one of his rounds of clock selling he found indicted for stealing a watch. "You hadn't ought to have stolen that watch. That was wrong, very wrong, indeed. You might have traded with him and got it for half nothin' or bought it and failed; or swapped it and forgot to give the exchange; or bought it and give your note, and cut stick afore the note became due. There's a thousand ways of doing it honestly and legally, without resortin' to stealin'."—Haliburton's Sayings and Doings of Sam Slick, the Clock Maker.

Modern finance has discovered an element in railroad property which it holds to be of great value, but which it proposes to make valuable exclusively to the stockholder, and in which the unsecured creditor can have no part. The property mortgaged is not worth as it stands the mortgage indebtedness, and so, of course, the unsecured debts are worth nothing. But it has a

capability of being reorganized into great value and this capability may be made the consideration of the issue of new stocks which will control the railroad as reorganized and serve as the basis of future if not of immediate dividends. But such is the nature of this capability that it neither can nor should be made the means of paying unsecured debts.

The Boyd case stands in the way of this, for there the Court decided that if there was a value in the property, evidenced by a substantial issue of securities, even though realized through reorganization, that value belonged to the creditors rather than to the stockholders. It was not something purely metaphysical when creditors were concerned and substantial as to stockholders, something which they could list and buy and sell on the stock market. Neither was it something purely sentimental, a brotherly feeling on the part of the bondholders, impelling them to give to the stockholders a substantial interest in property which was not worth the amount of the bonded debt. The bondholders might foreclose strictly and securing it in this way, fairly and openly, they could do with it what they pleased, give away part of it or all of it. But if they reorganized, whether without foreclosure, or with formal foreclosure as an incident of their plan, and provided from the beginning for the realization of value in the reorganized property by the stockholders to the exclusion of the unsecured creditors, then there was a taking from the creditors of what belonged to them and giving it to the stockholders.

The case of the Trust Company is supported not only by the majority opinion in the Boyd case, but by the minority opinion as well. Here are none of the elements of laches which Mr. Justice Lurton held should bar the claim of Boyd. The fundamental principle was asserted by the minority as well as by the majority. "That corporate property must be applied to corporate debts before shareholders can participate is plain," 228 U. S. *l. c.* 511. And there was not here, so far as concerned the Belt Company, the financial difficulties that beset the reorganization in the Boyd case. No assessment was made upon either the bondholders or the stockholders of the Belt and no foreclosure sale was necessary to carry out the plan. The foreclosure had was the merest formality and what was accomplished by it, could as well have been done by a quit claim deed from the Belt to the Southern.

The bondholders of the Belt dealt handsomely with themselves. They not only took Southern bonds in exchange for their old bonds, but in addition a premium in bonds of thirty-three per cent and a second premium in preferred stock of twenty-five per cent.

Nor did the stockholders of the Belt neglect themselves. They took new stock for old, par for par, and of the new stock twenty-five per cent was preferred. The appropriation of this stock to themselves, if it be true that they designed to leave creditors unpaid, was a violation of the principle announced by the minority as a plain one, "that corporate property must be ap-

plied to corporate debts before shareholders can participate."

Why is there such a persistent and concerted effort to strike down the rights of general creditors in these "reorganizations"? Their claims are as meritorious as those of stockholders and in law and equity stand above them. The reason is simply that usually these creditors while considerable in number are entirely unrelated and so not easily brought to act in concert, and individually the claim is not large enough to justify the expense of litigation. And to a great extent they are made up of personal injury claimants and so looked upon with special disfavor by the reorganizers. Sometimes, as here, a larger interest is involved, and then there is recognition or a contest.

Stockholders and bondholders naturally act in concert. The same persons are usually holders of stocks and of bonds, or in any event there is a community of interest and a class consciousness to bring them together and they operate like the upper and the nether mill stone and grind whatever comes between.

The Court of Appeals in the present case has not extended the doctrine of the Boyd case and had no occasion to do so. They did not as was done in the Boyd case, condemn the plan of reorganization, but only condemned the perverse consummation of the plan, for in this inheres the wrong of the present case. The cases are alike in that the same rule of integrity was enforced in both. But there was here no extension of

the rule. And, indeed, it admits of no extension and of no restriction. Its application may be varied as the methods devised by the ingenuity of chicane, but its measure is fixed and absolute. It is the eighth commandment, whose simple text neither needs nor admits of gloss or comment.

Contested in every possible tribunal, State and Federal, delayed for fifteen years, the Trust Company prays that the just decree at last entered in its behalf may be affirmed.

FREDERICK W. LEHMANN,
EDWARD P. GATES, and
GEORGE H. ENGLISH, JR.,
Of Counsel for the Guardian Trust Company.

Office Supreme Court, U. S.
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JAMES D. MAHER
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No. **85.**

IN THE

Supreme Court of the United States.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner and Appellant,
vs.
GUARDIAN TRUST COMPANY,
Respondent and Appellee,

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner and Appellant,
vs.
CENTRAL IMPROVEMENT COMPANY,
Respondent and Appellee.

Petition for Certiorari and Appeal.

Brief and Argument on Behalf of Shedd et al., Intervening Stockholders of Guardian Trust Company.

NEWELL H. CLAPP,
HARRY S. MECARTNEY,
FOR SHEDD ET AL.

BARNARD & MILLER PRINT, CHICAGO.

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NOTE: The brief below was prepared in the main before we received a copy of the brief lately filed for the Guardian Trust Company bearing the impress of the strong hand and luminous pen of Mr. Lehmann, who first appears in the case at this juncture.

While the cause is therein much more fully presented than it was in the Court of Appeals, as indicated below, nevertheless, the subject is so many-featured and so important that we believe an additional presentation can be appropriately tendered, particularly emphasizing certain features of the record and several very much neglected principles of the law upon the subject.

It is claimed below that the cause of the Trust Company—as, we think, is specifically proven by the opinion of the Court of Appeals—was saved from disaster by the intervention of these stockholders in that court. They are therefore substantial parties to the record here, are conscious also of a substantial place in the case in this court, and will ask a moderate share of the time allowed appellees for oral argument.

Some confusion has crept into the law of liability for floating debt claims in the matter of railroad reorganizations, as particularly revealed in the few late cases; and we believe it is demonstrated below that the judgment in the Boyd case (228 U. S. 482), *as well as the judgment in this case, rests upon an additional ground apparently not mentioned in either of the opinions, because not fully submitted in the briefs; while the judgment in the case at bar rests upon a* THIRD *ground not even mentioned in the* 200 *page brief of appellant.*

We believe that a case involving a subject which could well invite the services of additional counsel as an amicus curiae well warrants a brief submitted by parties who have saved the issue for review by this court, and who are also substantial parties to the record.

NEWELL H. CLAPP,
HARRY S. MECARTNEY.

"THE EVIDENCE"

"THE LONGEST RECORD EVER MADE"—34,614 PAGES

Kansas City Sub. Belt Ry. Co. (Kansas City Southern Ry. Co., Successor) *vs.* **Guardian Trust Co.**

(IN FEDERAL COURT AT KANSAS CITY)

IN THE

Supreme Court of the United States.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner and Appellant,

vs.

GUARDIAN TRUST COMPANY,
Respondent and Appellee.

Petition for Certiorari and Appeal.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
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CENTRAL IMPROVEMENT COMPANY,
Respondent and Appellee.

Brief and Argument on Behalf of Shedd et al., Intervening Stockholders of Guardian Trust Company.

An explanation of the necessity—as deemed existent—of filing a separate brief by stockholders on behalf of the Guardian Trust Company, prompt the following explanation of the position of

The Intervening Stockholders.

Messrs. Charles B. and Edward A. Shedd are stockholders in the Guardian Trust Company to the

extent of $76,700 (P. R. 950, 1006), and they together with one Robert H. Law, a third stockholder, intervened in these proceedings in the Court of Appeals. They not only intervened but did so three different times; and in each instance they were recognized by said court, in the way of formal orders entered in the case upon their petition and of a decision made upon the subject matter or issue tendered by the same.

The *first* intervention was occasioned in this way:

The Belt Company through its receivers in 1900 had filed in the Circuit Court an ancillary bill for an accounting against the Guardian Trust Company, which then held some large notes and claims (about $360,000) against the Belt and held also certain securities as collateral thereto. (P. R., 202.)

After a vast amount of testimony had been taken under a general reference to the master, the Southern Company early in 1905, filed an intervention in the case claiming the collateral held by the Guardian. It claimed that under the "after-acquired property" clause of the foreclosed Belt mortgages the Southern had purchased and acquired such property. (P. R., 269.)

The Trust Company in its answer to such intervention claimed, among other defenses, that the Southern Company was a consolidation of the Belt Company (Par. 17, P. R., 310), and also that its plan of reorganization "legally implied" the payment of the Belt debts and that it could not for this reason recover the collateral at least unless it paid the Belt notes. (Par. 19 and 20, P. R., 311.)

The master after having found the amount of the

Belt Company's debt to the Guardian, viz.: $639,658.86, found against the Southern as to its claim to the collateral except as to the lands of the Central Improvement Company which he awarded to the Southern. He then made a specific finding upon the issue of the Southern Company's liability for Belt debts, viz.: that the Southern was "*not liable in any way*" for said debts. (Par. "Third," P. R., 887.)

The trial court, Hon. John F. Philips presiding, confirmed the master's report and entered a decree in accordance therewith.

In the exceptions to the master's report filed by Messrs. Gates and English the then attorneys for the Guardian (par. "second," P. R., 893, 4), and in their assignments of error in the Court of Appeals ("second," P. R., 916) no exception was made to the *correctness* of the master's finding upon such liability issue, but fault was found merely with the "*inclusion*" of such a finding in the report and decree.

The only explanation of this course of practice on the part of the Guardian's counsel is, that they desired to try such issue in the then pending state court suits, which had been brought at "common law" against the Southern for the purpose; and that they did not realize that in such state of the record a denial of their proposition, or a finding that such an issue *was* a germane one in the case, and hence properly made the subject of *a* finding by master and court, would foreclose them from ever afterwards raising the merits of that issue.

In this precarious state of the record the three stockholders, Shedd and Shedd and Law, filed their petition for leave to intervene in the cause and to file

additional briefs making specific assignments of error upon such issue, etc. (P. R., 950-2.) Said petition set forth the fact that the former counsel for the Trust Company, Mr. Mecartney, had lately called the attention of the regular counsel to the grave situation of the case, but that the suggestion had been ignored and the cause had been argued and submitted in its original record condition. (P. R., 956.)

The Southern, Cambria and Guardian Companies were ruled to show cause. (P. R., 968.)

The Guardian Trust Company filed a written return to the order and together with its adversaries *formally opposed* the raising and discussion of the liability of the Southern as "not in issue" in the case "and can not be determined on this appeal." (P. R., 970.)

The record does not disclose the suggestion or warning of the court upon the oral argument on return to the rule, but it evidently succeeded in changing the counsels' attitude; for they then made formal application to file arguments "upon the merits" of such issue of liability. And the court entered an order setting the cause down for further hearing upon additional briefs. (P. R., 972.)

Evidently recognizing the propriety of not interfering more than necessary with the regular conduct of the case or with its regular counsel, the stockholders' counsel did not press their application to file separate briefs; and having accomplished their main object, left the cause to its regular course.

Later, and while the cause was still under advise-

ment, the three stockholders were impelled to intervene for the *second* time.

They filed a petition (P. R., 973-8), in which they asked that *in case* the court should find the Southern liable, and should reverse the decree upon such issue, it should order the lower court to enter a *final judgment* against the Southern; and that if the pleadings were not in shape to allow this and if necessary thereto the court then allow formal amendments to the answer of the Guardian praying such affirmative relief.

The petition set forth that this suggestion had also been made to counsel for the Trust Company, by its former counsel, Mr. Mecartney, but they had declined to act thereon. (P. R., 976.)

The petition also set forth that notwithstanding the narrow escape of the Guardian from having the liability question foreclosed against it, its regular counsel *had still declined to assign additional error* thereon,—thus trusting solely to the court to exercise *its discretion* to notice a plain error unassigned—and this *against an apparent* lack of desire for it. So petitioner asked leave to formally assign such error on liability of the Southern. (P. R., 974.)

A rule to show cause was duly entered upon the three parties, the Cambria, Belt and Southern. No formal answers appear to have been filed. (P. R., 983, 985.)

Later and on October 22, 1912, the court rendered its opinion on the merits of the entire case. (P. R., 986, Munger, J.) reported in 201 Fed. 811.

The court took advantage of its power "to notice

a plain error unassigned," and decided the question of the liability of the Southern Company for Belt Company debts in the affirmative. It then set down the case for reargument upon the *sole* question of whether the prayer of the *second* petition of the stockholders should not be granted, that is, the prayer for an order upon the lower court to enter a final money decree against the Southern. (P. R., 1004.)

Still later, and on December 21, 1912 (P. R., 1006, 7), said stockholders Shedd *et al.* presented their *third* petition;

It was to the effect that upon the coming hearing the Court of Appeals render a *special finding* that the litigation herein on behalf of the Cambria and Belt Companies had been commenced and prosecuted by the Southern Company, and that the same as well as the intervening petition of the Southern had been prosecuted "without good faith," and had been "trivial, wanton and oppressive"; that the statute as to costs was never meant to apply to such a case; and that upon making such finding the court direct the lower court to ascertain the amount of the Guardian's solicitors' fees and other expenses in defending and attending upon the litigation, and tax the amount thereof against the Southern Company.

This petition also set up that Mr. Mecartney had formally and in print made the claim on behalf of the Trust Company in the trial court; but that the succeeding counsel—as in the other two instances—had declined to present it, either to the lower or upper court. (P. R., 1008-9.)

Under the direction of the court notice of such application was duly given the counsel for the various parties (P. R., 1005); and later when the cause was called for oral argument the court by formal order allowed the petition to be filed. (P. R., 1017.)

Upon application of the Southern Company that its counsel be allowed at the approaching hearing to reargue the question of the Southern's liability, it was so ordered.

The cause was then orally argued in January, 1913, at St. Louis upon three issues viz.:

1. The liability *vel non* of the Southern. (Reargued.)
2. The power of the court to order a final money decree against the Southern. (As per the second petition of Shedd *et al.*
3. The question of the taxation of solicitors', etc. fees as costs against the Southern (as per the third petition of Shedd *et al.*)

Later the court rendered its second opinion in the case (*per curiam*), reported in 210 Fed. 696.

It reaffirmed its holding of liability against the Southern; and secondly, it ordered an affirmative decree against it for the amount of the Guardian's claim and decree against the Belt.

The third question—as to taxing solicitors' fees and other expenses, etc.—it left open, and directed the lower court to adjudicate that issue according to the "principles, rules and practices in equity," etc.

But in disposing of the case the court could not

help finding that the litigation so occasioned by the Southern was "baseless and unwarrantable."

These stockholders therefore feel that their efforts have been the means of preserving for decision the main issue in the case, viz.: the question of a decree now amounting with costs to nearly or quite $900,000 in money against the only solvent debtor, and also of presenting and preserving the two other vital issues and claims.

Counsel for these stockholders, as is borne out by the record, have meant to refrain from undue interference with the regular order; but they now seem to see a definite opportunity to shorten the labors of this court in outlining and briefly arguing two much neglected features of the case, as they see it and attempt to prove below.

It is not necessary to account to this court for the fact that the Guardian's case was presented in the Court of Appeals in such a prejudicial manner.

It is, however, but an appropriate courtesy to be shown Messrs. Gates and English, who first lodged the case in that court, to point to the affidavit of Shedd, stockholder (P. R., 954), and the facts alleged therein, that the Guardian had come under the liquidating control of one Prescott; that he had formerly represented Mr. John W. Gates and his counsel, Max Pam, Esq., who as stockholders had attacked the Guardian Trust Company and caused a receiver to be appointed for it and who also at the same time had become influential members of the Southern reorganization committee. After such committee with the use of its express promise to pay the floating debt, etc., had procured sufficient deposits—the Guard-

ian's bonds and stock included—to assure the success of their plan, they declined to pay the Guardian's debt. Upon the hearing at St. Paul, Messrs. Gates & English (P. R., 980) claimed in defense that they had submitted the question of legal policy as to whether the issue of the Southern's liability should be raised on the appeal to the executive committee of the Trust Company—of which Prescott was the dominating power—and had been ordered not to do so, and that after that issue had been again raised by the rule to show cause under the first petition they had been again ordered not to do so, and to oppose the rule.

It may occur to this court that it would have been better for these stockholders to move for a receiver of the Guardian and thus to wrest control of the litigation from those who had so prejudiced its interests rather than to ask or expect the Court of Appeals and this court to welcome a suitor with divided counsel. But the litigation is old, such a stockholders' controversy a burdensome one at best, receiverships costly, stockholders widely scattered, etc., etc. And if the rights of said company can be preserved in this court at the expense only of the inconvenience of an appearance by extra counsel, the court, we feel sure, will gladly submit—as the Court of Appeals did—to such slight inconvenience.

The Character of This Litigation.

Although the evidence upon the main branches of this suit was not taken up on appeal to the Court of Appeals, Judge Sanborn and his able colleagues in answering the Southern's claim of laches, find

occasion to characterize this cause in its main features as a "baseless and unwarrantable suit"— and this obviously upon the face of the record.

Pages 31 to 51 inclusive of appellant's brief are largely devoted to attacking this finding.

The chief question presented here emerges from a record the like of which the world has never seen, and out of a veritable mountain of "evidence,"— totally useless for lack of a valid or colorable bill to which to apply it. And common courtesy to this court may demand a brief or outline "accounting" for a record of such magnitude found in the end to have been useless, and hence a useless and colossal waste of judicial and professional energy.

We prefix hereto a photograph of which a duplicate was annexed to the second petition of these intervening stockholders (Orig. Rec., 1167). It should afford food for profound meditation.

36,000 pages of "evidence" (the master's finding, P. R., 579.) The longest record ever made—*and made upon a hopelessly bad bill of complaint!*

Such a thing—happening, too, in a Federal Court!

It challenges the entire American Bar to a reckoning—and a reckoning wide and deep. For such a record could not be attributed to the work of one man nor to one official. *Such a record* is produced by *conditions*—**it must needs have had a soil to grow in.**

And what was the *theory* on which the colossal record was made?

Namely, that ever since the organization of the Belt Company and the Guardian in 1889, the two

companies had had largely the same persons as directors, and that usually a majority of the directors in one company constituted a majority in the other, etc.

Therefore, the Trust Company had always *"dominated"* the Belt Company and all its constituent and subsidiary or associated companies; and *therefore,* all the transactions between them were "fraudulent;" *therefore,* the Trust Company was in law "a trustee" in managing the affairs of the Belt Company, etc., and hence liable to re-account for *all* the transactions of nearly a dozen years, all in the face of the facts that each and all of the companies had kept their books up to date—each item having been explained at large as entered, etc., the "voucher system"—and had checked them up with each other from week to week and the books *had tallied to a cent.*

Incidentally, the Trust Company was restrained the same day the original bill was filed by order of the court (Hon. John F. Philips, Judge, presiding) from selling the notes of the Belt Company which it then held and the collateral held by it as security for such notes, which—including an open account of over $31,000,—amounted to about $360,000; and said order continued in force up to the entry of the original decree herein in 1910. (Incidentally, too, the restraining order was issued upon a $10,000 bond. P. R., 31.)

In the amended intervening petition of the Southern Company filed in March, 1905, after over a third of this huge record had been made, and by which the Southern Company sought to recover certain property, this theory of "domination" is repeated.

The justices will wonder when told that it was not claimed in the ancillary bill in any of these "domination" pleadings, either (1) *that the Trust Company at any time ever held a majority of stock in the Belt, or even a respectable minority thereof,* or (2) *that any ring or set of men had caused the Trust Company to dominate the Belt to their financial interest,* or (3) *had caused the Trust Company to cause the Belt to enter into unfair or fraudulent "promoting" contracts with them,* or (4) that they, by reason of having a much larger interest in one corporation than the other, had *caused such unfair contracts* to be made in consequence of which they had received an undue financial benefit, etc. (These are the only four classes of so-called domination cases which we have heard of.) *But that the entire charge of "domination"* and resultant fraud and unfairness is based *solely upon the averment that during the entire period of eleven years covered* by the accounting, *the stockholders of each corporation*—presumably adult and not under duress—*happened to "elect" largely*—and not wholly—identical *directors* (P. R. 103); that **therefore and thereby** the entire transactions between the two companies, all open and unconcealed, all spread at large and *in duplicate* on the books of each company (they "tallied to a cent" (*master's finding,* P. R., 648, "j") *—were constructively "fraudulent,"* no matter whether approved by *the officers of each company, balances settled for by note, no matter whether older than the statute of limitations, etc., etc.*

Of course, the court will see that it would be just as easy and just as logical to say that *thereby* the

Belt Company had "dominated" the *Trust* Company, and there would be just as much excuse for a bill by the latter and just as much excuse for a $23,000 reporters' bill *and a* $25,000 *master fee*, and a large fortune spent in lawyers' fees and other expenses.

The strange thing about the master's report is that he finds the fatal insufficiency of the bill upon its face—he finds no legal sense at all inherent on its sole theory of domination—and then devotes some several hundred printed pages to finding from the evidence that there was no domination in fact!

He mentions (P. R., 646) the four classes of "domination" cases scheduled above. He then 'distinguishes" this case therefrom, by setting out (pages 647-9) *some thirteen "Controlling Facts" "which appear on the face of the bill, or are practically undisputed in the proofs"* numbered "(a)" to "(m)", *most all, if not each of which, would have been a complete defense* **if** *a good or prima faia cause of action* **had** *been stated in the* **first instance!**

(Of what use such an elaborate report could be can not be imagined—although the labor involved in its preparation probably justified the unusually large fee allowed.)

In other words, *the bill is at war with a well-known condition long common to the entire country.* And if it were good, *almost every large corporation* in the country would be held liable to *"account"* to every other corporation with which it had done business and whose directors were largely common to both, and no matter how many, how old or how open or often settled the transactions had been. Such a

ruling if generally enforced would, as it is easily perceived, overwhelm and *paralyze the courts of the entire country and throw them into chaos.*

No more pitiful object lesson of what may come of a deliberate and wanton court assault can be given than this record, and the picture of "The Evidence" taken in the court below. A large trust company and a railroad company have daily transactions; have their books kept practically in duplicate; each item *explained at large in duplicate* on each set of books; the books tested and made *to tally* week after week, and year after year; *notes given* to balance; the transactions *expressly ratified* by stockholders and directors from time to time; and then after *eleven years* of such transaction, when the books reveal 10,000 or 12,000 items, *both explained and closed* upon the *face* of the entries, the one company with a dry and meaningless theory of "domination and control"—not a charge of fraud but a mere *excuse for a cry of* fraud—drags the other company into court and puts it to the burden of "accounting," that is, of *explaining* again and proving *over* again, each of the 10,000 or 12,000 items! (P. R., 580.)

We repeat, "*The longest record ever made,*" *made upon one of the most baseless bills ever lodged in court!* A bill found bad for *thirteen defenses* "*either appearing on its face or practically undisputed in the proofs!*"

The Injunction Suits.

In the case brought in 1900 to foreclose the Belt mortgage, the Guardian had been made a party by reason of its having been a co-trustee with the

Provident Life in the mortgage. In addition to its formal answer as trustee, it asked leave to file "an amended and supplemental answer," in which it set up that the foreclosure was simply a part of a reorganization scheme and of a probable intent on the part of the reorganizers to use the prospective decree to embarrass the Trust Company and other Belt creditors in asserting their claims against the prospective purchaser—the Southern. The application for leave to file was denied with the following stipulation inserted in the decree to *protect* and *insure* against future questioning the company's *clear right to sue* the Southern, viz.:

> "This decree is entered on the *express condition to which the complainant has assented, that it shall be without prejudice to and shall not bar the right of the Guardian Trust Company, or its receiver, to plead and insist* **in any** *litigation now pending,* OR **hereafter brought,** *that the Kansas City Southern Railway Company, by virtue of the manner in which it was organized, or for any other reason, is legally or equitably liable for and* **bound to pay the unsecured debts** *of the Kansas City Suburban Belt Railroad Company,"* etc.

Early in 1905 the Guardian brought state court suits based upon such claim of "liability." In July of that year Mr. Moore, on behalf of the Southern, filed a supplemental bill in said very foreclosure case to enjoin the prosecution of the Guardian's state court cases.

In the face of this plainly worded stipulation the injunction was issued by Judge Phillips and the same deliberately accepted by Mr. Moore for the Southern!

The Court of Appeals held the injunction without merit, (1) upon the face of the record, and also (2) by reason of the stipulation, which it held controlled in *any* event, and this, of course, without argument or analysis. It evidently was one of those instances where a thing was too plain to admit of analysis or argument. (146 Fed. 337.)

———o———

What next was done to keep "the issues" and *all* of them in the United States Court under the direction or control of Judge Phillips and before Master Douglas or involved—or buried beneath—the awful pile of evidence, or, as we call it, "dust"?

It seems that when the state court cases were nearly reached for trial after all manner of dilatory pleas and motions had been made in the state court and the case had been finally set for trial on a specific date, Mr. Moore filed a supplemental bill by the Belt and Southern *jointly* (*claimed* by him to be *independent* companies) to *again* enjoin the state court suits.

It was sought not only to enjoin the two suits in which the Belt notes held by the Guardian were involved, but a *third* suit based upon the notes of the *Pittsburg and Gulf company which notes were not involved and* **not even mentioned** in the accounting case in the Federal Court was sought to be stayed.

Judge McPherson enjoined **all three** *suits!*

And incidentally, too, upon a $10,000 bond!

It is no wonder that the Court of Appeals held that the injunctionary order lacked not only a legal

basis but also involved an *abuse of discretion* on the part of the hearing judge—was "whimsical and arbitrary." (See *G. T. Co.* v. *K. Cy. South. Ry. Co.*, 171 Fed. 43.)

It therefore apparently, if not conclusively, appears from the record alone that an abnormal wrong has been committed here—invited and the results deliberately accepted by counsel for the Belt—Southern interests.

The "Scheme".

The following are extracts taken from our brief upon the application to tax solicitors' fees, etc., prepared for the Court of Appeals:

From the references made in our petitions here, and particularly to pp. 21 to 31 of our first petition, and the merest skeleton history of the case, shown by the record confronting this court, we have here the following consummated "scheme," (borrowing a term from the Belt pleadings), viz:

1. The Trust company having been the financial agent of the Belt Company for over eleven years, keeping accounts with the latter practically *in duplicate*, etc., finally winding up in 1900 with a net balance of notes held against the Belt, and also an open account, both aggregating nearly $400,000.

2. A reorganization plan then promulgated, which took in the Gulf Company, as well as the Belt Company and the Port Arthur Channel and Dock Company.

3. This reorganization plan broadly announced that one of the "*results*" to be "*attained*" was "*the payment of the floating debt,*" etc.

4. This open promise was enough to prompt the deposit under said plan of practically all the Belt securities, including securities held by the Trust Company to the extent of some hundreds of thousands of dollars.

5. *After* such deposit, a change of personnel and dominating management in the railroad companies, and of the reorganiaztion committee; then a *repudiation* of the Guardian Trust Company's debt, under the leadership.

6. Later, September, 1900, the Cambria Company bill filed—instigated, of course, by the same reorganization coterie representing the Southern—praying for receivers for the Belt Companies, attacking the collateral held by the Trust Company, and making all sorts of baseless "domination" charges against the Trust Company, etc.

7. A restraining order at once issued against the Guardian, restraining it from selling the notes, or disposing of the collateral.

8. Appointment of receivers for the Belt, and its constituent companies.

9. Receivers for various "auxiliary," though independent companies, viz.: the Amusement Company, the Elevator Company, the Townsite Company and the Central Improvement Company.

10. The Trust Company thus embarrassed by having such large claims tied up, insolvent several months later, and a receiver appointed for it in the "Bierce" case.

11. The filing of an ancillary bill on the part of the Belt Company receivers, and later an amended

and supplemental ancillary bill, in the latter of which charges of "domination" are repeated and an accounting asked as to specific transactions, all aggregating above $8,000,000. (P. R., 237 to 309.)

12. The filing of the intervening petition *renewing* charges of "domination" and then later, by amendment making a claim of a *breach of trust* by the Guardian, as *active* trustee in the Union Terminal mortgage, and a resultant liability claim lodged against it for over $1,000,000, etc.

13. The two outrageous injunctions issued later enjoining the state court suits.

14. Over 36,000 pages of "evidence" taken.

The Results:

From this remarkable litigation have been that the Southern Company and its agents and attorneys have succeeded:

(1) In destroying the business of the Guardian Trust Company and forcing it into liquidation.

(2) In holding it out of its claim against the Belt Company for over *twelve years* (now over fifteen years).

(3) In making the biggest court record ever known, and thus causing the Trust Company collossal costs, even before *a decision* had been reached upon the merits of the proceeding. All this upon a baseless and legally meaningless complaint.

(4) In deferring the collection of its collateral, or the realization thereon for over *twelve years* (now over fifteen years).

(5) In imperiling the *value* of its said collateral by appointment of *receivers* for a number of com-

panies, in which stock was so held, and holding such companies in receivers' hands for years, largely under control of the same counsel representing the Belt Company (even in the final decree they were allowed sums as counsel to the Central Company receiver. P. R., 1062.)

(6) In having the administration of said independent receiverships thus joined in one proceeding of oppressive dimensions, increasing or multiplying the burden and difficulties of contesting or attending upon the same.

8. In having the prosecution of the only suits begun against the only solvent debtor—the Southern—enjoined—the first injunction having been granted against the *express and formal* stipulation in the foreclosure decrees, thus violating the *sacred compact of the court itself.*

9. In having said suits a *second* time enjoined.

10. Said restraining order and the two injunctions having each issued upon a bond of but *$10,000.*

11. In having been enjoined from prosecuting its suits at law based upon *Gulf* notes—a suit *in personam and a claim in nowise involved* **or even mentioned** *in the pleadings in Federal Court case.* (P. R., 646.)

The question then is whether a docket fee of $20 *(Statutory costs) allowed the Trust Company for all this damage and loss satisfies the situation or limits the court's power for justice in the premises.*

———o———

It is this wretchedly "baseless and unwarrantable litigation—this purported "trial" of "issues" which

Mr. Moore for the Southern calls "commendable from every standpoint!" (p. 51.)

The Intervening Petition.

The claim asserted in the intervening petition—under the "after acquired property" clause—was somewhat unique for this day and generation in that the most of the property claimed was *personal* property unconnected with the Belt road or its equipment or operation, and, too, personal property of a *chose in action class* as notes, accounts, stock, coupons, etc.

The "domination" theory of the ancillary bill was also repeated here as a reason why the Guardian should not be allowed to retain its collateral. (P. R., 173-183.)

In the answer of the Trust Company four general lines of defense were set up:

First, that the property sought was of an intangible, chose-in-action class, and that the lien of the mortgages had never attached thereto.

Second. That the intervenor had been guilty of laches in not asserting its alleged claims until nearly three years after the purchase at foreclosure sale. (P. R., 198-201.)

Third. Limitations, and,

Fourth, and lastly, that

(a) the stocks, bonds and accounts in question had been actually and formally turned over to the Trust Company to secure a *bona fide* debt due and owing from the Belt to the Trust Company;

(b) that the Southern Company was in fact but *a*

consolidation of the Belt Company, either *de jure* or *de facto,* and hence was not a purchaser for value, and in fact stood in the shoes of the Belt Company;

(c) that as the Belt Company had no ground to recover the property, the Southern had none; and

(d) that since the reorganization committee of the Southern Company had expressly promised to pay the floating debt of the Belt Company, it should in equity be required to pay the claim of the Trust Company (p. 33); and

(e) that the plan of reorganization and exchange of stocks, etc., *legally implied* the payment by said Southern Company of all said claims, etc.

The Issues Here Involved.

If the Guardian Company is a consolidation of the Belt, or if it be liable on any ground for Belt debts, this alone would dispose of the issue of Central Improvement lands, independently of perhaps a separate ground outlined in the first opinion of the Court of Appeals (Judge Munger). We, therefore, pay no attention to such issue or feature of this controversy.

We also pass over the question of the right and power of the Court of Appeals to review the "liability" question, for lack of more specific exceptions and assignments of error, etc., as the opinion and its citations overwhelmingly sustain it.

We also leave to other hands the technical ques-

tions of the jurisdiction of the appeal and the propriety of reconsidering the merits upon certiorari.

The principal occasion for our presenting a separate or additional brief here in behalf of the Trust Company is this:

The liability of the Southern Company, as we affirm, rests upon three distinct grounds:

1. An *express* provision in the reorganization plan to pay the floating debt of the Belt,—which we assert became effective upon the deposit of stock—*i. e.*, upon the *first step* being taken under the plan, and in any event upon formal possession taken later—rendering all questions of sonsolidation or liability under *other* grounds really immaterial in this case.

2. The fact that the Southern is a *consolidation* of the Belt, and is therefore liable *at law* under Missouri *statutes* for the said floating debt.

3. Upon the general equities as revealed in all the facts and circumstances attending the reorganization, foreclosure, value of stock and assets, etc., etc.

The third ground is the one which is so strongly revealed in the opinions of the very able justices of the Court of Appeals; and these exhaustive opinions reveal so much of argument and authority upon the various features and elements outlined and discussed, that further argument here would be useless if not tedious.

But what a labor was involved in their work!

Now we seek to outline and empahsize in this court the *first two* propositions, upon which the judgment of that court can as validly and firmly rest and which are capable of far briefer demonstration.

And we claim indulgence for our separate effort here upon the plea that we mean to save the court some labor, and to emphasize several woefully neglected principles embodied in railroad reorganizations—principles which if now recognized by this court would help to set at rest many oft recurring questions upon this many featured and complex subject and save a vast amount of time, labor and cost in railroad financing and railroad controversies.

Two independent and dominating issues in this case, as we see it up to the present writing, *still remain neglected:*

Nowhere in the briefs filed heretofore in the Court of Appeals is the *one vital clause of "payment of the floating debt"* at the beginning of the plan put forth *distinctly* as a *separate* point and as a *controlling feature* of the case *in and of itself,* and the controlling principles of construction applicable to this issue outlined and briefed up.

In other words, almost the entire argument of the Trust Company heretofore has been to show that the reorganization plan in *all* its vast *details, features and figures* is thoroughly *consistent* in respect to its *expressed* purpose to pay the floating debt—a conclusion with which we heartily agree; and we believe that the various efforts of Messrs. Untermeyer and Moore to show the contrary have been successfully met in detail.

But we desire to emphasize:

1st. **That it is unnecessary** *for the Guardian Trust Company to undertake, or for this court to*

undertake the inordinate labor involved in this study; that the **one clause** *in the plan expressing as one of its* **objects "the payment of the floating debt"—***with well known and settled* **rules of construction applied** *to the document*—**controls of itself the entire case.**

We seek to emphasize:

2nd, **That the Southern Company is a consolidation** *of the Belt Company* **not only** (1) *a consolidation* **de facto,** *but also* (2) one **de jure** under *Missouri statutes.*

So far as the concrete results in the case is concerned, a recognition of either of these propositions would obviate the great labor of reviewing the record on general equitable grounds.

The brief has been prepared after an exhaustive study of the subject and the cases, but with an attempt to draw the lines close around the heart of the subject and avoid the unnecessary consideration of "wearisome details," which has so heavily consumed the patient labors of the Court of Appeals.

Outline History of the Consolidation.

The history of the construction of the properties of the Belt Company, the Gulf Company and the Dock Company, and of their subsequent absorption by the Southern Company, presents only another concrete and very apt illustration of the advantages of combination and co-operation which is so frequently exhibited in our modern industrial or corporate system.

A railroad connecting Kansas City and Port Ar-

thur, without its own terminals and depending upon contracts with other companies for its terminal facilities, was an incomplete and financially marred proposition.

Terminal companies which had to depend on one or a few companies for the making of terminal contracts in order to live were likewise, by this fact alone, much handicapped financially, no matter how great the physical advantages of their properties.

The three properties being recognized as physically or naturally portions of one general enterprise, the advantage of making them legally and technically one was easily apparent.

As many stockholders and bondholders in the one company were interested in the others, and as many bondholders in each company were also stockholders therein, it was also obvious that any arrangement for unifying the three systems, in order to be quickly carried out, would have to include or "take care of" both the bondholders and stockholders of all companies.

Hence, as we shall later see, the plan adopted did include all such bondholders and stockholders of all or any of the companies, who chose to deposit their bonds and stocks thereunder and participate therein.

Again, the floating or unsecured debts of the three companies being very small in comparison to the aggregate value of properties involved, it was clear that any attempt to "freeze out" the unsecured creditors and reserve to the stockholders an interest in the combination or its results to the prejudice of such creditors would have been not merely illegal and a fraud, but also a foolhardy experiment.

To have the immense properties tied up by various parties filing bills, not only seeking to stop the reorganization proceedings, but having a real legal basis therefor, would not have been the policy of modern business men.

It was therefore natural that the plan for the "unification" of the properties not only contained no express repudiation of such debts or claims, and not merely silently recognized the obligation *which the statute cast* upon the consolidation for such debts, but, in order to allay all fears and to invite the fullest co-operation on the part of stockholders and bondholders having "open" claims against the companies, or either of them, contained an *express* avowal of the intention to "*pay the floating indebtedness,*" and attempted to make allowances and provision therefor.

And, again, it was quite natural to find the Guardian Trust Company, a large if not the chief single "open" or poorly secured creditor of the Belt, declining or refusing to come into the plan and deposit its stock and bonds until assured that its debt would be paid.

And this assurance was claimed to have been actually given, not only by the express provisions of the plan itself as finally modified, but also orally by the mouths of Mr. Pam and others on behalf of the reorganization committee.

It is upon this oral promise that the claim is made on behalf of the Trust Company that "the reorganization *committee* expressly promised" to pay the Belt debt due the Trust Company.

To one moderately well acquainted with the his-

tory of railroad organizations, or to almost any modern, well versed business man, it is clear that the plan adopted in the instance of these three corporations was, at least in its general aspects, a wise one.

About, or over, 97 per cent. of Belt stock, and about 89 per cent. of the bonds of said company, and proportionately large blocks of stock and bonds of the other two companies, were deposited under the plan.

Progress was apparently made swiftly and harmoniously until the open repudiation of the reorganization committee in the summer of 1900 of their liability for the debt due from the Belt.

The unwisdom, if any, in the policy of the reorganization commenced at this point, and arose *in carrying out* the plan *and not in the formation of the plan itself.*

Prior railroad financial experience had done its share in demonstrating that financial "honesty was the best policy." In particular it had demonstrated that neither (1) the "wrecking" policy of a Vanderbelt nor (2) the "secret and concealed profits" policy of a Jay Gould, nor (3) the attempt to freeze out floating creditors to the profit of old stockholders (as was attempted in the Howard case, 7 Wall. 392), was in the end a paying policy. Railroad managers had largely outgrown these "tricks of the trade."

It had demonstrated more, viz.:

That while *bondholders* of a railroad corporation had a legal right to force its property to sale in default of payment of interest, etc., yet as a matter of

fact the damage and loss, direct and indirect, from thus having the company in the hands of a receiver for months, and possibly years, the natural growth of the enterprise suspended, the loss of credit, the expense of a stubbornly contested foreclosure suit, etc., were usually so great that such a proceeding was scarcely ever justified or profitable from any standpoint.

The floating debt of railroad companies being ordinarily so small in comparison to the great value of the properties and the usual large dimensions of the enterprise, the law making "preferred" the recent open claims arising, sometimes within six months, sometimes a year, prior to the foreclosure, the fact that bond interests and stock interests were so often and so largely held in the same hands, and the great damage to the large property from a contested and long drawn out foreclosure, etc., all resulted in most instances in the adoption of a policy of reorganizations along the lines of a readjustment of bond and stock interests, *with* the payment of floating debt.

In other words, no matter what the specific legal plan adopted might be, the general readjustment plan usually adopted in later years of railroad finance was in effect a "scaling" or readjustment of bond and stock interests and a payment of floating debt, etc.

Sometimes, a foreclosure was used as an *incident* to this general plan in order to satisfy the rights of non-consenting or non-depositing bondholders or stockholders in the assets transferred, and thus fully and technically complete the general scheme. But

an open repudiation of floating debt, as the list of *post* panic cases (*post* 1893) shows, was a rare exception.

In England a formal recognition of the public interest in having railroad companies going concerns, and continuing them as such, together with the general financial profit in recognizing the scaling or readjustment process as one naturally allied to such enterprises, etc., has led to the adoption of an almost universal plan of allowing bonds and stocks to be scaled and readjusted without foreclosure, and even in spite of the protests of minority holders, etc.

In America the same result is attained through the co-operation of bondholders and stockholders; except that the want of legal power in the majority—and the absence of a railroad commission having the requisite legal power—to force the minority or the occasional dissenter to yield to the new arrangement thus often raises complicated questions respecting his rights, or occasions a foreclosure in order to satisfy them—an expensive proceeding and a useless incumbrance upon the whole railroad financial system.

It is time for American states to avoid this useless waste and to charter railroad corporations—or at least cover the matter of their bond and stock issues—in a manner somewhat patterned after the English system.

One thing seems clear on the present case, viz.:

That the foreclosure of the Belt road not only consummated, but commenced long after the deposit of substantially all of the Belt stock and bonds and the

flotation of all securities of the new company, was an act of questionable business merit. It entailed thousands or tens of thousands of dollars of direct expense, kept the whole financial scheme affecting the three large properties from technical fulfillment —or at least kept some technical rights in the property unsatisfied—for the space of several years, and thus resulted in much indirect damage and financial loss, which it is hard to fully estimate.

It was obviously unjustified unless there was no other way of legally satisfying the rights of the 3 per cent. of non-depositing Belt stock or the 11 per cent. of non-depositing Belt bonds.

That there was such a way, and a very simple way, is clear.

As to the non-depositing stockholders, all the new corporation (or the committee controlling it) had to do was to allot them their quota of new stock, or allow them dividends thereon, if they chose to receive them. They could "take it or leave it."

As to the 11 per cent. of non-depositing bonds, they could have been ultimately paid without loss; for the new allotment to Belt bonds was 58 per cent. more of Southern bonds.

There was no real object in prosecuting the foreclosure case in order to attempt to wipe out the floating debt; since the plan expressly recognized it, and it will be shown herein that independently of this fact, the new company was made liable therefor.

The Agreement.

The reorganization "Agreement" (copy annexed to the Plan) was dated June 14, 1889, and published August 17, 1899.

Its main objects were:

(*a*) To show that it was necessary to "the protection of the interests of the holders of the *stock* and bonds of said railroad" (the "Gulf") and terminal companies, that said three corporations "should be, by means *of consolidation*, or stock control, or in some way, *united* and legally placed under the practical *management, direction and control of one corporate organization*, with, if possible, but *one class of incumbrance* secured upon the whole system, and *one set of shareholders.*" (P. R., 821.)

(*b*) To constitute a reorganization committee, with the fullest and broadest powers in respect to such general scheme.

(*c*) Such committee was to act for the benefit of such bondholders and *stockholders* as should deposit their stock and bonds under the agreement. (*Idem.*)

(*d*) Said agreement contemplated the adoption of some *specific "plan"* by the said committee, to be published in due course.

(*e*) It was to be "the *special duty* of said committee" "to prepare and adopt a plan for the reorganization" of said "three companies and their *properties*, and for the *consolidation of said corporations*, * * * either *with or without foreclosure*, of either or all of said properties, or by means

of the *acquisition of the stock* or other securities of either or all of said corporations," etc. (P. R., 823.)

Such agreement was, and the plan was to be, *primarily* for the benefit of the depositing bondholders and stockholders of the several companies involved.

The former had liens on the property; the latter control thereof.

It was not necessary, therefore, to appeal to others interested to further the plan. If the plan to be adopted *involved* the payment of floating indebtedness of the companies, the interests of such creditors therein were fixed and definite.

On the other hand, the various complexities of any plan to be adopted would run up to a goodly aggregate; and it was quite probable that some parties interested should make some *special* claims by virtue of the express wording of the agreement or plan or contracts, etc., to some lien, right or priority, etc., to which they were not entitled upon the merits of their claims alone.

It was, therefore, but natural caution for the committee to announce (Art. 12) that "*no right is conferred* nor any trust liability nor obligation (except the agreements herein contained in favor of the holders of certificates of deposit hereunder) *is created* by this agreement or the plan or *is assumed hereunder*, or by or for any new company in favor of any bondholder or any other creditor or any holder of any claims whatsoever against the said companies." (P. R., 823.)

This clause, therefore, cannot be treated as a repudiation of any legal or valid claim that might *at-*

tach by law upon the execution of any certain plan of the committee.

The specific plan was not adopted at the time, nor even outlined.

The committee was given the widest possible powers in respect to plans and adjustment of all claims and the adoption of methods and the control of properties.

Hence, it was fair to assume that the plan to be adopted would be absolutely legal and equitable to all parties concerned.

This clause did not, nor did any other, bind the committee to a plan which would be *fraudulent* to any creditor or infringe any person's rights; nor did it require the committee *to exclude* any creditor or class of creditors from consideration.

No right was "*conferred*" or "*created*" by virtue of the agreement—no *new* right. *It is not stated that* **the** *plan* **to be adopted** *would deny any existing rights.*

That this was the sense of the clause in question is substantiated by the remainder of the paragraph, in which is specified "claims in favor of any company now existing or to be formed hereafter" (*e. g.*, the Southern Company, as well as others), "whether such claim be based on any bonds, coupon stocks, securities, lease, guaranty, or otherwise, with respect to any *security* deposited under this agreement or any moneys paid to or received by the committee, or by the depositor hereunder, or with respect to any property acquired by purchase at any foreclosure sale, or with respect to any new certificates to be is-

sued hereunder, *or with respect to any other matter or thing.*" (P. R., 823.)

This clause, if read as a repudiation of legal liabilities, would be so sweeping *as to be ridiculous upon its face*. Any plan to be adopted would involve the committee and the new company in *some* rights and even *some* duties in respect to such moneys or securities or *some* "other matter or thing."

The import of this paragraph is to exclude parties other than the depositors from *sharing with* the depositors in the *plan itself* and as active parties thereto. It was proper and natural exclusion of non-participating stockholders; it involved no fraud on them, and so as to bondholders not participating.

This view is also evident from the wording of the next (13th) article, which, after providing that the committee shall hold all moneys paid under the plan or agreement for application to any "purpose as may be most convenient," and that "nothing in the plan shall be understood *as limiting or requiring the application of specific moneys to specific purposes,*" proceeds thus: "Any obligation in the nature of *floating debt*, or otherwise. * * * or any securities held as collateral for any such obligation, may be *acquired* or *extinguished* or *held*"—*i. e.*, purchased, paid or held—"by the committee at such time, in such manner, and upon such terms as they may deem proper *for the purpose of carrying out this agreement.*" (P. R., 823.)

If there were any doubt as to the proposition that the prior article did not extend to a clear repudiation of ordinary or unsecured creditors, it would be dispelled by the language just quoted, to the effect

that the committee could acquire, extinguish or hold "*floating debt*" claims *for the purpose of carrying out the agreement.*

The next clause is, "and nothing in said plan and this agreement contained is intended to or shall constitute any liability or trust in favor or in respect of any such obligations so *acquired or extinguished or held* by the committee." (P. R., 823.)

If this latter clause means anything, it does not, at all events, affect such claims before they shall have been sold or transferred to the committee, for it is an "acquired, extinguished or held" claim that is referred to.

Therefore we observe as to this feature of the agreement:

1st. There was no express repudiation of any creditor's claims in respect to any plan thereafter to be adopted, provided such *plan properly involved* the payment of such claims.

2d. On the contrary, the committee was given power to "acquire" floating debt (and all other class of claims) "for the *purpose* of *carrying out*" the purpose or plan.

3d. Any claim upon the part of the Southern Company, which grew out of such agreement, that it did constitute such repudiation in order to bar a creditor, who as stockholder had joined therein, or any one else from claiming his debt, would have to be based upon *clear and unmistakable language.*

4th. If the agreement had contemplated any such repudiation and the subsequent plan of the committee contradicted it, or manifested an intention to

take care of floating debt, *the latter* would prevail, as the former was only preliminary and general, while the latter was the specific plan. The later supersedes the earlier; the specific displaces the general,—the positive and equitable the negative and fraudulent.

The Plan.

The essential features of the published plan of November 7, 1899, so far as we are vitally concerned therewith, were these:

1. That the "Gulf" road was to be purchased by the committee at foreclosure sale and it was "to be *conveyed* to a successor company." (P. R., 815.)

2. "The *stocks* and bonds" of the Belt Company "and its constituent companies deposited hereunder" were also to be "conveyed" to such successor company, "*if sufficient* are so deposited to warrant the retention of that property by the new company, and said new company will issue *in payment thereof* the new securities (bonds and *stocks*) hereinafter mentioned, to be "disposed of" (distributed) "as hereinafter stated." (P. R. 815.)

"*by this means, therefore, the following* **results**," as it was *expressly* stated, "*will be* **attained**":

(*a*) "The new company, which will own the main line" of the Gulf Company, will "also own the bonds and *capital stock* of the Belt Company, and the bonds of its constituent companies, and the bonds and stocks of the other terminal company, the Dock Company, "and *thereby* all three properties will be under **one corporate ownership, management and control.** Said bonds and stocks so purchased will be pledged under the new first mortage to be created."

(*b*) **"The payment of the floating debt** *and existing Car Trust obligations."*

* * * * *

(*d*) In case the terminal *properties* are not *so acquired,* then other terminal facilities to be secured for the Gulf road.

"It is intended, as soon as practicable, that the new company acquire the properties of the terminal companies *in fee* and bring them directly under the lien of the mortgage." (P. R., 815.)

This last clause is the nearest reference to any contemplated foreclosure of the terminals contained in the whole plan. Such "acquirement" might be by direct purchase or deed, or certainly by complete consolidation; and hence such clause is not a specific statement of any contemplated foreclosure, although it *includes* or allows a plan of foreclosure *prosecuted in the interest of the consolidation or general scheme.* "Consolidation *with* or without foreclosure" is the language of the agreement (see clause "e" of the Agreement, *supra*).

3. (p. 3.) The new company, "as a consideration for the property and *securities*" (*i. e.,* bonds and *stocks*) "to be conveyed or delivered" to it, or which it "shall acquire," was to issue:

"*First.*" First mortgage bonds, $30,000,000, etc.

"*Second.*" *Preferred stock,* $21,000,000.

"*Third.*" Common *stock,* $30,000,000. (P. R., 816, 817.)

* * * * *

4. "By this plan the *cash requirements of the new company and the reorganization* will be provided as follows:

By sale of $3,000,000 first mortgage 3 per cent. bonds and $3,000,000 preferred stock $3,500,000

From payments of $10 per share by participating stockholders of the syndicate	2,400,000
	$5,900,000

To be applied as follows:

For payment of car trusts and interest adjusted to date of payment, *say*	$1,900,000
For payment of floating debt	475,000
For payment of receiver's certificates	800,000
For payment of first mortgage coupons, due April 1, 1899	575,000
Working capital and expenses of reorganization	2,150,000
	$5,900,000

(P. R., 820.)

Now, it is contended on the part of the Southern Company's counsel that in any event this latter itemization would limit the payment of floating debt to the sum named in the item so technically specified, viz: $475,000.

But this cannot be so. The specified allowances were merely *estimates*, as much so as if the word "say" in the first was repeated after each item. It is usual in itemizing estimates to put this word at the end of the first item of a schedule, inferring its repetition as to the others.

It is to be noticed that the estimates given are all in round numbers, not pretending to be exact and to cover interest and other incidentals, or attendant features or items, and hence not meant to be treated as a limit upon any one item.

If any one item of estimate should run short, the shortage would of course be paid. And if it had been necessary to specify the amount of such item (which it

was not), the shortage would properly have fallen within the estimate of "*working capital and expenses of reorganization*" at the foot of the estimates. "Working capital" is often provided or estimated *in view* of possible under-estimates of *old* liabilities and even to pay the same.

All this is in consonance with the declared purpose at the outset to pay "*the floating debt* and existing car trust obligations," which, of course, means the *full* amount thereof.

If no provision had been made for this payment, the plan would, by virtue of said declared purpose of paying the floating debt, have *contemplated* such payment in some manner, and if not otherwise then from the income or earnings of the system or new company, as in case of any other general liability. It was certainly *not* contemplated that old stockholders should get *dividends* from the new company before such debt should be paid by it, if such a thing were fraudulent or wrong.

It was stated that "by this means"—referring to the "basis" for the reorganization, *i. e.*, "the *acquisition*" of the "*stocks* and bonds of the Suburban Belt Railroad Company"—"the *payment* of the floating debt" would "*result.*"

The absence of a specific provision for immediate payment could not be pointed to as a repudiation of the *expressed intention* to pay such debt, especially since the latter was legal and consistent with honesty and the former was not so; and hence an adequate *estimate* or provision therefor could not be construed as an intention to limit the liability or to ultimately pay but *a portion* of the debt.

But, again: While an estimate of the amount required to pay floating indebtedness was in harmony with the expressed object to pay the same, that it was not necessarily a limit upon the amount to be paid in that way is also corroborated by the provision in the agreement above referred to, that "nothing in the *plan* shall be understood *as limiting or requiring the application of specific moneys to specific purposes,*" etc.

The plan, therefore, expresses clearly an intention to pay the floating debt, and that if the plan be adopted such payment will "result therefrom," *i. e.*, from its adoption and execution.

One of the *expressed objects* of the plan was "the *payment of the floating debt.*"

For, "a result" "to be attained" is an object to be accomplished.

Now, we next observe that it was not contemplated that necessarily every share of Belt stock would be deposited in order to insure the payment of the floating debt; or that in fact a full and technically complete consolidation between the companies would produce said "result."

For it is provided that the stocks and bonds of the *Belt* Company "deposited hereunder" would be conveyed to the new company "*if sufficient are so deposited as to warrant the retention of that property by the new company.*"

"By this means"—*i. e.*, the deposit of *sufficient* (and hence not necessarily all) of said stocks, etc.—"the payment of the floating debt" would "result," or be "attained."

That a "consolidation" (not necessarily technically full and complete) would result from the deposit of "sufficient"—not necessarily all—of such stocks, etc., was assumed, since it is stated that by the same "means" and "*thereby* all three *properties* will be under one *corporate ownership,* management and control."

Right here we pause to note that the *stockholders* of the Belt Company had an interest in having its floating debt paid. When the committee had determined that "sufficient" deposits had been made, it could be said:

(1) *That deposits had been made upon the condition that the floating debt would be paid, and* (2) *hence creditors of the Belt at the moment of such "sufficient" deposit had a vested interest in the consolidation or scheme—the right to have their debts paid.*

Such, then, was the esssential purport of this plan of "reorganization, *and also consolidation,* if legally possible," of these various companies.

The Plan Was Consummated.

After the publication of the plan progress was made swiftly.

The Gulf Road was purchased by the committee, the Southern Company at once incorporated, and a deed from the master made to it March 20, 1900, and it immediately entered into possession.

The Southern continued to operate the original Gulf road, now its own, and to make an effort to keep alive the Belt organization and to continue to oper-

ate the Belt road through contract or traffic arrangements.

Some months later the Southern Company or the committee on its behalf instituted foreclosure suits against the Belt Company and its constituents as holder of the various bonds thereon, and decrees of foreclosure were finally entered in the suits (as consolidated). The property was purchased by the Southern Company, after which the latter entered into formal possession of the same.

Since then, the only relic of the Belt Company in existence has been a company without assets, without operating franchises, and without stockholders except the Southern Company (which had become a stockholder by exchange of its own stock) and the three per cent. of non-depositors. The Southern by voting its stock at corporate meetings and by other formal acts, etc., has evidently kept the Belt Company alive—or as much alive as a company can be kept under such circumstances.

It is probably best to give the whole sequence of events in the order of their

Chronology.

April 1, 1899.

"Gulf" Company defaulted in interest.

August 17, 1899.

"Reorganization agreement" of committee issued, inviting deposits of bonds and *stocks* of the "Gulf" and of both terminal companies.

September 20, 1899.

Said agreement was declared operative through a deposit of majority of bonds (or bonds and stock) of Gulf road.

November 7, 1899.

December, 1899.

Plan in force.
Plan issued.

March 19, 1900.

Kansas City Southern Railway Company incorporated.

April 1, 1900.

New officers of Belt elected, almost identical with officers of Southern.

September 6, 1900.

Cambria Steel Company takes confession of judgment against the Belt Company, and same day files creditor's bill against Belt Company and Guardian Trust Company.

September 6, 1900.

Provident Life & Trust Company files five suits (United States Court) to foreclose bonds of Belt Company and constituent companies.

September 6, 1900.

Receivers appointed for said railroad companies.

October —, 1900.

Reorganization committee settles its accounts with Southern Company.

November 6, 1901.

Decree of foreclosure of Belt road and constituents.

December 31, 1901.

Sale under such decree.

January 2, 1902.

Deed by master to Southern Company of foreclosed Belt properties.

BRIEF.

I.

Express Promise.

(I).

The plan **invited deposits** *of bonds and stocks upon the* **express condition of the payment** *of the floating debt. The decree ordered against the Southern can validly rest upon this express promise* **alone.**

1. If a plan of reorganization *involves the giving of a benefit to the old stockholders* and *nothing at all* be said about the payment of floating debt of the old concern, it is but fair to *presume an intention* to pay it—as the law will imply fairness of conduct and intent rather than fraud or injustice.

2. *All the more so* will it imply such intention where *any language* whatsoever is employed or *any clause* inserted *reasonably calculated in and of itself* to lead a depositor to believe that such is the intention.

3. The *very issue of the payment vel non* of the floating debt *was inherent in reorganization itself;* and hence such issue was squarely presented to the reorganizers in framing their written instrument *by the situation itself.*

Hence, the *slightest recognition* in language of

such debt would constitute an *express election* to pay it.

4. *The expression at the beginning of the plan of* **"the payment of the floating debt"** as *one of the* **"result to be attained,"** *i. e.,* **as one of the very objects of the entire plan or scheme,** *is controlling here, no matter what else be contained in the written plan.*

5. It is strange that in the entire brief of appellants of nearly 200 pages, this dominating and controlling clause of the plan is not discussed, if even referred to or quoted.

6. *With this clause in the document clearly expressing the payment of the floating debt as one of its* **objects,** *it is instantly seen that the plan as a whole must either be*

(1) **consistent** *in respect to this express promise feature, or* (2) **ambiguous.**

Granting *the latter for argument's sake, the dominating rules of construction will require the ambiguity to be* **resolved against the committee;** *and hence it is unnecessary to prove such consistency—and the entire issue on this appeal is thus quickly disposed of.*

7. Such plan *having invited deposits* on the basis of its broadly expressed *objects*, stockholders and creditors will not—as a *prerequisite* to recovery—be put to the immense labor of accurately explaining or construing all the complex features of the plan, and of accurately "distributing" all its facts and features, etc., in order to make it as consistent throughout as a simple promissory note, etc.

Unless a creditor's claim amounted to a small fortune he might as well abandon it as to involve himself in the expense of so doing.

——()——

Cases in point supporting this express promise claim of appellees are the following:

The Key City, 14 Wall. 653,

where the companies in the plan "of uniting their property and interests" "*recognized a large and undefined indebtedness*" on the part of the original company and on this *express* ground the succeeding company was held liable, and also as being a consolidation.

Tysen v. *Wabash R. Co.*, 15 Fed. 763,

where the expression was merely that certain bonds "shall *be protected*" by the new company, etc.

See also cases cited next *infra* under "Rules of Construction."

Rules of Construction.

(II).

a. General Rules of Construction of Contracts Applicable Here.

> "The words of a document will, in cases of doubt, be construed most strongly against *the party using them.*"

And particularly is this true in cases of deed polls.

17 Am. & Eng. Enc. of Law 14.

A construction is to be placed on a document such

as will render it *reasonable* rather than *unreasonable*, and *just* to both the parties rather than *unjust*.

Idem. 18.

> "And as being made for *legal* rather than an *illegal purpose*."

b. Such an agreement is construed strictly against the committee.

> 5 Thompson on Corporations (2d Ed.), Sec. 5993,
>
> *United Water Works Co.*, v. *Omaha & C.*, 164 N. Y. 53.
>
> *United Water Works Co.* v. *Stone*, 127 Fed. 587.

Some very pertinent language on the subject is found in *Industrial & C.* v. *Tod*, 180 N. Y. 215.

There Mr. Untermeyer successfully argued for "good faith" *both in construing and carrying out* such agreements.

On page 225 the court says:

> "As the reorganization agreement was *prepared* by *the committee* and the language used *is wholly their own*, it should be construed most favorably to the bondholders, who had no part in preparing it, but were compelled to *accept* it as it was or *not* accept it at all."

In each of the above New York cases (164 N. Y. and 180 N. Y.), in support of the proposition that a reorganization agreement will be construed strictly against the committee, the court cited the case of

> *Kratzenstein* v. *Wetsern Assurance Co.*, 116 N. Y. 54.

This case was a suit upon an insurance policy

which contained ambiguous language. (And even opposing counsel have not claimed that this plan *clearly and consistently repudiated* floating debt or was anything *less* than ambiguous.) The court there said (p. 59):

> "When an insurance contract is so drawn as to be manifestly *ambiguous*, so that reasonable and intelligent men on reading it would honestly differ as to its meaning, the doubt should be resolved against the company, *because it prepared and executed the agreement, and is responsible for the language used, and the uncertainty thereby created.* * * * If the defendant intended that the risk should not cover goods in transit, * * * *it should have said so in clear and unmistakable terms so that no one could be misled.*"

(This is substantially our argument on the point, *infra.*)

c. Contracts Implied in Fact.

If the agreement and plan did not constitute an *express* contract, *i. e., a complete* agreement to pay the floating debt, then they did constitute a contract *implied in fact* to make such payment.

15 Am. & Eng. Enc. of Law 1077-78, where it is said:

> * * * Both *express* contracts and contracts *implied in fact* are founded upon the actual agreement of the parties. The one class is proved by direct, the other by indirect evidence; in other words, the one must be proved by an actual agreement, while in the case of the other, it will be *implied* that the party *did make such agreement as under the circumstances disclosed he ought in fairness to have made.*"

In other words, if the plan made did not work

out the agreed *objects* of the parties, the committee and the Southern ought "*in fairness*" to have made *other* detailed provisions to that end.

d. New Corporation Liable Where Express or Implied Promise to pay debts of old Company.

One of the instances where a new corporation is liable for the debts of an old one is

> "where it has in *express terms or by reasonable implication* assumed the debts of the old corporation."
>
> 10 Cyc. 287 and cases cited.
>
> 23 L. R. A. 231 (citing the Tysen case *supra* and others).

e. The Word "Say" as Used in the Schedule of the Plan.

The meaning of the word "say" as used in the first item of the schedule showing the proposed application of the cash of the new company is given in the Standard Dictionary thus:

> "* * * To assume as possibly true, or as a working hypothesis; suppose; in the imperative, as equivalent to 'let us assume'; as, worth say a million."

The principle here involved is strictly analogous to that in the case of *Brawley* v. *U. S.*, 96 U. S. 168, where the construction of a contract for the sale of personal property was involved.

(III).

Estoppel.

The principle of "estoppel and election" absolutely controls this entire case. When the committee announced that one of the *objects* of the plan was the

payment of the floating debt, and the deposit of stocks, etc., *was invited upon this basis or condition*, there was a definite position taken by the committee in respect to open debts; and upon their invitation being *acted upon* by the deposit of stocks, etc., the obligation to pay became fixed.

In fact, the moment deposits had been made and accepted, and the successor company had issued its stock in lieu thereof, its liability became fixed, and it thus became unalterably committed to the payment of the debt. Even though creditors might have the election to wait until the foreclosure and possession taken thereunder—*i. e.*, until all steps in the plan had been consummated—makes no difference.

A complete *change of position* had been taken by parties interested in the payment of the floating debt (the old stockholders); and the Southern Company was thereafter estopped to deny its liability.

And the law of "quasi-estoppel and election" applies.

16 Cyc. 784-5-6.

Instead therefore of the Trust Company being estopped to claim that the plan involved a payment of floating debt, the proponents of the plan were estopped to claim that the plan *denied* such claims. And the many authorities cited by opposing counsel on quasi-estoppel, etc., apply.

———o———

The cardinal truth from all the above, be it repeated, is, that even if the plan proposed and consummated had been no more than a proposal for the Southern to become the *chief or only stockholder* of

the Belt, it *invited* stockholders to take *a step forward* and to change *their position.* It invited the old companies and all their *interests* to submit to a decided *change of status,* by which the old companies instead of being run and managed by independent stockholders became subject to the control of *another* corporation.

When such a step was invited it became imperative that representations by the moving party as to either property or debts should be *unequivocal;* and *vague or inexplicit* representations must be construed *against* it.

It is indeed fortunate that these rules of construction can be resorted to in cases involving corporations and their various stock and bond operations.

Otherwise the lawsuits that would be engendered by the *profit* in *denials* of liability *merely by putting the claimants to specific interpretation of complex documents* would speedily bring anarchy itself into the business world.

The documents made and published as a basis for the New York stock and bond market *alone* could be thus made to largely engage the labors of the bar and the courts of the entire country.

It is indeed insisted that the above citations are more than ample to support in law that which obvious justice demands.

It is therefore immaterial whether there was hidden somewhere in the body of the plan or agreement "a solemn covenant" as counsel puts it, that the

floating debt would *not* be paid; and counsel's entire argument seems to fail at this point.

But we further assert:

(IV).

There was in fact no "solemn covenant" in either the "plan" or "agreement" involved in this record, to the effect that the Trust Company would not assert its claim against the consolidation.

1. The clause claimed by counsel to be such is the one mentioned only in the agreement inviting deposits and is analyzed *supra*.

As opposed to this, and in addition to the express promise *or election*, there was here.

(a) A distinct *estimate* of the amount to be paid *as* "floating debt;"

(b) *Express authority* given the committee "to *extinguish*" floating debt;

(c) Specified amounts *expressly allowed* the committee as "working capital" and "expenses of reorganization," which may have included a portion of the floating debt; and

(d) An expression of an intention to "consolidate," a process which would be inconsistent with a repudiation of floating debt.

(e) Certain floating debts actually paid out of such "working capital" and "expenses."

2. The claim on the part of appellant that the plan was "*fraudulent*," and the whole scheme *a fraud*, and that *thereby* and *therefore* the Trust Company cannot claim its debt "with clean hands," etc., is an *affirmative issue raised by the Southern itself;* and in order to sustain it the Southern must

(a) establish the fact that the plan per se and on its face, and consistently throughout inevitably involved fraud, and in clear and unmistakable language; and (b) an actual intent and avowed purpose *on the part of the reorganizers as a band of conspirators of which the Trust Company was one,* to "freeze out" floating debt claimants.

The former (a) is absurd upon its face—*i. e.*, upon the face of the instrument; the latter (b) is also contradicted by the language of the plan, and evidence is totally lacking suggestive of such actual intent.

The Guardian having a large floating claim of its own, any such intent and purpose on its part would have been an intent and purpose to rob itself.

In charging the Trust Company of being a party to a fraudulent plan "it must be remembered that such company was only a *depositary.* In denying such character to the plan the Trust Company would be entitled to insist that the rules of *strict construction* against the committee be observed in making the test.

II.

Consolidation.

(1) *The merging or joining together of the stock and assets of the Belt and Southern Companies* constituted **a consolidation in fact** *of such companies.*

Leavenworth County v. *Ch. R. I. & Pac. Ry. Co.*, 134 U. S. 688.

Chicago, Santa Fe, etc., Ry. Co. v. *Ashling*, 160 Ill. 373.

Williamson v. *N. J. Southern R. R. Co.*, 26 N. J. Eq., 398.

Shadford v. *Detroit, etc., Ry. Co.*, 130 Mich. 300.

The exchange of stock is the distinguishing feature—the very test—of a consolidation.

Morawetz on Corp. Sec. 939.

Vol. 7 Ruling case law §§ 155-156.

3 L. R. A. 435.

23 L. R. A. 231.

7 Thomp. on Corp. (2d Ed.), Sec. 8241.

(2) There being a statute of Missouri *allowing consolidation, the Southern Company* **is estopped to deny** *that it did not observe the technical* **method** *required or furnished by statutes to accomplish the same.*

(Same cases next, *supra*, particularly the second and fourth.)

See also Vol. 7, Ruling Case Law §130.

(3) *In the face of a* **consolidation in fact**, *a creditor* of *the old concern can no more be justly put to the labor of proving the observance of various steps and methods*, etc., *legally or technically required to accomplish consolidation* and thus of "distributing facts and figures" in respect thereto, than in the instance of the express promise mentioned above.

(4) **A complete de jure consolidation under Missouri statutes** *was here affected, and a de-facto one would be sufficient for the purpose of holding the Southern liable.*

(Argued *infra.*)

(5) **The new corporation is liable:**

1st. When it is merely a "continuation" of the old (this case).

2d. When it has by "*express terms or by reasonable implication*" *assumed* the debts of the old (this case).

3d. Where it has received the assets of the old under such circumstances as to make the transaction a fraud upon the creditors.

4th. Where a statute imposes such a liability (this case).

23 L. R. A. 231.

Vol. 7, Ruling Case Law, § 156.

III.

The Opinion of the Court of Appeals.

1. The opinion of the Court of Appeals orders a recovery in favor of the Trust Company against the Southern *based upon the equities of the entire situation*, and proves exhaustively and in detail, *the equitable principles which are involved* not only as to the question of liability but also as to the *priority of lien* given the Trust Company. At the same time it answers in detail the claims in opposition.

But it is unnecessary, so far as the mere claim of liability is concerned, that the case be placed upon such many featured foundation. **The equities in favor of the Trust Company result from consolidation alone, and from the express promise in the plan.** *And to prove, as the Court of Appeals has done here so ably, that a clear equitable*

basis for full liability of the Southern exists in the circumstances, is to unnecessarily prove the merit of railroad consolidation statutes long since existing throughout the entire country. **That is, the right to recover here is not a mere equity—it is an inexorable legal right.**

The fact that old stockholders contributed money to the deal makes no difference and it has nowhere been held to affect the inexorable rule that the exchange of stock constitutes a consolidation.

The liability in every such case is a **full** *liability, and is not limited to the value of the stock or property given the old stockholders, nor to the value of the assets transferred.* Vol. 7, Ruling Case in Law, §155.

The case of *Northern Pacific Co.* v. *Boyd*, 228 U. S. 482, as many prior cases do, amply sustains the opinion of the Court of Appeals, and is squarely in point upon this ground of general equitable principles. But the case at bar is much stronger, since it rests upon the *additional* ground of an express promise. In both cases however, the creditor's claim safely rests upon the additional ground of *consolidation*—a feature apparently overlooked by counsel in the Boyd case.

2. *As to the lien feature of the opinion*:

Though the rule ordinarily may be that an "open" claim is not entitled to a first lien above the new mortgage given by the consolidation, the Court of Appeals properly did not allow such rule to control here.

For here the *express promise* to pay was a part of *carrying out the* plan; and the committee were

the agents of the bondholders for this purpose as well as of others.

Secondly, the abnormal and oppressive litigation here in evidence was instigated by the same committee which then controlled the Southern and the Belt.

And the Court of Appeals was right in making the bondholders' lien subservient to the Guardian's on this ground.

(Argued *infra.*)

IV.

The Public Interest in the Question and the Appeal of the Amici Curiae.

We here simply note that notwithstanding the great public issue in the main question here involved and the vast amount of pending reorganizations affected, no effort has been made to advance this case.

We admit the fact that great public interests *are* involved, but we believe that that interest will be advanced both in point of justice in railroad dealings and that of judicial economy in general by not only reiterating the conclusion in the Boyd case but *broadening it.*

Let it be again decreed that a plan of reorganization *inviting an exchange of stock* **involves** *liability for and an assumption of old debts,* and we will get rid of persistent efforts to make a creditor accurately distribute facts, figures, values, equities, etc., and thus detect and reveal the net value of assets transferred—as a *condition* to recover his debt. The right to recover might almost as well be denied in the first instance.

ARGUMENT.

I.

The express promise or condition in the plan in respect to payment of the floating indebtedness.

This ground of action, although distinct from the other, is, however, only fully appreciated in connection with it.

"Consolidate"—to unite, compress or pack together. * * * To cause to cohere or cleave together. Century Dictionary.

We will see below that there may be a complete consolidation of two or more railroad *companies*, or a consolidation of their *property*, operating *franchises* and *stock* (leaving the companies in technical or partial existence), or a consolidation of merely property *or* franchises *or* stock. (Either of these can be "packed together" or "united," etc.) A statute allowing such companies to consolidate "their franchises *or* property *or* stock" (which is the language of many statutes), and making the new company liable for the debts of the old, would no doubt mean a full liability for *any* such consolidation.

And we are inclined to believe that if the Missouri statutes stopped with the first and general provision of Sec. 1059 analyzed *infra*, authorizing consolidations "*in whole or in the main*" and prescribing full

liability upon the absorbent company, etc., every arrangement by which merely the *stock* of one company was held or purchased or exchanged for that of another would hold the receiving company for full liability for the other's debts.

For stock or stock interests can be "consolidated," "united" or "packed together."

So a right or privilege to operate a railroad from A to B can be "added" or "joined" to or "united" with a right or privilege to operate a railroad from B to C and the result is a consolidation of operating "franchises."

So one railroad property or equipment can be added to and mixed with another such property or equipment, and the result is a consolidation of railroad "property."

Now, whether the new company should *on principle* and apart from any statute be held to liability where there is only an exchange or purchase of the major portion of the stock of the old *and no mixing of property* is not absolutely or instantly clear. There are potent reasons to support the affirmative.

In such case the old corporation still exists; it may still be managed, but not as an independent corporation controlled directly by individuals and they thus having control of its assets, but as controlled by individuals *through the medium of another corporation.* The old corporation *has lost its identity* as an *independent* dealer and has gone into *quasi* partnership with another corporation. In such case it is or it is "in the main" a member of a combination—before it was an independent body. Rather, it has been

partially dismembered, and the larger part of its substance absorbed by the other corporation. One could momentarily view this transformation as leaving a part of the original corpus in its original state, which part would be represented by the individual stockholders not joining in the merger. But a corporation is not sectionized in its composition, stockholder by stockholder, nor are its assets divisible into units, each unit corresponding with each stockholder's interest. It will be a far more accurate view to consider the change as a partial metamorphosis of the old company, by which, while some of its elements are left undisturbed, its acting power and speaking voice are controlled by the absorbing corporation, or rather merged in it. The corporation's identity as an *independent actor* has been lost.

Certain it is that the joinder of such stock interests is *apt* to unsettle or change the interests of stockholders as held in each company prior to such coalition.

This is obvious. It is *possible* for the one company to be dominated or contrtolled in the interest of the other and to the prejudice of minority stockholders in the one; and *possible* for both companies to be managed in a way prejudicial to the public right to fair rates, etc., or, as some would put it, to its interest in "competition." And hence a line of cases like the Pearsall case, 161 U. S., 687, and the Northern Securities case, 193 U. S., 197.

While, however, such a coalition would give such an opportunity for *oppression*, etc., it would also possibly give an opportunity for *benefitting* all stockholders and public alike,—providing there was

a wise and salutary conduct of both enterprises and faithful consideration for the rights of all parties. And this would be possible without making necessary in all cases the complete merging of franchises, property, or stock, of the corporations themselves.

Hence, in the gradually intensifying of modern commercial industries, many statutes have been passed (like those in Missouri) allowing, in addition to actual consolidations, one company "to purchase and hold" the stock of another and vote such stock and to "acquire" such stock or "to subscribe" for such stock "in aid," etc., where the other company *continues* to "use and operate" its *own* property or road.

Under these statutes it had been held therefore that where one company thus has acquired the stock of another, or the major portion thereof, and the latter company *is kept in control of its own property* and operated in the same manner as if it had a full set of individual stockholders, etc.—then there is no liability on the part of the purchasing company for the other's debts. *Pullman, etc., Co.* v. *Mo. Pacif. Ry. Co.*, 115 U. S. 587.

But it is also true where the property or assets are mixed the holding company is clearly liable. (Cases *supra* in brief, Point II.)

It is obvious that where one corporation owns all or substantially *all* the stock of another, there is *usually* but little object in keeping the properties entirely separate and operated separately; and it is even hard to do for any length of time, except in the case of very large corporations. There could be little hardship in holding the purchasing company

for the debts of the other in any case; for the latter would have the sole interest in the property.

The point for the present is, however, that the purchasing company must in such case **affirmatively keep the assets separate and keep the purchased company going as an independent organization** *in direct control and management of its own property. If it allows the one organization to lapse or the properties to become* **mixed a direct liability will follow.**

The direct interest in, if not direct control of a corporation's business and assets, possessed by a sole owner of its stock, has quite naturally given rise to many attempts to hold such stock owner directly liable for the company's debts. In Maryland the courts have gone so far as to hold him liable—a rule opposed to the weight of authority.

Now, while we concede that in such a case the holder of all or substantially all the stock of a corporation, whether an individual or a corporation, is not by reason of that fact *alone* liable for the corporate debts, yet we point out that it would require but a *slight recognition* on the part of a purchasing company of its liability in order to fix the same upon it.

And where stock of the old company *is bid* for by the new company and on the basis of an exchange of its own stock therefor a statement that one of the "*results*" or *objects* to be "*thereby attained*" was "*the payment of the floating debt*" of the old company would be ample in and of itself, *without considering* questions of a *subsequent mixture of assets*

of the two companies or the taking possession of the old company's assets by the new one.

———o———

In the case of *The Key City*, 14 Wall., 653, one Young shipped a quantity of wheat by the "Key City," which vessel was owned by the Northwestern Packet Company. The cargo was lost.

At this time there was a rival steamboat corporation known as the La Crosse and Minnesota Steam Packet Company. After the loss of the wheat these two companies "united their stock in trade, their steamboats, barges and other property, and formed a new corporation, the corporators of which were taken exclusively from those in the two old companies; and to the new corporation they gave the name of "the Northwestern *Union* Packet Company."

It appeared that the original Northwestern Company "was largely indebted and provision was made for the payment of the debts generally of that company by the newly formed company and of a fund to come within its control. The nature of that provision was this: Certificates of stock of the value of the boats, barges, and other property of the Northwestern Company merged in the new company were issued, but on their face they recited that *no dividends would be paid* on such stock *until the debts* of the Northwestern Company *should be paid* out of the proportion of the net profits which the shareholders of that company would otherwise be entitled to."

In this state of things, Young, three and a half years after the wheat was lost, and his cause of

action had accrued, filed a libel in admiralty against the Key City for its failure to perform its contract of affreightment. The new corporation appeared and contested and the lower court dismissed the libel. Young appealed. This court reversed the decree.

The court, through the renowned MILLER, said:

> "We are of opinion that if the claimants" (the Union Company) "had shown an ordinary case of purchase and payment without notice, the lapse of time would protect them."
>
> But "these" (the circumstances attending the transfer) "show that there was *no sale* of the property of one of these original corporations to the other, but that they agreed to unite their *property* and their *interest*, and for convenience assumed a new corporate name; that in doing this *they recognized a large and undefined indebtedness* on the part of the (original) Northwestern Company, and *provided* for its payment out of the earnings otherwise payable to that company."

It was therefore held that, on account of this *recognition*, there was no sale and purchase for value, and upon the *additional* ground that there was "a consolidation" of the two old companies.

Note how similar to the provision as to debts in the present plan is the one in the Key City case.

"Whenever *it appears* from an instrument, *notwithstanding its form* that *it is intended to afford a security*, an equitable lien exists in favor of the person in whose behalf the provision is made."

Tysen v. *Wabash R. Co.*, 15 Fed. 763.

Apply this principle to the present case, thus:

"Whenever *it appears* from an instrument, *not-*

withstanding its form, that *it is intended to pay a debt*, an action exists in favor of the person in whose favor the provision is made."

"In the articles of consolidation one of the bases and *conditions*" thereof was stated to be, as to all the bonds, that they "shall as to the principal and interest thereon, as the same shall respectively fall due, *be protected*" by the new company. Held, that not only was the new company liable, for the bonds, but that the lien thereof was *expressly* preserved by the instrument of consolidation. *Idem.*

These two cases are in point, and amply support plaintiff in its claim of an express assumption in the plan of the Belt floating debt.

It was not necessary that the phrasing in the plan should be as specific and clear as that of a promissory note or an ordinary contract to pay—where *no property or interests therein* are involved.

Creditors, whatever their legal rights, *had a vital interest in the assets to be transferred*, and the question whether they were or were not to be paid was directly presented.

It was an issue fully presented by the situation itself.

Therefore, very little in the way of an express recognition of such debt was sufficient to show an election to pay the same.

Where one class of persons interested—stockholders—whose claims in the assets to be transferred were *inferior or junior* to another class,—creditors—were to be given a specific interest in the new prop-

erty consisting of the old assets joined to the new, the question was squarely presented to the parties furthering the scheme: *what is to become of the claims of creditors in this property or trust fund which you propose to mix with the new?*

When it is answered, that "*the* **payment** *of such claims is one of the* **results** *to be attained,*" is *this* not sufficient to show an election in regard thereto? What more is necessary?

Would this not be enough to dominate the election of a creditor who was contemplating a suit to follow the assets of one of the old companies? And if so, is it not an *express election* on the part of the contracting parties to *pay him?*

———o———

The more this feature of the case is studied, the more clear and inexorable the conclusion that the point here made is sound and controlling.

After it is broadly stated as an *inducement* for stock deposits, etc., that "*one of the* **results** *to be* **attained**" "is the **payment** *of the* **floating debt,**" what concern need the depositor or creditor have with the *details* in respect thereto? That is: What show of justice can there be in requiring a stockholder who is also a creditor, or one who is a creditor merely, to work out all the details of the many featured and complex plan of these complex organizations, and to work them out *accurately, or else to lose his debt?*

What burden is cast upon *him* to actively see that the "object" or "result" of the plan is carried out in full?

An immense lawsuit could thus be forced upon any depositor and any creditor (for every stockholder is presumably *interested on behalf of all* creditors) in every case of a reorganization agreement—as, for instance, such a lawsuit as is measured by the arguments of able counsel in this case *even since it has reached this court*—to say nothing of the prior litigation of many years. What protection would the public have if this is made possible under the law?

1. If *nothing* be said in such a plan *about payment* of a floating debt, it is fair to *presume an intention* to pay it—and particularly where *stockholders* are clearly to receive a benefit—as the law would imply fairness of conduct and intent rather than fraud or injustice.

2. *All the more so* will it imply such intention wherever *language is expressed reasonably calculated* in and *of itself to lead a depositor to believe such is the intention.*

The object of the plan is broader than the details thereof.

And even if it *were* clear from the *details* of the plan that the expressed object (payment of the floating debt) would *not* be fully subserved thereby, would not a party dealing with the plan or its proponents be warranted in believing that the plan would be *changed* to conform to its *expressed objects?*

So that whether we approach these words from the standpoint of "strict construction," "election and estoppel," "contract implied from the language *and* circumstances," each of which as shown above

technically and fully sustains the claim, etc., the appeal of the creditor to be relieved of the responsibility and burden of *accurately distributing all facts, features and figures* of the complex plan *as a prerequisite to collect his debt* is too just and too inexorable to go unheeded.

So that even if the plan had clearly and by its other express provisions **contemplated merely** the **acquirement, or out-and-out purchase of the stock of the old companies by the Southern, this one clause would hold the latter to the payment of the floating debt.**

And why? Because it invited a *change of position* on the part of stockholders of the old companies,—corporate functionaries of such companies interested in seeing such *debts paid.* It invited the taking of a *step forward*—a change from individual stockholders to one corporate stockholder and the *partial merging* of corporate interests theretofore absolutely independent.

A fortiori will such payment be conclusively inferred when stockholders of the old companies are expressly given *an interest* in the new arrangement.

And this case can therefore be properly ended at the *beginning* of the plan, at the point of its *expressed objects*—instead of at the end. And this is our excuse for submitting this document.

II.

Consolidation.

(I.)

Several Much Neglected Principles.

The course of American decisions on railroad reorganizations contains indeed a big lesson for the American bar. In particular, it illustrates what a vast tribute in the way of misconception, crude work and hence loss we pay to our modern twin evils so to call them—complexity and haste.

In such haste have we been as a profession at large to do things quickly and reach financial and "practical" results in the instant situation, that we have been prone to take an issue up at the point of the last favorable decision. Thus the chain of decisions grows and lengthens, until it becomes so long that the new student does not stop to analyze, but assumes that the principles or methods heretofore announced must of necessity be exhaustive and that of necessity all features of the subject have naturally been covered by the labors of the prominent lawyers who have delved in the same field.

To come to the specific:

1st. In the leading case of *Railroad* v. *Howard*, in 7 Wall.—74 U. S. 392—decided in 1868, certain creditors of the old corporation successfully levied in equity upon the particular quota of stock of the new company which was about to be delivered to stockholders in the old company. This court held that the rights of such creditors in the assets of the old

company were superior to those of the stockholders and allowed the creditors to levy upon that which represented in the new form exactly the fund originally liable for such debts or at least the *quantum in value* which had been wrongfully preferred.

What has been neglected about this now famous decision is the fact that the court was merely announcing a result of *one* out of several *elective* remedies of such creditors, and its express intimation that such creditors *could* have elected to sue the new corporation *at law*.

For the next 20 years or more, quite a few cases arose of two additional general classes, viz.:

2d. A number like *Montgomery-Webb Co.* v. *Dienelt*, 133 Pa. St. 585, where it was ruled that transfers of property from the old to the new company where old stockholders share in the fruits of the deal, as it were, were "voidable" as against creditors of the old concern, and that the *property* transferred would still be treated as a "*trust fund*" which "*equity would follow* on behalf of such creditors, for satisfaction of their debts."

3d. Cases like *Railroad* v. *Ashling*, 160 Ill. 373, where they held that in similar circumstances the new company would be *liable at law* for the *full* amount of the claims *independently* of and without reference to the *value* of the property transferred.

This last class of cases has been too little emphasized. The very principle embodied in them is the one which has occasioned the passage of the laws of the various states providing for full liability on the part of the new company for the debts of the old *whenever* a consolidation is made.

4th. Then came the ruling in *Louisville Trust Co.* v. *Louisville & N. R. R. Co.*, 174 U. S. 674,—the "Monon" case—where it was held that the fact that a reorganization plan *failed to make provision* for the payment of existing debts, *plus an actual and fully proven intent not to pay them*, would give ground for a creditor to *interfere* and *frustrate the plan*, at least to the extent of stopping a foreclosure suit against the property *until* such question could be fully inquired into and the creditor equitably treated or provided for.

In later years, in many cases the railroad financiers seeking to bar out old creditors, have tried to complicate the situation by (1) having the old stockholders put "fresh money" into the deal and then claiming (2) that, reckoning lien debts and the "fresh money" together, there was *nothing left* "of value" for the open creditors. Sometimes and usually, as here, a foreclosure was used and the forced sale value pointed to as conclusive evidence of the value of the property and as the means of demonstration that there "was no equity" for the general creditors.

Some encouragement was given to this plan by the now fully rejected ruling of Judge Jenkins in *Paton* v. *Chicago & North Pacific R. R. Co.*, 85 Fed. 838, and several other lower court rulings; and also by some slight references in the dissenting opinion of Mr. Justice Lurton in the late Boyd case.

And some encouragement may also be gathered from the qualifying words of the opinion of Judge Munger, and of the second and *per curiam* opinion in the present case that in similar circumstances

the new company is liable for the old debts "*at least to the extent of the value of the property* taken and converted, * * * or secured by the stockholders of the old company," etc.

These qualifying words are potent with the greatest imaginable injustice.

The particular service to the court and the profession upon this general subject which we attempt here—with hands all too crude and unskillful—is to prove the following:

1st. *That in no case of an exchange of stock* is the liability of the new company limited to the value of the new stock turned over to the old stockholders, *nor is it even limited to the value* of the *property turned over to the new company.*

That by the **very act** *of the* **exchange of stock** *the new company* **assumes** *to pay the debts of the old and the debts* **in full.**

That is, that the *act* of exchanging stock and acquiring the *assets and business* of the old company **implies** the assumption of old company debts.

3d. The UTTER LACK OF EQUITY *in* REQUIRING *a creditor* TO **follow** *the complicated and many featured property of a* **railroad** *corporation and prove the value or amount of this "trust fund," as a prerequisite of collecting his claim.*

If the claim were for a large amount, a huge fraction of the claim would be eaten up by the expense of the contest; if a small amount, it would be entirely consumed.

The *fact* of such injustice was no doubt the *chief reason* impelling the passage of statutes casting *full* liability upon the consolidation.

The author of a very luminous review in Vol. 7, Ruling Case Law, § 155, says that "the qualification *at least to the extent of* 'the property received from the old corporation' seems to have been employed from an abundance of caution, and is not referred to in the great majority of cases."

So, too, the counsel for Boyd in the late case (228 U. S. 482) used these qualifying words in presenting his claim.

We are therefore satisfied that had this issue been fully presented to the Court of Appeals, it would have disposed of the entire case upon *the fact alone* that *the reorganization plan here invited the exchange of old stock for new.*

———o———

Another thing that strikes the student of railroad reorganization cases is the prevalent tendency of counsel attacking reorganizations or seeking to establish claims against the new company to raise the cry of "fraud."

Some cases reveal plans which in their essence were violative of the rights of unsecured creditors and constructively fraudulent.

Other cases—but not so many, involving constructive fraud in the plan of arrangement, revealed also *actual* fraud—a well-defined and well-proven *intent* upon the part of the acting parties to defraud general creditors. As in cases of constructive fraud, the law imputes to each one concerned therein a knowledge of the consequences of his acts—there are few cases where proof of the actual intent to defraud was of any particular consequence—except

ing where some gross waste or concealment of assets, etc., was incidentally involved.

Then there are cases where the payment of the floating debt of the old companies involved *was provided* for in the plan itself, but was *repudiated* by the new company or the parties controlling the consummation of the plan.

These latter cases were not technically cases of fraud. *They involved merely a breach of contract.*

A man may have a fraudulent intent in breaking a contract. But this ordinarily is immaterial. No matter what his intent, his contract is broken, and the measure of damages for the breach ordinarily is the same, no matter what the intent may have been. The party at fault might have known that he was at fault, or he might have believed that he had a legal right to do the act which constituted the breach.

Are plans of reorganization *which do not expressly provide* for floating debts necessarily *actually* fraudulent? Or, rather, do the parties furthering such plans *necessarily* intend fraud? Why not say that it may have been an oversight and attribute good motives instead of bad ones to the parties interested? Or, why not say that as the scheme to be valid *involved* the payment of floating debts that it must have been *intended* to pay them? Why not say that as a plan of reorganization by which stockholders of the old company are to have an interest in the new, is not necessarily illegal or fraudulent, unless the *positive intention not to take care of creditors clearly appears* as a proven *fact*, it will be *presumed* that the latter were to be protected.

Why not say that if such scheme *implies* such payment, the new purchaser will be held in *implied assumpsit*, and will not be allowed to say that the plan was meant to be fraudulent?

Why then relegate the debtor in such cases to the remedy of *frustrating* the plan, or pursuing the old assets, or otherwise being barred from recovery?

If general creditors ought to be paid in such case, does it lie in the mouths of those effecting the change to say that *they meant to defraud?* Could not the parties affected—the creditors—say, "We will concede or assume that your motives were honest, and that you *either* inadvertently omitted to mention or provide for the floating debt, *or* you and your colleagues recognized all around that the law would cast the obligation upon you? Can we not elect to consider your scheme *an honest* instead of *a dishonest* one?"

And, while creditors might in such case *intervene* and stay proceedings until their rights were provided for, we repeat that the liability *being implied from the step taken*, and thus fastened upon the new company, it was, like any other liability, a claim at law, and would continue until barred by limitations.

In the leading "fraud" case, *supra, Louisville Trust Co.* v. *Louisville & N. R. R. Co.*, 174 U. S. 674, —the court expressly excuses earlier action on the part of the attacking parties on the express ground that they were warranted in attributing an honest intention to the part of the reorganizers until the contrary clearly appeared from the facts.

And even if actual fraud **has** *entered into the*

deal, why can the creditors not waive the fraud and sue as in any other case of breach of trust?

In the leading case of *R. R.* v. *Howard*, 7 Wall., *supra*, the creditors intervened before the deal was entirely consummated. The arrangement provided that stockholders in the old company should receive 16 per cent. of the stock in the new. Just before the stock was delivered to the old stockholders the creditors had it sequestered and appropriated to their claims. Something which represented exactly *the value of that taken* from the old company which had been subject to the payment of its debts was thus seized upon, and in a case where it was clear that the parties *meant* to consummate an actual fraud. But the one thing about this Howard case which has largely escaped the notice of the profession is this: That *if* such creditors had *not* intervened they *could have sued the new company direct for their claims* and *recovered* the full amount thereof.

If the creditors in this Howard case had failed to intervene, or had not taken prompt steps to levy on the *identical stock* thus appropriated, they would have been barred therefrom, as the stock would have been apt to pass into innocent hands. *But the* **right of action** *against the new company was a* **distinct** *right* and would remain unaffected.

And the court *distinctly held that the fact* that the creditors *had* a remedy at law against the new company (if they *elected* to sue it) was immaterial.

One vital proposition, therefore, is:

Any such arrangement, whether called a consolidation or reorganization, by which the stockholders of

the old corporations reserve a value in the property, is fraudulent and void in law as against creditors, unless the claims of such creditors are provided for, or it is intended to pay them.

But a *corollary to this proposition is equally important to be borne in mind, viz:*

Any such *arrangement whereby the property of the old company and the new—the two trust funds—are joined or merged in consideration of the exchange of stock* **implies** *the payment of the claims for whose benefit they are held, and of necessity carries with it that liability.*

And this *independently* of a statute fixing the liability.

7 Thomp., Sec. 8241.
23 L. R. A., p. 231.
3 L. R. A. 435.

3. The *third* feature of reorganization law which we submit can stand more elucidation and emphasis is that which relates to the *election of remedies* and the *effect of foreclosure* in certain cases.

The very fact that there is confusion on a subject so vital as railroad reorganizations and of such universal and overwhelming public interest, drives us back to the very threshold of the entire railroad subject in all its originality, its ultimate, and its ideal, if you please.

Railroads are a species of public highway, a public convenience—inexorably demanded by modern conditions. Primarily, it is the duty of the state to provide public ways for traffic conveniences. Many states originally built and operated railroads. In

some European countries to-day the government owns and directly operates railroads, in some the government owns and private companies operate them.

The fact that the state licenses private capital to establish and operate railroads makes them no less public in their essential character. Moneys contributed, therefore, to the establishment or operation of railroads are contributed directly to a public use—to the state.

The idea of repudiation of any of such claims is unnatural. The state should pay its debts, and the idea of repudiation of public or state debts, we repeat, is intolerable.

Is there, then any comparative merit in claims against the state as respects *the establishment* of highways and the *operation* thereof?

Operation presents the more immediate necessity, and it would seem that as between the two claims, moneys furnished to a going railroad system, *i. e.*, to keep it going, would have a natural preference over those contributed for the establishment thereof,—a principle recognized in the instances of preference allowed by the courts for supplies furnished for a period immediately prior to insolvency or foreclosure, and also by the issuance of receiver's certificates, etc.

Hence, we find that in England, where roads are still privately owned, the railroad system has been modeled upon the plan of avoiding the waste and delay, etc., of foreclosure, and at the same time recognizing the *exacting equities* of open debt claims. And under the acts of parliament the Railroad Com-

mission there, as stated elsewhere herein, has power to force a reorganization, even as against the consent of stockholders, and allow a scaling down of bonds and interest as well as stock—with ordinarily a payment *in full* of floating debt.

This system also effects a saving of public moneys by the very means of the security or grade of merit thus afforded to "open" or "floating" claims, namely, by lowering the rate of interest demanded, which inevitably follows an increase of security, viz: by way of a preferential classification.

It is at this point where we wish to observe that the dissenting opinion in the Boyd case is in its strongest aspects *a protest against our system of allowing foreclosure of public railroads*,—which always entails loss and unnecessary expense. *It is an appeal for a system better fitted to the situation* and industry.

———o———

It seems that counsel in presenting the late Boyd case (228 U. S. 482) to this court failed to recognize the wide divergence between cases where the creditor *seeks to pursue the property* of the original company and where he elects to sue upon the basis of the *consolidation* of the companies.

It is in fact marvelous that the claim of the complainant Boyd was not rested in the alternative at least, upon the basis of a consolidation; for there *was there an exchange of stock.*

And we do submit that it is now settled and axiomatic law that "the *exchange of stock* is the distinguishing feature of a consolidation." (Authorities *infra* and *supra* in brief Point II.)

If this be so, it is so absolutely and *independently of any contributions of money made by stockholders.* It is none the less a consolidation by reason of contributions of money made by them or any one else, or of obligations undertaken by them—which are usually the equivalent of money, etc., etc.

Had the case been squarely presented to this court on the basis of *a consolidation* it would no doubt have been instantly disposed of upon that issue, and in the affirmative—unless an overwhelming list of consistent authorities were to be overruled.
The court, however, would then have reached a more doubtful question as to whether or not, in addition to finding a legal liability on the part of the consolidation to pay, the court should give, as it did, a *special lien upon the old assets.*

There is at least authority to the effect that in ordinary cases the liability of the consolidation to pay is a mere general liability with no special claims on the part of the creditor to a lien over the new mortgage indebtedness.

The chief finding of the majority opinion in the Boyd case is a *liability to pay,* there being no serious question assumed as to the *special lien* given by the lower court.

The dissenting opinion protests against an open creditor having a right in effect to *stop a foreclosure* where evidently there is nothing of value in the property to pay the debts after foreclosure. That is, it assumes, as we think in error, that if Boyd could not have *stopped the foreclosure,* he could *not recover at all.*

As held in the majority opinion, as well as in that

of the Court of Appeals herein, *the value at the time of reorganization* is not conclusive evidence of what the *value might be at the end of a foreclosure.* And hence there lurks in the dissent a fallacy, as we submit, at this point.

But this argument or protest against an adversary foreclosure of a public utility system when there is apparently no value above the mortgage, *is a loud and unerring appeal for a change in our entire railroad system,* one that will avoid foreclosure as a totally unnecessary expense and as generally *unfitted* to such industry or system.

In other words, all this brings us to a parting of the ways in the matter of railroad finance, and it is high time for America to pattern her system in this respect after the English and other European systems and keep step with railroad progress.

But the injustice which lurks in the dissent lies in the fact that, while in some cases, as in the instance of the Northern Pacific, a bond indebtedness and interest thereon may have become so great and the entire system so reduced in earning power as to show a great deficiency in value,—and hence the apparent uselessness of foreclosure,—nevertheless under our established system *credit is not given to the company upon that basis;* nor on the basis of a waiver of the right to insist upon foreclosure or be concluded in the contingency that the reorganizing officials (the debtor itself) should (a) find the value and (2) should find as a fact that there was "no equity." Nor is such credit given upon the basis of a *stockholders'* foreclosure, one instituted at the instance of the mortgagee.

Most of the dissenting opinion can be used as a sound argument against Boyd's right to *stop the foreclosure* as fraudulent *per se*, and as a colorable argument to deny that he is entitled to a *specific* lien; but it could not be used *at all* against the assertion of a *general liability* of the new company arising by virtue of *consolidation statutes*. And the reasoning of the dissent leaves this proposition of general liability unattacked as clearly as the majority opinion—for lack of a full presentation of the case as we see it—fails to fully emphasize it.

The expression in the Boyd case as to "a non-assenting creditor" being "offered a fair share" in the reorganization plans and the right of a court to bind a creditor "not accepting fair terms offered" *where he seeks to subject the property* of the old company to the payment of his debt, etc., is pregnant with great misunderstanding and accounts in our judgment largely for the divergence of views of the justices of this court in that case.

The Boyd case was evidently presented to this court in a way that ignored the *election of remedies* which an "open claim" creditor had in the circumstances.

A creditor's claim of a right *in equity* to *forestall or block a foreclosure* is *one thing*.

A creditor's claim of a general "common law" or *legal liability* upon the purchasing or succeeding *company* is another thing and an entirely different thing.

As to the former, it is said in what is frequently called the "Monon" case (*Louisville Trust Co.* v.

L. & N. R. R. Co., 174 U. S., *supra*) that he can block such procedure when he asserts *actual* fraud—a proven *intent* to wrongfully exclude him in the entire scheme of reorganization of which the foreclosure is a part.

Such a holding *may* go "to the edge of the law," as Mr. Justice Lurton remarks in his dissent; but this *may be* because it goes to the edge of the *necessity* to protect the open creditor.

It is one thing to intervene and *stop the foreclosure* of a great big public utility system which may be suffering from bankruptcy and in the public interest should be quickly restored as a financially "going" concern.

Nothing short of a clear showing of *actual intended fraud* as in the "Monon" case should warrant success in the effort. And hence, the applicant coming into *equity* can be conditioned by the fact of such overwhelming public interest and be barred from *interference* or from *following the old assets* by even slight laches or possibly "failure to *accept fair terms offered.*"

But the very considerations of overwhelming public interest in the enterprise and the necessity of keeping it "going" without undue hindrance to those responsible for its operation and seeking to rehabilitate the property and at the same time to keep the service at its best and improve it right along to the best advantage, etc., etc., *heighten the merit of the creditors claims and make more urgent the duty to take care of them.*

The overwhelming necessity of keeping a public

utility "a' going" bids for extra confidence on the part of lenders of money, that moneys furnished for *such urgent purpose* shall *not* be *imperiled,* and that claims for furnishing supplies, etc., shall be ever treated as above and far above the stockholders' claims—*i. e.,* the *money-making* claims.

It is this very principle which supports the preference which courts give to claims contracted a few months or so prior to foreclosure and insolvency—making them a lien even above prior bond issues.

If these claims of open creditors of a public utility are or should be recognized as of special merit, such claims would always have *a special power or advantage*—over open claims against a "private" or ordinary corporation—in conditioning a foreclosure. That is to say, a court of equity would or should give such claims a *special opportunity* to attempt to save the foreclosure and the fullest opportunity to raise the interest due and thus to defer the foreclosure—and probably save it.

The value of the creditors' right or interest "in preventing the foreclosure, or for the purpose of conditioning the foreclosure, or for the purpose of the present or future control of the property," referred to by the Court of Appeals in its second or *per curiam* opinion is not merely a right *to obstruct; it is a strict legal right to demand* **"an adversary** *foreclosure,"* if any at all is to be had. In which case the creditor would have opportunity to appeal to the court for delay with a chance to profit from possible bettering *of trade* conditions, as well as being entitled to presume, as he did when he loaned his money, that the stockholders and their interests—the very *corpus*

of the legal person liable for the debt—were behind his claim in seeking to save foreclosure.

Furthermore, no matter what public inconvenience may be given to efforts, well intentioned or otherwise, on the part of the railroad financiers, stockholders and bondholders, to speedily bring about a rehabilitation, etc., by a creditor enforcing his *right* to delay, if we may call it such, *that right was in part at least the fundamental consideration or inducement for giving the credit.*

———o———

Should open creditors of the prior company be given a first or prior lien upon the road or property of the consolidation.

1. There are texts and decisions in the negative, and it is held that the lien of the new mortgage is not affected by such claims.

Where however—as in the case at bar—the organization plan itself *expressly provides* that upon or by the *consummation of the plan itself* such debts will be paid a *distinctly different* situation and issue is presented.

The reorganization committee is the agent of the old stockholders of the old bondholders and of the new stockholders and *bondholders.* And where the plan contains such express promise of actual payment of such debts, and a creditor is thus invited to *suspend the use of a remedy* against the *property* of the old company, to put his claim *behind* the new bondholders, does not equitably satisfy the situation.

The original lien against the original property (*i. e.,* the old mortgage) being released a judgment

against that company for an open debt would become a first lien.

And where the parties so releasing their bonds *become parties* to an express promise to pay the debt *upon* release of their bonds, they can not equitably complain of the lien being fastened upon such property in consequence of *their* default.

The decree ordered by the Court of Appeals is well based not only as to its holding of liability, but also as to the special lien given to the Trust Company's claim as "prior in time and superior in equity."

2. *But there is another basis for the giving of this first lien to the Trust Company, viz.:*

The fact that at the time of the filing of the bills of complaint herein the Reorganization Committee was in control of the Belt Company and the Southern Company; and hence the very *agents* of these new (and old) bondholders WERE RESPONSIBLE FOR THIS OUTRAGEOUS LITIGATION AND THIS EXCEPTIONAL AND ABNORMAL BURDEN CAST UPON THE TRUST COMPANY AND THE OPPRESSIVE TACTICS USED TO DELAY IT IN COLLECTING ITS CLAIMS. Claims, too, proven by the books of the Belt (the Southern) itself, by exchange of accounts, by *notes* and *extensions* of notes, and in every conceivable way ordinarily used to settle accounts and foreclose any question of them.

(II.)

The Nature of a Corporation.

Morawetz says (2d Ed.), Sec. 780, that at law "a corporation is recognized as an entity without regard to its membership." "In equity a corpora-

tion is recognized as an association of individuals united for their common benefit under a collective name."

The idea of regarding the corporation as a thing or person apart from its members, as it is said, "is a mere fiction."

That is to say, the corporation is a mere *contract* of membership.

Corporations "act" and it is said, therefore, that they are persons—artificial persons. But articles of association or contracts cannot act in fact; it is the members who, as officers and agents, do the acts. Therefore, as Morawetz says, the view of a corporation as a person or agency apart from its members is a mere fiction.

Corporations owe duties, or their members, *as part* of the corporation, owe duties *arising from the contract of membership*, to be performed *together* or in certain specified ways. By such contract these duties are chiefly thrown by the stockholders upon the directors and officers. But all three classes are component parts or factors of a going corporation, and stockholders themselves have some active and positive duties. What their liability is for a breach of these, or what penalties they pay therefor, whether great or small, is a different matter.

The corporation as such *owes*, and hence all its component members and agents *together* owe, a duty to the state, a duty to its creditors and others dealing with it; and its members each owe a duty to the corporation as such or to each other as members thereof.

A corporation just starting in business bids for

credit upon the faith of its capital, as it is frequently stated. But, in reality, this it not all. It bids upon the strength of its capital *and* upon the implied promise that its capital shall be *actively used* and managed in the line of corporate purposes and for the purpose of being *increased,* and also that this management and use shall be continued *for the full life of the corporation.*

It is true that the creditor cannot actively compel the continuance of the corporation in case its directors decide at any time that it shall quit business. But that does not alter the truth of the fact just stated.

It is frequently stated that the assets of a corporation constitute a trust fund for the payment of its debts; and that its debts must be first paid before its stockholders (in reality the corporation itself) get any portion of or benefit from its assets. The control of these assets rests with the corporation or its officers and agents, they being required to manage and handle the assets in good faith towards preserving and increasing them and in the interest of the creditors as well as the stockholders.

If a corporation actively ceases business, its creditors have a right to have its assets sold and the proceeds applied to the payment of their debts.

The state in such cases has a right to have the franchise forfeited or surrendered up, and to have the existence of the corporation formally ended.

Yet the rights of creditors are, of course, clearly independent of and distinct from those of the state; and a corporation which has actively ceased business and has had its assets entirely distributed may still

exist as a corporation, or a legal *corpus* for the settlement of creditors' claims, etc.

In other words, as long as there are *some* contract rights or privileges *to be adjusted,* the corporation,—*i. e.,* the contract—is treated as being in existence *for such purposes.*

(III.)

What Constitutes a Consolidation of Corporations?

One starting out to study this subject from the books will soon see that the courts have wrestled hard with the definition of the term "consolidation."

In England the corresponding term is "amalgamation." One of its learned justices declared "it is difficult to say just what the term 'amalgamation' means." (Page-Wood, V. C. See Brice, *Ultra Vires,* 2nd Ed., p. 708.)

"The term 'amalgamation' has no definite or positive signification. It is employed more or less loosely to denote various operations, in themselves widely different, which more or less completely work a transfer of corporate affairs from one corporation to another, and a merger of the former body in to the latter." (Brice, p. 708.)

It is very evident, then, that, as is usual in such cases, the term has a wide range of meaning or is generic in its nature, and logically divides into several specific classes.

The trouble is, as is usual in corporation cases, the rights involved or to be affected in the various

cases have been so different that the struggle over the definition has been had with but little profit.

A joinder of interests of several corporations might be so far effected in one case as to effect certain rights in a certain way, and yet not affect certain other rights. As to what effect it did have in the particular case considered depended upon what had been done.

"*Consolidate—To unite, compress or pack together and form into a more compact mass, body or system.*" "*To cause to cohere or cleave together.*" "*To bring together and unite firmly into one mass or body.*" Century Dictionary.

"Reorganizations" of railroad properties are generally classified as either consolidations or reorganizations *proper*. The two are defined in the Encyc., 2d Ed., Vol. VI, p. 801, thus:

> "A CONSOLIDATION occurs where the *rights, franchises and effects* of two or more corporations are by legal agreement combined into one whole and committed to a single corporation, the stockholders of which are composed of those (*so far as they choose to become such*) of the corporation thus agreeing, whether such single corporation, called a consolidated corporation, be a *new* one then created or one of the original corporations continued in existence with larger rights, capacities and powers."
>
> "REORGANIZATION is to be distinguished from consolidation. The former term is used to designate the formation of an entirely new and distinct corporation for the purpose of *purchasing* the property of another corporation and superseding it in its business, *without incurring any liability* to the creditors of the latter."

The *exchange of stock* is the distinguishing feature of a consolidation.

This is *settled* law.

Morawetz, Sec. 939.
Vol. 7, Ruling Case Law.
3 L. R. A. 435.
7 Thomp. on Corp., Sec. 8241.

It seems clear that there may be:

1. A complete or full consolidation.
2. A partial consolidation.

And again:

1. A *de jure* consolidation.
2. A *de facto* consolidation.

There may be:

1. A temporary consolidation.
2. A permanent consolidation.

The first division explains itself, just as the terms complete or partial "merger" explain themselves. So a *de jure* consolidation may be full or partial; and so a *de facto* consolidation may be full or partial.

And so a statute may provide for or allow generally a consolidation, full or partial, and may also specifically allow companies to do things *which amount in their essence* to consolidation, full or partial. In such case there would be a mere duplication of subject-matter.

Again, there may be *acts performed* by one corporation in respect to another corporation or its assets under or upon which

(1) the former will be held to have assumed the latter's debts and estopped to deny the same; or

(2) under which the former may be *estopped to deny* that it is a *consolidation* of the other, and *hence* that it has assumed such debts.

The cases in the books of absolutely full and complete consolidations are not so common. In most cases there are some remains of the old corporation in existence, at least for a time, or liable to respond to some suit or action on behalf of the state or others. There are *some* contract rights, etc., left unadjusted. If, therefore, no liability would attach to the new company, except when the merger had been or become absolutely full and complete, great injustice would occur in many cases. As we shall see, therefore, that in most cases where the new company—the consolidation—has been held liable the old company has been continued and operated to a certain extent and for certain purposes.

In view of the diverse classification above and this array of distinctions, it is no wonder that the courts, in treating cases with limited issues and in each instance one of many classes, got into difficulty when attempting to form a definition which would cover the whole field of "consolidation" and at once reveal all classes of cases falling within it.

And it is likewise apparent that a brief which would do justice to the whole subject of corporate consolidation would have to reach the proportions of an ordinary text-book.

We therefore intend to keep as close as possible to the specific case here presented, and treat very briefly that portion of the consolidation "field" immediately contiguous or surrounding it; this latter simply for the purpose of emphasizing the propositions, and "boxing" them in.

(IV.)

A Schedule of Vital Propositions.

1. It is often said that a complete consolidation of two corporations consists of a complete merging of property (or assets), franchises and stock.

But here again there are two classes of complete consolidations, because there are two classes of franchises of a corporation—the non-observance of which fact has led to considerable confusion in the decisions, or at least in the language thereof.

Every corporation is a creature of the state and is created for certain limited and specified purposes. Its creation and existence are, however, different or separate from the fulfillment of its purposes. It may do business along the lines of or within its chartered purposes, and after ceasing to do business, it does not thereby or *eo instante*, become extinct. The corporation still exists.

For a ceasing of business or other causes, *the state* can cause a surrender of the charter. But until it does the corporation exists as such. If the state should not act, and the corporation re-engages in business, no private person could complain, nor could he successfully raise the plea that the corporation had ceased to exist, or could not act.

The franchise *to exist* as a corporation is, therefore, distinct from the franchise to do a specified *business.*

"The absolute destruction of the former corporation has seldom been accomplished. In whatever mode a corporation be ended it is found that the

law, *i. e.*, the state, intervenes. A corporation is something distinct from its members. All these may leave it, yet it still exists; how, then, is it possible that any action of theirs unrecognized by the law, can destroy that which depends for its origin and continuance upon the law?"

Brice. Ul. Vir., 2d Ed., p. 710.

2. Two corporations may by certain specified methods consolidate all their property, their stock, their business franchises, and also the very substance of their corporate *existence*—their "franchise" to *exist* as a corporation.

Statutes allowing complete or the *completest* consolidation contemplate that upon consummation thereof the one corporation shall *go* out of existence.

But the mere fact that a corporation as such exists or has not become extinct cannot be in and of itself a defense to the claim that it has consolidated with another. Vol. 7, Ruling Case Law, § ....

3. A "true" or "perfect" or "direct" or the "completest" "amalgamation" (or consolidation) involves:

(1) A destruction, either actually by dissolution or substantially *by abeyance*, of the entity of the original or transferring corporation.

(2) A transfer of corporate rights and liabilities out and out, present or contingent, a transfer, in short, of the legal *corporate persona*.

(3) A transmutation of the members of the former corporation into members of the latter.

(4) A novation of the rights of creditors, etc.

The first two are connected with and specially relate to the corporations themselves.

The last two are totally distinct, and depend upon principles of the rights of individual shareholders and creditors.

Brice, U. V., 709.

4. Creditors cannot be *compelled* to sue the new company. A novation must be accomplished by consent of all parties.

Morawetz, § 808.
Brice, U. V., 724.

As to creditors the old one is treated as in existence and hence capable of suing and being sued, and having contracted the debt, no plea of *nul tiel corporation,* or other similar plea, would lie in its mouth to utter.

The new corporation would be liable because it had taken over *the assets and business* of the old, and was *continuing* the same for its own benefit, under a statute permitting it to do so, and expressly making it liable for the debts of the old.

Vol. 7, Ruling Case Law, §§ 155-6.

(And if the statute did not expressly so provide, the law would imply such a liability.)

Idem and 3 L. R. A. 435; 23 L. R. A. 231.

5. "Consolidations may and often do take the form of a *purchase* by one company of the stock of another.

The right to consolidate *includes* the right to purchase (and even destroy) the stock of another corporation.

Morawetz, § 942.
Thomp, on Corp. § 324 and § 8224.

In such case the purchasing company, owning absolutely all or the major portion of the stock in the other, and thus controlling it, takes possession of the assets of the other and uses or operates them as its own property and for its own benefit.

The Air Line-Belt relationship was an instance of such a consolidation.

The Belt Company held all of the Air Line stock. It operated the road directly, for its own benefit. It had the accounts against the Air Line charged directly to itself.

As owner of the Air Line stock, it kept alive the Air Line organization.

If it had surrendered or resold the Air Line stock, and given up to that company the control and possession of its assets (no other person's rights intervening) the consolidation would have been broken, and the original status restored.

The consolidation would have turned out to have been for a time only, or what was called by Lurton, J., in the Todd-Kentucky Land Company case, a "temporary" consolidation. (57 Fed. Rep. 56.)

While it had lasted, however, the Belt Company would have been liable for Air Line debts, and *estopped to deny* that there had been a consolidation or that it was so liable.

6. Two or more corporations can consolidate, using one of them as the absorbent corporation; or they can all be absorbed in a new corporation to be formed. Ashling case, 160 Ill., *supra.*

7. The distinguishing feature of a consolidation is the exchange of stock. *Morawetz,* Sec. 939, and 3 L. R. A., *supra.*

It is, therefore, apparent that although all the stock of the old corporation is not absorbed by the new, and that no matter how little is so absorbed where the exchange or acquirement of the stock is followed by the *acquirement of the assets* of the old corporation, there is nevertheless a consolidation *pro tanto*—where the statute allows such a proceeding.

(Here we have no case of a *minority* participation, and hence it will be unnecessary to follow out the effect thereof upon the rights of various creditors, lienholders and stockholders, etc.)

8. The capital and assets of a corporation constitute a trust fund for the payment of its debts.

The duties of the trustee (the corporation) are, that it will preserve the trust fund and manage it in the interest of the creditors and *seek to increase it* in the due prosecution of the chartered business of the company.

If, therefore, *another* corporation *appropriates* the trust fund and *continues* the business it quite naturally should be liable for the debts of the old. And this principle is the foundation for the statutes making consolidated corporations liable for debts of its constituents. *And this principle does not concern itself with the circumstances that the old stockholders contribute some cash to the deal.*

9. In case of an out and out sale in good faith to a new company, no such liability attaches. The old company has received the purchase money therefor, and the money stands as *a substitute* for the assets sold. The trust fund *remains*, and in *the form* of the substitute received. But where the new company is-

sues its stock for the old company's assets, it is not a purchaser for value. The *Key City,* 14 Wall. 653, *supra.*

10. In the case of an ordinary corporation, and where its assets have been thus turned over to another corporation in exchange for stock, the creditors of the old can *elect* to sue the new company, or to follow the assets and have their rights enforced against the property itself.

In the leading case of *Chicago, Rock Island & P. R. R. Co.* v. *Howard,* 7 Wall. 392, they *elected* to levy on the assets in the *form* of the value given old stockholders.

11. Now, the fact that it would be inequitable for stockholders of the old corporation obtaining or retaining an interest in its assets, by taking stock in the new or successor corporation (ahead of creditors), plus the fact that several corporate enterprises may often be situated as to suggest or prompt consolidation as a beneficial step or process, constitute the origin of the statutes *allowing* consolidation of corporations and specifically *providing* for the assumption of debts by the new company.

12. Again, where consolidation is allowed by statute it is permissible to use *any* methods not illegal in themselves which will bring about the *actual result.*

And even though a statute furnish a method therefor, such method is not exclusive, unless it be so specified. *The general* **authority** *to consolidate is ordinarily separate from the* **method** *provided therefor.*

Ashling case, 160 Ill., *supra.*

A general legal permission to one company to absorb or "swallow" another is *all the law needed* by the corporations *to justify the act,* no matter in what *manner* the act has been performed or the *actual* **result** *brought about.*

13. And so where consolidation takes place in a state where no exclusive method is furnished, the consolidation is legal and complete—*i. e., de jure*—when *the actual* consolidation has been fully accomplished; while

14. It may be a *de facto* consolidation when some details are yet to be done or accomplished.

15. "The contract of consolidation is an act of dissolution in form and substance of the Lebanon Company, and the corporation cannot in the act of dissolution dispose of the rights of its members. The act of dissolution, like the act of association, is not a corporate act, but an act of the members of the corporation. They may commit to their officers the business of effecting it in all its details, but they are not required to do so by the terms of their association, and in effecting such a purpose the officers would be rather trustees of the members than corporate functionaries."

Lauman v. *Lebanon Val. R. Co.,* 30 Pa. St. 46.

For this reason many statutes like those of Missouri provide for consolidations by mere contract or consent of the stockholders, in addition to the "vote" method.

V.

Consolidation under Missouri Statutes.

The statutes of Missouri in respect to corporations, like those of most of the states, have finally become through amendments made from time to time quite prolix, almost to the point of tediousness.

They form a good illustration of how the modern public have tried to remedy or thwart the evils of corporate administration with a very web of laws running to the merest detail,—a mere lot of mechanical fetters,—the chief result being a volume of waste consequent upon endless complexity.

A second feature of the Missouri statutes, and particularly of the sections bearing upon railroad consolidations, etc., is a duplication or overlapping of subject-matter. The three or four long sections bearing upon the subject could be reduced to less than a third in volume under the hand of a skilled draftsman. As will be found, the effort was to allow expansion, and at the same time under many explicit directions and prohibitions meet the threatened extinction of "competition."

The ever-recurring issue of "competition or co-operation" is revealed in these sections; as is also shown the erstwhile popular method of attempting to regulate this whole subject through prohibitive and mechanical laws alone, instead of by strong administrative and supervisory bodies, acting under general laws.

This is not the place to dwell at length upon the merits of this now universal issue. We simply say,

in passing, that it would seem that the American people are beginning to realize that "Sherman Acts" and Northern Securities decisions will not meet this issue; that combination with administrative regulation is simply healthy *co-operation;* and that, lastly, one of the duties up to the people and legislatures of the various states is to wipe off the statute books a great web of useless mechanical fetters.

The sections of the Missouri statutes which bear upon this subject of railroad consolidations are numbers 1059, 1060 and 1061. The first with which we are chiefly concerned is as follows:

> "SEC. 1059. COMPANIES MAY CONSOLIDATE, WHEN. Any two or more railroad companies in this state, existing under either general or special laws, and owning railroads constructed wholly or in part, which, when completed and connected, will form in the whole or in the main one continuous line of railroad, are hereby authorized **to consolidate in whole or in the main,** and form one company owning and controlling such continuous lines of road, with all the powers, rights, privileges and immunities and subject to **all the obligations and liabilities** to the state, **or otherwise,** which belonged to or rested upon either of the companies making such consolidation.
>
> In order to accomplish such consolidation, the companies interested may enter into contract fixing the terms and conditions thereof, which shall first be ratified and approved by a *majority in interest* of all the stock held in each company or road proposing to consolidate, at a meeting of stockholders regularly called for the purpose, or by the approval in writing, of the persons or parties holding and representing *a majority* of such stock.
>
> A certified copy of such articles of agreement, with the corporate name to be assumed by the

new company, shall be filed with the secretary of state, when the consolidation shall be considered duly consummated, and a certified copy from the office of the secretary of state shall be deemed conclusive evidence thereof. The board of directors of the several companies may then proceed to carry out such contract according to its provisions, calling in the certificates of stock then outstanding in the several companies or roads, and issuing certificates of stock in the new consolidated company, under such corporate name as may have been adopted."

(Here follows a prohibition against consolidation by competitive roads, either in whole or in part, and declaring that any such consolidation "shall be void," etc.)

"Before any railroad companies shall consolidate their roads, under the provisions of this article, they shall each file with the secretary of state a resolution accepting the provisions thereof, to be signed by their respective presidents and attested by their respective secretaries, under the seal of their respective companies, which resolution shall have been passed by a majority vote of the stock of each, at a meeting of the stockholders to be called for the purpose of considering the same, sixty days' public notice of the time, place and purpose of such meeting having been given by advertisement in some newspaper printed in the county where the general offices of said company or companies of this state are situated."

This section contains (1) a general authority for railroad companies to consolidate "in the whole *or in the main*" and casting a *full* liability upon the successor company in *either* case; (2) it provides two general methods of *consent* to consolidation which "may" (not must) be adopted, viz.: one under which the contract or terms of consolidation are fixed in the first instance by a majority *vote* of the stockhold-

ers of each company, and one needing only *the approval in writing* by such a majority; and (3) a prohibition against consolidation of competitive roads (immaterial here).

Sec. 1060 provides (a) that any railroad company may "aid" a connecting line company by means of subscription to its capital stock "*or otherwise;*" (b) for extension of, intra-state railroads into adjoining states allowing the one company to "build, buy, sell, lease or *consolidate*" with any railroads in such adjoining state; (c) for "any railroad company" to "lease or *purchase* all or any part of a railroad, with *all its privileges, rights, franchises,* real estate and other property, the whole or a part of which is in this state," *if the lines connect "within or without this* state," etc., and (d) that any railroad corporation (of another state) may extend its road "into and through this state, and for such purposes be treated as a domestic corporation," etc.

Then follows a provision for assent by a majority *vote* of the stockholders to such aiding, purchasing, etc., or other "arrangements" "or until the holders of a majority of the stock of such company shall have *assented thereto in writing,* and a certificate thereof signed by the president and secretary of said company or companies, shall have been filed in the office of the secretary of state," etc.

Sec. 1061 is of definite interest to us. It provides that any Missouri railroad corporation "may *acquire any line of railroad* within or without this state which shall form a continuous line," etc., "and may acquire *and may hold the obligations and stock* of other companies, *owning or operating* such lines of road,"

etc., Provided, that no such line of railroad shall be so *purchased* until "a *majority vote* of the stockholders of the companies shall have been taken in regular meeting," or until a *majority of the holders of the stock* of such company shall have consented thereto, in writing, and a certificate thereof, signed by the president and secretary of said company or companies shall have been filed in the office of the secretary of state."

Now we desire to point out in reference to these various provisions:

1. That the general authority to consolidate given at the outset of Section 1059 covered and made legal and permitted a consolidation under *any* method which would accomplish such *a result.*

2. In neither of the two methods outlined in such section for approval of or consent to the contract was it attempted to prescribe the contract itself or "the terms or conditions thereof." In other words, any *actual* method of consolidation, whether by *purchase* by one company of the stock of the other, or by an *exchange* of stock or otherwise, was expressly allowable under this section *independently* of the general clause *allowing* consolidations—provided consent was given in *either* of the two ways presented.

3. That consolidations could also actually and legally take place under the provisions of Sec. 1060 classified above as "(a)" and "(c)".

A company which would "subscribe" for all or nearly all of the capital stock of another (a), have the stock issued to it, and itself having the franchise of operating a railroad between the same points as

the constructed road, and which would then as the owner of the stock of the aided company cancel its stock or have it abandon operations and *enter upon possession* of such line of road would be a consolidation of said new company. So a company "purchasing" (c) the road of such connecting company might "*pay*" therefor with its *own stock*, and in that case, upon the former taking possession of the property, a consolidation would also result.

4. And likewise, under Section 1061, a company which should "*acquire* the stock" of any connecting line company, by means of *an exchange* of its own stock therefor, and *take possession* of and operate the line of such company, would be making thereby a consolidation with such company; and

5. *Such* a consolidation could take place as said above under Sec. 1059; the only difference, if any, being that under Sec. 1061, a mere *approval in writing* by a majority of the stockholders, and the filing of a certificate thereof by the president and secretary, etc., would be all that was necessary to make a full and complete *de jure* consolidation; while under the last provision of Section 1059 a majority *vote* of the stockholders "accepting the provisions" of "the article," etc., might also be necessary.

(It is doubtful if this last provision does not apply solely to the instance where the contract of consolidation is *ratified* in *the first instance* at a stockholders' meeting, and not where the contract is approved in writing by a majority, etc.,—an individual and not a corporate act—as per Lanman case, 30 Pa. St., *supra.*)

6. However, since there is a general authority for

these three companions to consolidate "in the whole or **in the main,**" and since no one *exclusive* method was provided therefor, we are here thrown back upon the question whether the transaction here in question was *in its essence* a consolidation "in the whole or in the main." And as a consolidation can be made by a mere *acquisition of the stock* (see Prop. 5, *supra*), the question is fully answered.

7. Even if not a complete consolidation, yet if the major part of *the stock* of the Belt Company was in fact consolidated and the Southern *took possession* of the property *under the contract* providing for such exchange, **full** liability on the part of the new company for the Belt debts results by virtue of the statute. **It was a consolidation "in the main."**

The legislature did not propose to allow a small portion of the stockholders to block the joinder of two enterprises which might be very beneficial to corporations and public alike. And on the other hand it proposed that in case of a *partial* consolidation of the companies or of their stock there should be no question about creditors' rights as against the absorbing company; *and that creditors should not be put to following the assets of the old company by proceedings in equity, etc., wherever the absorption should not be absolutely complete.*

(VI.)

Applying the foregoing rules and statutes to the case at bar.

The cardinal proposition deducible from above observations and which is the turning point in this whole case is this:

Any *contract or arrangement by which stock in one company, say Company A, is* **exchanged** *for stock in another company, say Company B, and in pursuance of which Company B* **enters into possession** *of or acquires the property of Company A is a* **consolidation** *of said companies.*

Under the "Reorganization Plan" in issue here, *97% of stock of the Belt Company* **was exchanged** *for stock in the Southern Company and* **under said plan,** *the Southern Company* **did acquire possession** *of the assets of the Belt Company and has since operated them for its own use.*

Whether the exchange of stock alone would constitute such consolidation to the extent of making the new company liable for Belt debts, that is, (1) whether the liability had attached in July, 1900, when the "prospectus" had been issued on the New York stock exchange stating that "substantially all" the Belt stock had been deposited and the Southern stock issued to depositing Belt stockholders (subject to the voting trust arrangement which is not material here) or (2) whether it only attached upon the instant of the Southern Company taking possession of the Belt property after the foreclosure in January, 1902, is not vital here. For the foreclosure was carried on *in the interest* of the depositors and *under the plan.*

As a matter of fact the liability did attach in 1900 by virtue alone of the express stipulation in the plan as to payment of floating debt.

Two important propositions held as law in the case of *Chicago, Santa Fe, etc., Ry. Co.* v. *Ashling*, 160

Ill. 373, a case often cited, are as follows (as per syllabus):

> "1. *A consolidation* and not a mere purchase by one corporation of the property of another, is affected by *a transfer* of all the property, stock and franchises of the latter, *under an arrangement by which the stock of the former is issued to the stockholders of the latter, in exchange for their stock.*"

(Write it "*any*" arrangement and the proposition will be still sound. Write it "*some* of the stock," and there will have been a consolidation *pro tanto.* Write it "*major portion of the stock*" and there will have been a consolidation **"in the main,"** which, under Sec. 1059, Missouri laws, will cast a **full** liability for all debts upon the absorbent corporation.)

> "2. A corporation which has **in effect** *consolidated with another* **is estopped** *to assert that the proceedings for consolidation were not in accordance with the terms of the statute,* in an action against it to recover the amount of a judgment against the other corporation on the ground that there was a consolidation."

That is to say, where the statute gives *permission* to one company to absorb or "swallow" another company, and the former *has actually* absorbed or "swallowed" the other it will be *estopped* to deny that *the act* was illegal. *The act has* **been permitted by law** *and* **the act** *has been done.*

At the time this case arose there was in force in Illinois,—

1. A statute of 1867 providing that in case of a consolidation of corporations, the new or consolidated company should be liable for the debts of the old or constituent companies.

2. A statute of 1872 providing for the consolidation of railroad companies, and prescribing a sixty-day notice to stockholders and the publication of a general notice for *nine successive weeks;* and also requiring that a certificate of such action to be filed with the secretary of state, etc.

3. A statute of 1885 authorizing all railroad companies "*to purchase* and hold in fee simple or otherwise" "and *to use and enjoy* the railway property, corporate rights and franchises of the company or companies owning such road or roads" (other connecting or leased roads) "upon such terms and conditions as may be agreed upon between the directors and approved by the stockholders owning not less than two-thirds in amount of the capital stock of the respective corporations becoming parties *to such purchase and sale;* such approval may be given of any annual or special meeting upon sixty days' notice," etc.

The Santa Fe Company was a lessee of the St. Louis Company and thus authorized to "purchase" the latter. Each company called a meeting of its stockholders upon sixty days' notice only (there was no nine weeks' publication, etc.), and by resolution authorized "a purchase" by the former "of all the property, effects, assets, corporate rights and franchises of every kind of the latter company," "and a deed of conveyance was executed to evidence the transaction" (p. 379). The consideration for the "purchase" was the assumption by the Santa Fe Company of the bonded indebtedness of the St. Louis Company and a certain amount of *stock* in the Santa Fe Company to be delivered to the St. Louis Com-

pany stockholders; and the Santa Fe Company entered into the possession and use of the St. Louis Company's road.

The court says:

> "The record does show that the proceedings of the two corporations were had under the Act of 1885, rather than under the Act of 1872. The resolution fully authorized the purchase * * * and the deed fully evidenced the transaction. It must, however, be conceded that if what is authorized to be done under the Act of 1885 *would amount to* a consolidation of the lessor with the lessee company it was competent for the legislature to prescribe steps, not unconstitutional, to be taken to effect such consolidation different from those prescribed by the Act of 1872."
>
> "Again, this is not a direct proceeding" (by the state) "to test the right of the Santa Fe Company to hold the franchises and property of the St. Louis Company * * * and if *the effect* of what has transpired between the two companies *amounts to a consolidation* of the St. Louis Company with the Santa Fe Company, the latter cannot, in this proceeding, be heard to say that it did not comply with the requirements of the statute, *but it is estopped therefrom.*"

Said further, that the effect of that part of the transaction *relating to the exchange of stock "was an act of consolidation,* and not necessary to a mere purchase and sale." * * * *There is no magic in words. Merely calling the transaction a purchase and sale would not prevent it from being a consolidation."*

Held further (382), that the mere fact that the St. Louis corporation "had been kept alive for certain purposes did not materially affect the question. It

may be that a consolidation of two corporations—or amalgamation, as it is called in England—*if full and complete,* may *work* a dissolution of them both, and its effect *may* be the creation of a new corporation," etc.

This Ashling case is clearly reasoned and has been adopted as sound by courts and text writers.

It will be noted that the statute of 1885, treated above, is substantially like the third clause of Section 1060 of the Missouri statute (referred to above as class "d"), providing for "a purchase" by one corporation of "the property and franchises" of the other, etc.

And it substantiates the assertion made above that a consolidation might be made under said "purchase" clause.

It also supports the claim that a consolidation can take place under Section 1061 providing for the "acquisition" of the stock of one company by another and calling it in one place "a purchase."

And it is thus evident that the Missouri statutes not only allow generally consolidation, but provide a very wealth of variety in the way of method therefor.

It is also evident at this point that as more than a majority of the stockholders in the Belt were pledged in writing—"assented in writing" to the " acquisition" or "purchase" of the Belt stock by the Southern and payment therefor *in stock* of the latter (*"an act of consolidation"*) and a certificate thereof having been filed by the president and secretary of the Southern Company, the latter, being a full *de jure*

corporation, is a full *de jure consolidation* of the Belt Company's *a,* property; *b,* franchise, and also, *c,* stock "in the main"—and its full liability for Belt debts follows.

Every legal requirement for such "acquisition"—which was, *in fact,* a consolidation—was complied with.

"There is no magic in words." And calling the transaction "a purchase" or "acquisition," or what not, "did not prevent it from being a consolidation" where the "*result*" or "what was done *amounted* to a consolidation."

And whether a deed was given to evidence the transaction directly from one company to another, or whether the scheme or arrangement provided for a foreclosure of bonds *acquired and held under and in the interest of the "contract" or plan* (in order to satisfy the rights of the 1 per cent. of non-depositing or non-consenting Belt stock), and that the taking of direct possession of the Belt property by the Southern should be simply deferred until *after it had received a deed* under the foreclosure, makes no difference.

The foreclosure, the issuance of the deed, the ultimate taking possession and acquirement of the property, were all had and taken in pursuance and "*under an arrangement* by which the stock of the former (the Southern) "is" (was) "issued to the stockholders of the latter" (the Belt) "in *exchange for their stock.*"

———o———

An instructive and well recognized case is *Williamson* v. *N. J. Southern R. R. Co.*, 26 N. J. Eq. 398,

which state has furnished so many valuable equity decisions.

The New Jersey Southern Railroad Company was given statutory power (p. 400) to unite with other companies whose railroads might connect with its road; and to that end to "consolidate the capital stock" upon a vote of two-thirds of the stockholders of each company proposing to unite.

The Long Branch & Sea Shore R. R. Co. was empowered by its charter acts "to consolidate" its capital stock with that of the Southern Company upon the terms mentioned above; or, "in lieu of such consolidation, the Southern Company might *purchase the stock* of the Sea Shore Company, or might purchase the road and *pay for it in capital stock* of the Southern Company," to be issued by the latter.

The Southern Company acquired 1,619 shares out of a total of 1,718 shares of the Sea Shore Company —about 16-17 of the whole issue—"and a consolidation of the road was, in fact, made. The Sea Shore Company ceased to keep up their separate organization, except as a *mere matter of form, in the interest* of the Southern Company." (Just what the Belt Company is doing in the interest of the K. C. Southern.) The Southern Company took possession of the Sea Shore road and spent its own money upon certain portions of its route, and the road of the latter became an indistinguishable part of the continuous line of the Southern road. "In fact, the consolidation was actual and complete in all respects. The purchase and sale and delivery of the stock (sixteen-seventeenths of the whole), by virtue of the legislative authority referred to, *for the purpose* of consol-

idation, and the consequent actual, practical and absolute consolidation, completely recognized in all things, will be held in equity to be a consolidation in accordance with the provisions of the acts. If the proceedings are lacking, it is not in substance, but form merely; the consolidation has been fully acquiesced in. If the consent of the stockholders of the companies does not appear, it has, nevertheless, been given. *The Southern Company* BOUGHT, *and the stockholders of the Sea Shore Company sold.* The board of directors of the former represented the *whole* of the stockholders of their company in the purchase, and the *stockholders of the Sea Shore Company acted for themselevs.* Two-thirds of the stockholders of each company have, *in fact*, consented to the consolidation. The Southern Company are *the owners* of two-thirds of the capital stock of the Sea Shore Company."

(There was no *vote* of the Sea Shore stockholders, although the statute specified this method of consent alone. This holding supports the holding in the Lauman case (30 Pa. St. 46) that in forming consolidations, the stockholders act as individual members of the company "rather than as corporate functionaries.")

Now, prior to such consolidation, the Southern road had given a mortgage upon all its property, both real and personal, and including all property, both real and personal, "to be thereafter acquired."

Jay Gould had been president of the Southern Company, and when the Sea Shore stock came into possession of the Southern Company, he, in some

manner, took it into his possession as collateral to his personal claim against the Southern Company.

The trustees in the mortgage filed a bill against him to recover the stock as included in and subject to the lien of the mortgage, and alleged that he took the stock with notice of the complainants' rights, etc. Gould demurred, but the bill was held good.

The chancellor said: "The acquisition of the stock, under the authority of the act of the legislature, was, as before stated, *the means by which the road of the Sea Shore Company was acquired,*" etc.

That is to say, "the road"—that is, *all* property, both real and personal—of the Sea Shore Company was acquired by the Southern Company by "means" of the stock, and the mortgage thus *operated directly* upon the property acquired, *because such a transaction was in fact a merger or consolidation of the companies.*

Now, it is evident that the two methods provided "in lieu of such *consolidation,*" viz., a purchase of the *stock* of the Sea Shore Company by the Southern Company, or a purchase of the *road* of the Sea Shore Company—and payment therefor by the issuance of *stock* in the Southern Company—*were simply other means of consolidation.* The *former* of the two substituted methods *was adopted,* and while one-seventeenth of the Sea Shore stock was *left outstanding,* and the *organization of that company was kept up,* yet the practical merging or mixing up of *the physical property* of both roads was held, with the *purchase of so much* stock, to *constitute a practical* consolidation; and this made the property of the old

Sea Shore Company the property of *the new and directly subject* to the lien of its mortgage.

This case sustains in full, the proposition that a transfer *of only a majority of* the stock of one company to another, with the abandonment *of the old corporation's business,* will constitute an *actual consolidation,* even though *the organization* of the old company is *kept up* in form. So far as the amount of stock acquired goes, there is no resting point between sixteen-seventeenths and a bare majority—the point at which control passes.

Section 1059 of the Missouri statutes above outlined, received some twenty years ago the judicial construction of that renowned legal giant, Mr. Justice Miller, upon the Circuit, and his opinion was adopted almost or *in toto* by the U. S. Supreme Court, without dissent.

The case was *Leavenworth, etc.,* v. *Chicago, R. I. & P. Ry. Co.,* 134 U. S. 688.

There was a Missouri corporation known as the Chicago and Southwestern Railway Company chartered in Missouri. There was *another* corporation by the same name chartered in Iowa.

These two companies entered into articles of consolidation on September 25, 1869 (p. 690).

There was a *third* corporation (under Missouri laws) known as the "Atchison Branch of the Chicago and Southwestern Railway Company."

On the 16th day of August, 1871, articles of consolidation were signed between the Chicago and South Western Company of the states of Missouri and Iowa (the consolidated corporation) and the "Atchison Branch."

"These articles were duly filed in the office of the Secretary of State of Missouri. The validity of that consolidation is assailed by the plaintiff on the ground that it is void by reason of a failure to conform to the laws of Missouri." (691.)

(Section 1059 here construed was in the same words as it is today, except only that the last three or four lines of the present section prescribing the notice for the stockholders' meeting for the purpose of "accepting the provisions of the act," occurring after the words "the same" were missing then—an immaterial difference.)

There had been a foreclosure of the bonds of the Southwestern Company after its purported consolidation with the "Atchison Branch" and covering the original bonds issued by the latter company on its road. The Chicago and Southwestern Company alone appeared in the foreclosure suit which was prosecuted to consummation and sale, the "Atchison Branch" not being a party thereto. The complainants filed a bill to set aside the sale, and contended that the proceedings were void or inefficient as to the Atchison Branch bonds, because the consolidation was void and therefore the Atchison Branch Company had not been foreclosed.

The specific ground of attack was that there had been no meeting of the stockholders of the respective companies "accepting the provisions of the article" and no certificate thereof filed in the office of the secretary of state.

Mr. Justice Miller held:

1. That the provision in the body of the article

in reference to attempted consolidations being "void if contrary to the provisions of this article" and immediately following the prohibition against the merging of "competitive roads," was simply in furtherance of such prohibition and did not relate to the *methods* of consolidation outlined in the article.

2. That the word "void" only meant that a joinder of competitive roads was *voidable* at the instance of the state.

3. That when a certified copy of the contract of consolidation "or the articles of agreement" should be filed with the secretary of state the consolidation was to be "considered as duly consummated" so far as concerned individuals or other corporations dealing with the consolidating company or "when it should come into a court of justice as plaintiff or defendant." (700-1.)

4. That the holding of the corporate meeting to "accept the provisions" of the act and the filing of the certificate thereof were mere directory provisions in reference to "a matter between the state and the corporations whose rights are affected." (700.)

With the use of these three leading and well recognized cases analyzed as above we can establish these further propositions:

1. That (a) the filing with the secretary of state of a copy of the "plan of reorganization" upon (b) the assent in writing of a majority stock holding in the Belt, with (c) a resolution of the stockholders of the Southern approving or acting under said plan followed by (d) *the taking possession* by that com-

pany of the Belt property, etc., would have "consummated" the consolidation of the two companies under the second *method* outlined in Section 1059, and this would be sufficient proof for the purposes of this case to hold the Southern upon the Guardian Trust claims.

2. It would have also shown a consolidation (even if the *vote* had been lacking) under Section 1060 and could be called "a purchase" for which Southern *stock* had been issued *in payment.*

3. And (without the *vote*) it would have also shown a consolidation under Section 1061 by calling it as it is sometimes called in the plan itself an "acquisition" of the Belt stock, for which Southern *stock* had been issued *in payment.*

4. That if an actual consolidation had been *effected,* and *by any method* NOT *expressly outlined in* ANY *of the three sections in question,* it would still be held legal under the *general* authority to consolidate given in Section 1059.

5. And there being a legal warrant *for* consolidation, if the steps taken *resulted* in an *actual* consolidation, the consolidated company *would be estopped* in this proceeding from asserting that the proceedings were void or inefficient. (And as the Southern Company *took possession* of Belt assets *under a plan* by which its stock *was exchanged* for Belt stock, it is *estopped* to deny that the consolidation was legal. Ashling case, 160 Ill., *supra.*

Conclusion.

Our argument has been long. But a many-featured subject is involved.

It is somewhat anomalous that a subject of such universal importance has not at this late day been judicially settled in all its main features.

It is hoped that in the interest of public economy and of court economy it soon will be settled. And we tender our feeble contribution towards the attainment of this end.

Respectfully submitted,

Newell H. Clapp,
Harry S. Mecartney,
For Respondent and Appellee.

No. [redacted] 35

APR 25 1914

JAMES D. MAHER

—IN THE—

Supreme Court of the United States

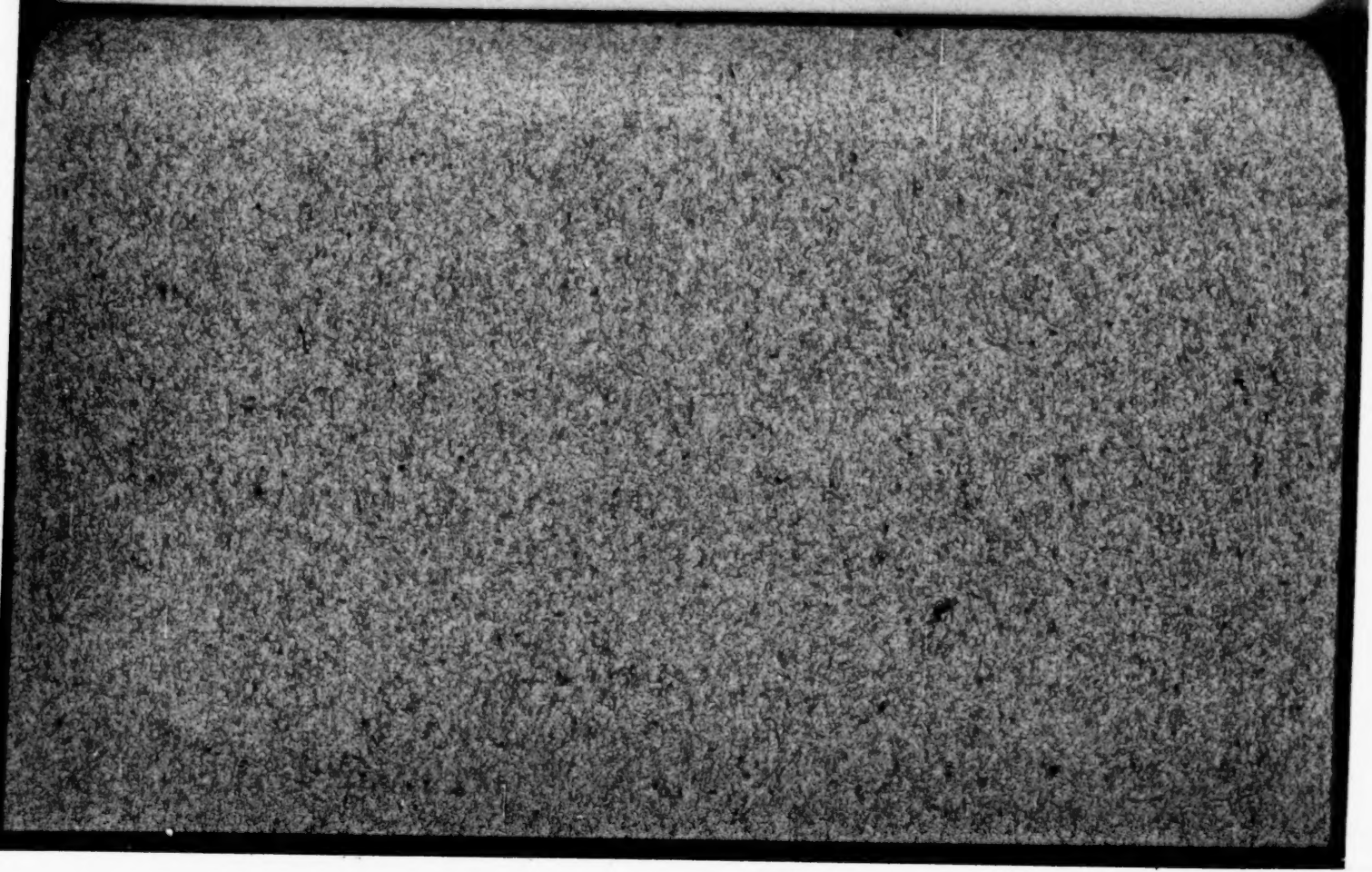
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Appellant*,
vs.
GUARDIAN TRUST COMPANY, *Appellee*.

No. 941.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Appellant*,
vs.
CENTRAL IMPROVEMENT COMPANY, *Appellee*.

Brief of Appellant in Opposition to Motion of Appellee to Dismiss or Affirm.

SAMUEL UNTERMYER,
SAMUEL W. MOORE,
Solicitors for Appellant.



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vs.

CENTRAL IMPROVEMENT COMPANY, *Appellee*.

Brief of Appellant in Opposition to Motion of Appellee to Dismiss or Affirm.

It is important to bear in mind that the questions presented by this appeal for the consideration and determination of this court, involving a judgment or decree for over $700,000.00, are *essentially federal questions* arising under the laws of the United States. They involve the validity and effect, in a collateral proceeding, of a decree of foreclosure and sale of railway property, duly entered and made effective by a circuit court of the United States.

Our contention in this brief will be that the decision of the Court of Appeals was not final, and that this court has

jurisdiction over this cause upon this appeal for each of the following reasons:

First. The original bill of the Cambria Company in this case presented a distinct ground of federal jurisdiction independent of that of diversity of citizenship.

Second. The intervening petition of the Southern Company, which was in the nature of an original bill, stated facts sufficient to confer jurisdiction upon a federal court, independent of the grounds of jurisdiction stated in the original bill.

The main question upon the merits in this case is the same as would have been presented in the Boyd case (228 U. S. 482) if that case had contained the following *additional elements,* established by the undisputed testimony:

(a) If Boyd had been a party to the reorganization plan of the Northern Pacific Railway Company and, under the provisions of the plan, had exchanged his securities in the old company and had received, in lieu thereof, and had retained $1,480,909.20 par value of the securities of the new company.

(b) If it had been determined in an "adversary proceeding" to which Boyd was a party, that the fair market value of the Northern Pacific Railroad property, at the time of the foreclosure and sale, did not exceed the valid bonded indebtedness of that company, and that the property was sold at foreclosure sale for that exact amount.

(c) If Boyd, as a condition of participation in the reorganization plan, had executed a covenant that he would not hold the new reorganized company for any of the debts of the old company.

It is not intended, however, to present the merits of the case at this time, since that feature will be covered by a brief in support of our application for *certiorari,* which it is expected will be submitted with the appellee's motion to dismiss this appeal.

I.

General nature of the case brought here by appeal.

1. *The bill of the Cambria Company.* A consideration of this bill and the issues made by it are only important *for the purpose of ascertaining if the bill sets forth a distinct ground of federal jurisdiction independent of that of diversity of citizenship.*

In September, 1900, the Cambria Company filed a creditor's bill (Rec., 5-34), based on a judgment rendered in its favor by the United States Circuit Court for the Western District of Missouri against the Belt Company, and brought against the Belt Company, the Trust Company and others, asserting that the *lien of this judgment* attached to the *equitable* title of the Belt Company to certain real properties, the *legal title* to which was held or claimed by the Trust Company and certain auxiliary companies, and seeking a foreclosure of this *judgment lien* and a sale of the real properties *thereunder;* and also demanding an accounting between the Belt Company and the Trust Company, and seeking to subject certain stocks and bonds held by the Trust Company as collateral, to the payment of the complainant's judgment, if as a result of the accounting, the alleged indebtedness should be canceled and the collateral should be released. The litigation of the accounting feature was carried on under the ancillary bill of the Belt Company and its receivers, *infra,* as provided by stipulation (Rec., 1099, 1095). The finding and decree of the circuit court were against the complainant on the issues made by the bill and no appeal was taken. A more detailed reference will be made hereafter to the bill of the Cambria Company.

2. *The ancillary bill of the Belt Company and its receivers.* The issues made by this bill are of no importance here except as part of the history of the case. The Belt Company and its receivers by direction of the court (Rec., 35), and by stipulation (Rec., 1034), which provided that there should be an accounting between the Belt Company and the Trust Company, filed an ancillary bill and amendments (Rec., 116, 237, 456) against the Trust Company and others, seeking an accounting as between the Belt Company and the Trust Company and the release of the collateral held by

the latter. The decree of the circuit court (Rec., 1050) eliminated three items from the account, and gave judgment (Rec, 1052) in favor of the Trust Company and against the Belt Company in the total sum of $639,658.86. No appeal was taken by the Belt Company or its receivers for reasons stated at page 58 of our brief in support of our application of *certiorari*.

3. *The intervening petition of the Southern Company.* The questions raised by this appeal have *solely* to do with the *intervening petition* of the Southern Company and the *Trust Company's answer* thereto.

In February, 1905, it was stipulated (Rec., 191) that the Southern Company should be made a party to the cause either as joint complainant or by bill of intervention, as it might elect, and that the testimony theretofore or thereafter taken in the case should be considered in support of the issues made. Its intervening petition, *which was in the nature of an original bill,* was immediately filed (Rec., 195), in which it alleged that it was the purchaser at foreclosure sales under foreclosure decrees of the United States Circuit Court at Kansas City, of the railroad properties of the Belt Company, the Gulf Company, and the Air Line; that the mortgages executed by those companies upon their properties respectively, contained after-acquired property clauses, and that the liens of said mortgages attached in equity to the property and collateral held by the Trust Company as security for the alleged indebtedness of the Belt Company to it; and the Southern Company prayed that the collateral be awarded to it. In particular, the Southern Company alleged that certain terminal properties in Kansas City, Missouri, and in Kansas City, Kansas, had been purchased by the Belt Company, Gulf Company, and the Air Line, with moneys contributed by those companies respectively, for terminals and rights-of-way needed by them, the legal title being taken, for convenience, in the name of the Central Company which, it was charged, had been organized solely for the purpose of conveniently holding the legal title to such properties. The Southern Company averred that the lien of the mortgages of the Belt Company, the Gulf Company, and the Air Line, attached in equity to said properties at the times of their purchase and acquisition, and that the equitable title thereto had passed to it as purchaser under the foreclosure sale, and it

demanded either a conveyance of the properties to it, or a return to it of the capital stock of the Central Company which was held by the Trust Company as a part of its collateral security.

4. *The answer of the Trust Company to the intervening petition of the Southern Company.* The answer of the Trust Company sought to invoke the rule of *Northern Pacific Railway Company* v. *Boyd*, 228 U. S., 482, and asserted that the reorganization of the Gulf Company, Belt Company and their associated companies, resulting in the organization of the Southern Company, the appellant herein, was a *fraudulent scheme* which entitled the Trust Company to recover over $700,000 from the Southern Company, *notwithstanding the fact that the Trust Company was a party to the reorganization plan and benefited therefrom to the extent of approximately* $1,500,000, which it still retains.

The Trust Company, in its answer filed in March, 1905, (Rec., 218), alleged (Rec., 233) that a reorganization plan, contemplating the reorganization of the Gulf Company and its allied companies had been prepared and promulgated by a reorganization committee; that such plan contemplated the deposit with the committee of the stocks and bonds of the companies involved in the reorganization, and the organization of a new company, to-wit, the Southern Company, which should issue its stocks and bonds in exchange for the stocks and bonds of the old companies in certain specified proportions; that the exchange of stocks resulted in the stockholders of the Belt Company securing a large amount of the stock of the Southern Company which was alleged to be more valuable than the Trust Company's claim against the Belt Company, and it was averred that said scheme legally implied the payment by the Southern Company of the Trust Company's claim against the Belt Company.

5. *The master's report and decree.* The master's report was filed in May, 1910 (Rec., 659-1033). In addition to the finding upon the bill of the Cambria Company and upon the ancillary bill of the Belt Company and its receivers above referred to, the master found (Rec., 1031-1032) that the Southern Company was entitled to a conveyance to it of the lands of the Central Company; and that the Southern Com-

pany did not, by reason of the reorganization plan or otherwise, assume or agree to pay or become liable for the indebtedness of the Belt Company to the Trust Company. The Trust Company filed exceptions to the master's report. It excepted to the *inclusion* in the report of *any* finding on the issue of the liability of the Southern Company, but did not except to the *correctness* of the finding itself. The Belt Company and its receivers also excepted to the master's report.

The final decree was entered on June 25, 1910 (Rec., 1049), overruling all exceptions, confirming the master's report, dismissing the bill of the Cambria Company, rendering a judgment in favor of the Trust Company against the Belt Company in the sum of $639,658.86, and finding that the Southern Company did not assume or agree to pay the indebtedness of the Belt Company, and directing the Central Company to convey certain specified lands to the Southern Company.

6. *The appeal to the Circuit Court of Appeals.* The Trust Company was allowed an appeal, without supersedeas, to the Circuit Court of Appeals for the Eighth Circuit on August 10, 1910. An appeal was allowed on behalf of the Central Company on August 10, 1910, but on October 8, 1910, the orders allowing the appeal of the Central Company, and approving its supersedeas bond were set aside and vacated by the Circuit Court upon the ground that counsel purporting to represent the Central Company were not, in fact, authorized to appear for or represent it (Rec., 1083). The record on appeal contained only the pleadings and the report of the master. It did not contain any of the evidence.

7. *Proceedings in the Circuit Court of Appeals.* The case was argued before the Court of Appeals, composed of a circuit judge and two district judges in May, 1911. Three questions only were raised by the assignments of error of the Trust Company; first, that the issue of the liability of the Southern Company to the Belt Company was *not* in the case and should *not* be decided; secondly, that the decree was erroneous in requiring the Central Company to convey the specified property to the Southern Company; and, thirdly, that the court erred in requiring one-third of the costs to be paid by the Trust Company. There was no assignment of error directed to the *correctness* of the finding on the liability issue, assuming that issue to be in the case. In fact, counsel

for the Trust Company insisted that the liability issue was not in the case and should not be decided. They said in their return to a rule to show cause, etc. (Rec., 1146):

> That by reason of the former decision of this court, and by reason of the state of the proceedings and record in the cause from which this appeal is taken, *the question of the personal liability of The Kansas City Southern Railway Company for the debt of the Belt Company is not an issue and cannot be determined upon this appeal.*

In June, 1911, the judges of the Circuit Court of Appeals advised that they thought the liability issue was one of the issues made by the pleadings, and asked counsel to brief that question so that the court might determine whether it could consider the liability issue under the state of the record and, if so, whether there was a plain error in that regard which the court could notice on its own motion. Briefs were accordingly filed on December 1, 1911, and the case was submitted thereon, oral argument being denied.

On October 22, 1912, the Court of Appeals handed down the opinion reported at 201 Fed. 811 (Rec., 1163), reversing the decree of the circuit court and directing the lower court to enter a specific decree in favor of the Trust Company and against the Southern Company for some $700,000. In January, 1913, a reargument was had, and on December 2, 1913, a second opinion was handed down adhering to the former conclusions of the court (Rec., 1216), copies of which second opinion are lodged with the Clerk of this court.

8. *Appeal to this court.* On January 24, 1914, the Circuit Court of Appeals allowed the Southern Company's appeal to this court (Rec., 1253), fixing the supersedeas bond in the sum of $600,000, which has been duly given.

9. *Application to this court for a writ of certiorari.* The Trust Company insists that the decision of the Court of Appeals is final, and that no appeal should be allowed to this court. Out of an abundance of caution, and in accordance with the settled practice where the right to an appeal to this court from the Court of Appeals is controverted, the Southern Company will submit to this court its application for writ of *cer-*

tiorari at the same time that the Trust Company's motion to dismiss is submitted, so that the motion and the application may be considered together.

II.

The original bill of the Cambria Company not only demanded an accounting, but also sought to establish and enforce a judgment lien, created by Act of Congress, and therefore, the jurisdiction of the Circuit Court was not entirely dependent upon diversity of citizenship.

If the bill of the Cambria Company stated facts sufficient to present a distinct ground of federal jurisdiction independent of that of diversity of citizenship, then the decision of the Court of Appeals was not final and the motion to dismiss the appeal must be overruled. (*Mayor of Vicksburg* v. *Henson*, 34 Sup. Ct. Rep. 95; *Warner* v. *Searle*, 191 U. S. 195; *St. Louis Railway Company* v. *Wabash Company*, 217 U. S. 247; *Howard* v. *United States*, 184 U. S. 676; *Union Pacific Ry. Co.* v. *Harris*, 158 U. S. 326; *Mississippi Commission* v. *Railway Company*, 203 U. S. 335; *United States Fidelity Company* v. *Bray*, 225 U. S. 205). Even though the averments are "quite defective" the appeal will not be dismissed (*Warner* v. *Searle*), (*supra*).

It is the *face of the bill* of the Cambria Company to which we must look for the jurisdictional averments. It is not material or important what questions arising upon the issues made by this bill were actually decided. (*Florida Central* v. *Bell*, 176 U. S. 321; *Omaha Electric Co.* v. *Omaha*, 230 U. S. 123; *Siler* v. *Louisville Railway Company*, 213 U. S. 175).

It becomes necessary, therefore, to examine the bill of the Cambria Company (Rec., 5-34), bearing in mind the Act of Congress of August 1, 1888, entitled "An Act to regulate the liens of judgments and decrees of the Courts of the United States" (25 Stat. L. 357) which provides that:

> Judgments and decrees rendered in a circuit or district court of the United States within any state shall be liens on the property throughout such state, in the same manner, and to the same extent, and under the same condi-

tions, only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state; provided, that whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the State of Louisiana, before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such State shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the State.

And also the following statutes of the State of Missouri (1909):

Section 3123. Judgments and decrees obtained in the Supreme Court, in any United States District or Circuit Court, held within this state, in the Kansas City Court of Appeals or the St. Louis Court of Appeals, shall upon the filing of a transcript thereof in the office of the clerk of any such court, be a lien on the real estate of the person against whom such judgment or decree is rendered situate in the county in which such transcript is filed.

Section 3124. Judgments and decrees rendered by any court of record shall be a lien on the real estate of the person against whom they are rendered situate in the county for which the court is held.

The bill of the Cambria Company may be summarized as follows:

(a) After the formal averment of the incorporation and citizenship of the parties it is alleged (Rec., 7) that the Cambria Company on September 6, 1900, obtained judgment in an action at law in the Circuit Court of the United States for the Western Division of the Western District of Missouri, against the Belt Company in the sum of $100,962.91; that execution was issued and returned wholly unsatisfied; and that the Belt Company had no property subject to be reached by legal process issued upon the judgment.

(b) It is next charged (Rec., 7) that the Trust Company organized a large number of railroad companies to construct

railroads, and a large number of auxiliary companies, the latter for the purpose of holding legal title to lands, buildings and other structure necessary to be used by the railroad companies in their operations; that the Trust Company controlled these companies by the election of its own officers and employes as their officers and employes, and used them for its own benefit, and that thereby it assumed a fiduciary relation toward them; that among the companies so organized (Rec., 9-12) were the following railroad companies, Kansas City Suburban Belt Railroad Company and its subsidiary companies, the Union Terminal Railroad Company, Kansas City, Independence Air Line; and the following auxiliary companies (Rec., 13); Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company.

(c) With reference to the railway companies it is charged at some length and with considerable detail, that the Trust Company appropriated all of their stocks and bonds and applied a portion of the proceeds thereof to the cost of construction of their properties, and refused to account for the remainder, and an accounting was demanded.

(d) With reference to the auxiliary companies it was charged that the Trust Company fraudulently invested them with the legal title to various properties, both personal and real, which in equity belonged to the Belt Company, and the Cambria Company sought by its bill to impress its *judgment lien* upon them. It is alleged (Rec., 13) that the Trust Company acted:

> With the fraudulent intent and purpose of preventing the properties so taken in the names of said auxiliary companies, respectively, from being reached by the creditors of said railroad companies or either of them and particularly by the creditors of the said Belt Company * * * that, as your orator is informed and believes, all or substantially all of the moneys invested in the purchase, improvement and acquisition of the several properties of the said auxiliary companies and each of them, was paid and supplied by the said Belt Company, and each and every one of the said auxiliary companies was a mere device or "dummy" contrived and provided by the said Trust Company as a means for taking and holding the naked *legal title* to such properties as might be vested

in the said auxiliary companies, respectively, for the use and benefit of the said Belt Company, and that, as to the creditors of the said Belt Company and particularly as to your orator, *the properties and shares of stock of each and every of the said auxiliary companies in equity belongs to the said Belt Company and are chargeable with the lien and payment of your orator's aforesaid judgment against the said Belt Company;* a list of real estate in the name of the auxiliary companies so far as known to complainant, is attached hereto as Exhibit 2. (Exhibit 2, Rec., 28-33, being a list of real estate situated in Kansas City, Missouri).

(e) It is next averred (Rec., 18, 19), that the Trust Company fraudulently, by reason of its control and domination, caused the Belt Company to transfer and deliver to it certain promissory notes and a large amount of property of various kinds, consisting of bonds, shares of stock, steel rails and other property, all of which it is charged rightfully and in equity belonged to the Belt Company, and should be subjected to the *judgment lien* of the complainant. It is alleged (Rec., 19):

> Your orator charges that each and all of the aforesaid shares of stock, assets and other personal property so passing into the possession of the said Trust Company, constitute assets and property of the said Belt Company, *equitably and justly chargeable with the lien and payment of your orator's aforesaid judgment*, and that the said shares of stock and other property were fraudulently taken into the possession of said Trust Company without consideration moving from the said Trust Company, and that said Trust Company has no right to such possession or title to any part of said stocks, or property.

(f) It is further charged that the Elevator Company, owning several elevators in Kansas City, Missouri, was a mere device or dummy to hold the legal title to its property for and on behalf of the Belt Company; that the Central Company (Rec., 21), was likewise a mere dummy contrived by the Trust Company to hold and carry the legal title to the real property standing in its name for the use and benefit of the Belt Company and its creditors; that the same was true of the Second Street Company, which among other things, held the legal title of certain tracts of real estate in and near Kansas City,

Missouri, and used and indispensably necessary to be used by the Belt Company for depot grounds, necessary buildings, rights of way, yards, freight houses and machine shops; and:

> That the said property in equity belongs to the said Belt Company and is chargeable with the debts and liabilities thereof, including the *judgment* of your orator as aforesaid.

It is also charged that the property and assets, the legal title to which is held by the Amusement Company and the Townsite Company, respectively, are essential and indispensable to the successful operation of the property of the Belt Company, and that the Amusement Company and Townsite Company are dummies of the Trust Company for the purpose of holding the legal title to said assets and property for the use and benefit of the Belt Company, as the equitable owner thereof, and,

> That such assets and property so held are equitably and justly chargeable with the claims and demands of the creditors of the said Belt Company, and particularly the *judgment* so obtained by your orator as aforesaid.

(g) Then follows a prayer for the *establishment of the lien of complainant's judgment* against the Belt Company's equitable title to the various properties held for it by these dummy corporations as follows (Rec., 23):

> That the property and assets, the legal title to which is held, respectively, by the said Elevator Company, Amusement Company, Central Company, Second Street Company, and Townsite Company be declared to be in equity the property of the said Belt Company, and chargeable with the *lien* and payment of the debts and liabilities of the said Belt Company, and, particularly, the judgment aforesaid of your orator.

Next follows a prayer for the sale and distribution of the assets and property of the Belt Company in the order of the respective liens of its creditors as follows:

> (d) That the assets and property of the said Belt Company, real, personal, or mixed, and wheresoever situated, including all rights of action, legal or equitable, be marshalled for the benefit and protection of all persons concerned therein.
>
> (e) That the rights and interests of all persons in

and to the said assets of the said Belt Company, be ascertained, adjudicated and decreed.

(f) That the said assets and property, and each and every part thereof, be sold and the proceeds thereof, after paying the costs and expenses of this proceeding and all allowances which may be made therein be distributed among those found to be entitled thereto.

(h) It is beyond question that the bill asserted a *judgment lien,* created by an act of Congress, upon the equitable title of the judgment debtor to various properties both real and personal, which were held or claimed adversely by the Trust Company, and sought to impress and establish such judgment lien upon these properties and to foreclose the lien and sell the properties and to distribute the proceeds to the parties equitably entitled thereto.

It is equally beyond question that the Trust Company *understood* that this was one of the issues tendered by the bill, for it says in its answer (Rec., 59), that it,

> Denies that all or any of the said companies were mere devices or dummies contrived and provided by this defendant as a means for taking title to such property as might be vested in them for the use and benefit of the Belt Company, and denies that the properties and shares of stock of the so-called auxiliary companies in equity belong to the Belt Company *and are therefore chargeable with the lien of the complainant's said judgment as alleged in the bill of complainant.*

(i) The Cambria Company on January 22, 1914, (Rec., 1250) applied to the Court of Appeals for leave to amend its bill, making a specific reference to the Act of Congress of August 1, 1888, and to the Missouri Statutes, above quoted, in reference to judgment liens, and by stating in express language that the suit arose under the laws of the United States, invoking the rule of *Vicksburg* v. *Henson,* 34 Sup. Ct. Rep., 95, which permits additional grounds of jurisdiction, existing at the time of the filing of the original bill, to be added by amendment. The Court of Appeals denied leave to make the amendment (Rec., 1251). The allegations of the proposed amendment are in respect of matters of which the court will take judicial notice, so that the action of the Court of Appeals in denying the motion is not important.

III.

Where, as in this case, the bill asserts a judgment lien created by Act of Congress and seeks to establish and enforce the lien against the equitable title to certain properties of the judgment debtor, the action arises under the laws and constitution of the United States and presents a distinct ground of federal jurisdiction independent of that of diversity of citizenship.

The lien of the judgment rendered in the federal court was solely a creature of the federal statute. The validity and effect of the lien as well as of the statute itself were involved in the case. The decree establishing or denying the lien claimed by the complainant would naturally turn upon the validity, construction, and effect of the statute.

Where the case made by the plaintiff is one which depends upon the proper construction of an act of Congress with the contingency of being sustained by one construction and defeated by another, it is one arising under the laws of the United States. (*Northern Pacific Railway Co.* v. *Soderberg*, 188 U. S., 528; *Ex Parte Lennon*, 156 U. S., 548).

As an illustration of the application of this rule to this case it is pertinent to inquire:

(a) Did the lien created by the Act of August 1, 1888, extend to the *equitable title* of the judgment debtor to the real properties described in the bill? (The judgment lien created by the Missouri Statutes above quoted, which statutes may or may not be a part of the federal act, extends to equitable as well as legal interests. *Williams* v. *Lobban*, 206 Mo. 3399, 410; *Eneberg* v. *Carter*, 98 Mo., 647, 650; *Slatterly* v. *Jones*, 96 Mo., 216).

(b) Did the act of Congress adopt these Missouri Statutes and with them its construction by the Missouri courts?

Upon the determination of these questions the existence and validity of the lien of the complainant may depend.

These questions appear *on the face* of the bill of the Cambria Company, and at once *involve and require a construction of the act of Congress*, with the necessary result that

by one construction of the act the right of the complainant will be sustained, and by another construction such right will be defeated.

But it has been expressly determined by this court (*Cooke v. Avery*, 147 U. S., 375), *that an action which seeks to establish and enforce a judgment lien created by an act of Congress is an action arising under the laws of the United States.* There the contest was over certain real property and the plaintiff alleged that he derived his title from the sale of the property under the *lien of the judgment* rendered by the Circuit Court of the United States for the Northern District of Texas, and the action was sustained as one arising under the laws and constitution of the United States, without regard to the citizenship of the parties, for the reason that the validity of the plaintiff's title depended upon the *existence of the lien* and the determination of that question involved the *construction and application of the act of Congress which created the lien.*

The act of Congress relied upon was the Act of June 1, 1872 (Sec. 916, Revised Statutes), which provided that the parties recovering a judgment in any common law action should be entitled to similar remedies by execution or otherwise, to reach the property of the judgment debtor as were then provided in like causes by the laws of the state in which such court was held or which should be thereafter adopted by rule of court. This was the statute which preceded the Act of August 1, 1888, which expressly gave a lien to the judgments of the courts of the United States.

The court said, in upholding the jurisdiction of the court:

> Plaintiff is to be regarded as the purchaser at the sale, and the *validity* of his purchase turned upon the *existence of a lien*, which he asserted and the defendants denied. The *disposition of this issue* depended upon the laws of the United States and the rules of the circuit court, and *their construction and application were directly involved.* We are of opinion that jurisdiction as resting on the subject-matter was properly invoked.

Does not this case conclusively establish our right to an appeal? The right of the Cambria Company to relief turned upon the *existence of the judgment lien* created by act of Congress, which the Cambria Company asserted and the Trust Company denied. Did not the disposition of this issue depend

upon the laws of the United States, and was not the jurisdiction of the lower court as depending upon the subject-matter properly invoked?

The same conclusion was reached by the Circuit Court of Appeals of the Fourth Circuit in *First National Bank* v. *Society for Savings*, 80 Fed., 581. There a federal circuit court issued a mandamus requiring the county court to levy a tax to pay a judgment against the county. Certain inhabitants of the town filed a bill in the state court to enjoin the levy on property in the town, claiming that such property was not subject to the claim upon which the judgment was based. This injunction suit was then removed by defendants to the federal court. It was held that the latter court had jurisdiction of the injunction suit, *as it involved the enforcement of a judgment of a federal court acting under the federal laws and constitution.* The court said:

> This proceeding is in the nature of an execution. The rights of the parties to the judgment in respect of its subject-matter are fixed by its rendition. *City of Chanute* v. *Trader*, 132 U. S., 210. This being so, the proceeding in the state court involves the enforcement of a judgment of the United States Circuit Court, acting under the constitution and laws of the United States, and it is, therefore, *a question arising under that constitution and those laws*, and so within the jurisdiction of the federal court.

The case of *Sowles* v. *Witters*, 46 Fed., 497, is also directly in point. It is there held:

> The laws of a state respecting the enforcement of judgments, adopted, pursuant to Rev. St. U. S. 916, by a rule of the federal district court for the government of judgment liens of such court, and for the guidance of the marshal in levying executions, derive their force from the United States, and not from the state; and a suit involving *the question whether or not the marshal's proceedings in levying an execution issued out of the federal court was in conformity with such rule is a question arising under the laws of the United States, and cognizable by the federal courts.*

The reason of the rule finds support in many adjudicated cases. An action on the bond of a marshal of the United States, or on the bond of a clerk, or on the official bond of a cashier of a national bank, or on the bond of a federal con-

tractor given for the protection of persons furnishing materials and labor for the construction of public works, or on a supersedeas bond, are held to arise under the laws of the United States for the reason that the case depends upon the scope and effect of the bond and the meaning of the statute under which it was given. (*Bock* v. *Perkins*, 139 U. S., 628; *Howard* v. *United States*, 184 U. S., 676; *Walker* v. *Bank*, 56 Fed., 76; *Hill* v. *Surety Company*, 200 U. S., 197; *United States* v. *Bonding Co.*, 89 Fed., 925; *United States* v. *National Surety Co.*, 92 Fed., 549; *United States* v. *Rundle*, 100 Fed., 400; *Hardaway* v. *Surety Company*, 150 Fed., 465; *Seymour* v. *Phillips*, 7 Biss., 460).

An action against a corporation created by Congress is one arising under the laws of the United States for the reason that the corporation has no powers and can incur no obligations except as authorized or provided by its charter. (*Removal Cases*, 115 U. S., 1; *Railway Co.* v. *Cox*, 145 U. S., 593.) Likewise, an action on an injunction bond given in the course of proceedings in the federal court arises under the laws of the United States for the reason that it is to be construed with reference to the liability administered in the courts of the United States on that subject. (*Tullock* v. *Mulvane*, 184 U. S., 497; *Railway Company* v. *Elliott*, 184 U. S., 530.)

That diversity of citizenship also existed in this case is not important. Nor is it material that the pleader in framing the bill may not have had in mind the assertion of any other ground of jurisdiction than that of diversity of citizenship. The controlling feature is that the complainant did assert a judgment lien upon the equitable title to certain real estate, and this judgment lien depended for its *existence* and *validity* upon an act of Congress, and upon the *construction of the act of Congress* creating it. These facts constituted a suit arising under the laws of the United States and gave to the circuit court an independent ground of jurisdiction in addition to that of diversity of citizenship.

IV.

The intervening petition of the Southern Company was a suit arising under the laws of the United States and for that reason alone the right of appeal to this court exists, regardless of the source of jurisdiction of the Cambria bill.

The decision of the Court of Appeals in this case was not final for the further reason that the intervening petition of the Southern Company (which was in the nature of an original bill) asserted the equitable title to certain real and personal properties held or claimed by the Trust Company, based upon foreclosure decrees rendered in the United States Circuit Court for the Western District of Missouri and sales had thereunder at which the Southern Company became the purchaser. It was, therefore, a "*case arising under the laws of the United States establishing the circuit court and vesting it with jurisdiction;* and hence, it would be *within the judicial power* of the United States as defined by the Constitution." (*Dupasseur* v. *Rochereau*, 21 Wall., 130; *Pittsburg Railroad Co.* v. *Long Island Trust Company*, 172 U. S., 493, 508; *Tullock* v. *Mulvane*, 184 U. S., 497.)

There was involved the Constitution of the United States (Article III, Section 1) providing that the judicial power of the United States should be vested in the Supreme Court "and in such inferior courts as Congress may from time to time ordain and establish," as well as the numerous acts of Congress defining the jurisdiction of the circuit courts of the United States and prescribing their procedure; and particularly the Act of March 3, 1893, entitled, "An Act to regulate the manner in which property shall be sold under orders and decrees of any United States courts" (27 Stat. L., 751).

The equitable title asserted by the Southern Company, as appears from the face of its petition, depended upon the *validity* of the foreclosure proceedings and the sales thereunder, and there was involved, therefore, the laws of the United States establishing the court, defining and limiting its jurisdiction of the subject-matter as well as of the parties, regulating the procedure in the course of the litigation, and prescribing with particularity the manner in which property shall be advertised and sold under the decrees of the court.

The title asserted by the Southern Company would be defeated by a construction of the laws of the United States that would deny the jurisdiction of the courts passing the decrees, either over the subject-matter or of the parties, or would invalidate the sale by reason of a failure to conduct it in accordance with the federal statute.

It was a necessary part of the case of the Southern Company that *under a proper construction of the acts of Congress* the courts passing the foreclosure decrees and conducting the sales had jurisdiction of the subject-matter and of the parties, the prescribed procedure had been followed and the sale had been made in the manner and at the place designated.

In other words, the Southern Company set up a right to recover as the result of a judicial sale made under a decree of the United States Circuit Court and, therefore, a federal question was presented.

This court, speaking through the present Chief Justice (*Commercial Publishing Co.* v. *Beckwith*, 188 U. S., 567), said:

> As in the complaint the plaintiff in error unquestionably set up a right to recover as the result of a judicial sale made under decrees, both of courts of the United States and of a state, federal questions exist in the record, and the motion which has been made to dismiss is therefore denied.

In *State* v. *Frost*, 89 N. W., 915, foreclosure proceedings brought in a federal court against a railway company had ripened into a decree. The master was unable to make a sale of the property at the up-set price named in the decree and reported that fact back to the court and asked for instructions. The court directed the receiver to take up the rails and ties for the purpose of selling them separately. The State of Wisconsin thereupon brought an original proceeding in the Supreme Court of Wisconsin to enjoin the receiver from taking up the rails and dismantling the road. Application was then made by the defendant to remove the case to the federal court upon the ground that the action arose under the laws and constitution of the United States. The right of removal was sustained, the court saying:

> It cannot be doubted that *the jurisdiction of the federal court depends wholly upon the constitution and laws of*

> *the United States;* nor that its power, after the expiration of a term, to modify a decree already entered, depends wholly upon the construction to be given to the *laws of Congress originating that court, and granting and defining its powers.*

Cooke v. *Avery*, 147 U. S., 375, and other cases cited under the preceding heading are also referred to as authority for this position.

Where an ancillary bill upon its face presents federal questions, the right of appeal to this court from the Circuit Court of Appeals exists, regardless of the source of jurisdiction of the main action. This has been expressly decided by this court in the recent case of *Railroad Commission of Ohio* v. *Worthington*, 225 U. S., 101. There, Worthington, who had been appointed receiver in an action depending solely upon diversity of citizenship, brought an ancillary bill to enjoin the enforcement of an order of the Railroad Commission of Ohio, invoking the Constitution of the United States, so that federal questions were presented on the face of the bill. The question arose as to whether a determination by the Circuit Court of Appeals of the issues made by the ancillary bill was final, and this court held that it was not, and that the appeal had been properly allowed, saying:

> The argument that the jurisdiction of the circuit court of appeals is final is based upon the contention that, as Worthington, the complainant in the present case, was appointed receiver of the Wheeling & Lake Erie Railroad Company in a suit in equity in the circuit court of the United States for the northern district of Ohio, eastern division, wherein jurisdiction depended upon diversity of citizenship, and since the jurisdiction to entertain an appeal in an ancillary proceeding is that of the original case, therefore, under the circuit court of appeals act, the decree of the court of appeals is final. It is undoubtedly true that in cases of intervention in *foreclosure suits*, where jurisdiction depends upon diverse citizenship, jurisdiction of the intervening petition is determined by that of the original case. It is equally true that petitions in original proceedings to enforce rights

and to protect the exercise of the jurisdiction of the court take their jurisdiction from that of the original case (*St. Louis, K. C. & C. R. Co.* v. *Wabash R. Co.*, 217 U. S. 247, 54 L. Ed. 752, 30 Sup. Ct. Rep. 510), and the many previous cases in this court therein cited.

An examination of the bill in this case, which was filed under the authority of the circuit court, shows that the order of the commission was attacked, not only upon the ground that its findings were alleged to be unsupported by the testimony and to have been made upon improper consideration of the facts, but also because the order affected and interfered with interstate commerce, in which the complainant was engaged and over which the Railroad Commission of Ohio had no authority because of the commerce clause of the Federal Constitution. It further was alleged that the owners of the property constituting the receivership estate would be deprived thereof without due process of law; that they would be denied the equal protection of the laws, and that their property would be taken without compensation. *It thus appears that jurisdiction was invoked, not only because the present case is ancillary to the receivership suit, which depended upon diverse citizenship, but upon grounds which involve alleged infractions of the Federal Constitution and rights secured thereby.* The case was therefore one which might have been taken to the circuit court of appeals, and the fact that it involved grounds which might have warranted a direct appeal to this court did not deprive the circuit court of appeals of jurisdiction. *American Sugar Ref. Co.* v. *New Orleans*, 181 U. S., 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646; *Macfadden* v. *United States*, 213 U. S., 288, 53 L. ed. 801, 29 Sup. Ct. Rep. 490.

The question, then, is: Is this one of the cases made final in the circuit court of appeals by the act creating that court? The 6th section of that act provides that the judgment of the circuit court of appeals, "shall be final in all cases in which the jurisdiction is dependent upon the opposite parties to the suit or controversy being aliens and citizens of the United States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases." (26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 550). In all other cases there is a right of review by this court if the matter in controversy exceeds $1,000. It is averred in the bill and admitted in the answer that the amount in dispute exceeds in value the sum of $5,000. *The case is therefore one not made final in the circuit court of appeals, and the appeal to this court was properly allowed.* *Spreckles Sugar Ref. Co.* v. *Mc-*

Clain, 192 U. S., 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376; *Macfadden v. United States*, 213 U. S., 288, 294, 53 L. ed. 801, 802, 29 Sup. Ct. Rep. 490; *Standard Paint Co.* v. *Trinidad Asphalt Mfg. Co.*, 220 U. S., 446, 460, 55 L. ed. 536, 543, 31 Sup. Ct. Rep. 456.

We understand the present state of the law on this subject to be as follows:

(a) Where it is sought to appeal from a decision of the Court of Appeals rendered upon the issues made by an intervening petition or an ancillary or dependent bill which does not itself disclose upon its face grounds of federal jurisdiction, the right of appeal is to be referred to the original bill which first invoked the jurisdiction of the lower court. If the sole ground of jurisdiction disclosed on the face of the original bill was diversity of citizenship, then no appeal lies; but if the bill disclosed a cause of action arising under the laws of the United States, whether stated separately or in connection with a ground of jurisdiction founded upon diversity of citizenship, the right of appeal from the Court of Appeals to this court exists.

(b) Where it is sought to appeal from a decision of the Court of Appeals rendered upon the issues made by an intervening petition or an ancillary or dependent bill which discloses on its face grounds of federal jurisdiction, then the right of appeal exists, regardless of the source of jurisdiction disclosed on the face of the original bill as filed in the lower court.

It is the contention of the appellant in this case that it has a right of appeal to this court: *first*, for the reason that the bill of the Cambria Company disclosed a cause of action of which the circuit court would have had jurisdiction independent of diversity of citizenship; and, *secondly*, that the intervening petition of the Southern Company sets forth a cause of action arising under the laws of the United States, and for that reason the right of an appeal exists wholly independent of the grounds of jurisdiction contained in the bill of the Cambria Company.

Respectfully submitted,

SAMUEL UNTERMYER,
SAMUEL W. MOORE,
Solicitors for Appellant.

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IN THE

Supreme Court of the United States.

KANSAS CITY SOUTHERN RAILWAY COMPANY,
APPELLANT,

VS.

GUARDIAN TRUST COMPANY, APPELLEE.

KANSAS CITY SOUTHERN COMPANY, APPELLANT,

VS.

CENTRAL IMPROVEMENT COMPANY, APPELLEE.

Notice of Motion to Dismiss or Affirm, Motion to Dismiss or Affirm and Brief for Guardian Trust Company in Support of Motion.

EDWARD P. GATES,
WALTER C. CLEPHANE,
Solicitors for Guardian Trust Company, Appellee.

GEORGE H. ENGLISH, JR.,
Of Counsel.

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NUMBER 941.

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KANSAS CITY SOUTHERN RAILWAY COMPANY, APPELLANT,

VS.

GUARDIAN TRUST COMPANY, APPELLEE.

KANSAS CITY SOUTHERN COMPANY, APPELLANT,

VS.

CENTRAL IMPROVEMENT COMPANY, APPELLEE.

NOTICE OF MOTION TO DISMISS OR AFFIRM.

To Samuel W. Moore, Esq., Solicitor for Appellant, Kansas City Southern Railway Company, H. H. Crittenden, Receiver of Central Improvement Co., Frank Hagerman, Solicitor for Cambria Steel Company:

Please take notice that on Monday, April 27, 1914, at the coming in of the court, or in case the court shall not be sitting on that day, on the next motion day when the court shall be sitting, a motion to dismiss the appeal or to affirm the decree of the court below in the above entitled cause, will be submitted to the Supreme Court of the United States. Printed copy of such motion and brief to be submitted in support thereof is hereto attached and served upon you.

EDWARD P. GATES,
WALTER C. CLEPHANE,
Solicitors for Guardian Trust Company, Appellee.

GEORGE H. ENGLISH, JR.,
Of Counsel.

NUMBER 941.

IN THE

Supreme Court of the United States.

KANSAS CITY SOUTHERN RAILWAY COMPANY, APPELLANT,

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MOTION TO DISMISS OR AFFIRM.

Now comes appellee, Guardian Trust Company, and moves the court to dismiss the appeal in this case for want of jurisdiction, because the decree of the United States Circuit Court of Appeals for the Eighth Circuit, from which said appeal was taken, is in a cause in which the jurisdiction of said United States Circuit Court of Appeals for the Eighth Circuit, is final, in this, namely, that the jurisdiction of the Circuit Court (now District Court) in which this action originated was dependent entirely upon the diversity of the citizenship of the parties hereto, as appears from the original bill of complaint of said Cambria Steel Company herein filed. Or, if said appeal shall not be dismissed, then this appellee prays that the decree of said United States Circuit Court of Appeals of the Eighth Circuit, be affirmed on the ground that although if, in the opinion of this court, the record may show that this court has jurisdiction, it is manifest that said appeal was taken for delay only and that the question on which jurisdiction depends is so frivolous as not to need further argument.

EDWARD P. GATES,
WALTER C. CLEPHANE,
Solicitors for Appellee, Guardian Trust Company.

GEORGE H. ENGLISH, JR.,
Of Counsel.

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CENTRAL IMPROVEMENT COMPANY, APPELLEE.

BRIEF FOR GUARDIAN TRUST COMPANY IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

STATEMENT.

This is an appeal from the decision of the Circuit Court of Appeals of the Eighth Circuit.

The parties are numerous.

Those concerned here are the Cambria Steel Company (herein called the Cambria), the Kansas City Southern Railway Company (herein called the Southern), the Central Improvement Company (herein called the Central), and the Guardian Trust Company (herein called the Trust Company).

The Cambria is a corporation of Pennsylvania. All the other parties are corporations and citizens of Missouri, except one, a corporation of Kansas.

The original bill of the Cambria, exhibited September 6, 1900, averred that it was a judgment creditor of the Belt; that an indebtedness claimed by the Trust Company to be due the Trust Company from the Belt and secured by the deposit of collateral, would appear upon a true accounting to be invalid, and that the Trust Company would be indebted to the Belt; the bill prayed that the court decree that an accounting be taken between the Belt and the Trust Company and that the collateral and the proceeds of the accounting be subjected to the payment of the Cambria's debt.

Pursuant to the Cambria's prayer the Belt receivers exhibited an ancillary bill which (twice amended) set forth in detail the transactions complained of in the Cambria's bill and prayed for the cancellation of the indebtedness and the return of the collateral and for judgment for the amount to be found due on the accounting.

The Southern intervened averring that it was the purchaser of the Belt properties at a foreclosure sale and thereby became entitled to the collateral and the proceeds of the accounting. It also averred that the lands of the Central had been purchased with money of the Belt and that the equitable title thus created in the Belt passed to the Southern by the foreclosure sale; it therefore prayed for a decree requiring the conveyance to it of the Central properties.

The Trust Company's answer to the intervention of the Southern, set up that the Southern was liable for the Belt Company's debt in that the Southern Company was organized pursuant to a plan of re-organization of the Belt and other companies, whereby the Southern Company became successor in liability to the floating debt of the Belt Company to the Trust Company, which plan also provided expressly that one of the objects to be attained thereby was the payment of the floating debt.

Upon the accounting, the Master found that the Belt Company was indebted to the Trust Company; that the Trust Company was entitled to the collateral including the stock of the Central Company, but that the Southern Company was not liable to the Trust Company for the Belt indebtedness, and that the Southern Company was entitled to a conveyance of the property of the Central Company. The decree of the Circuit Court having been rendered in conformity with the master's report, the Trust Company appealed to the Circuit Court of Appeals for the 8th Circuit. The receiver of the Central Company also appealed. The Court of Appeals, after mature consideration and re-argument, in two opinions, held the Southern Company liable for the Belt indebtedness to the Trust Company, and held that until the Southern Company paid that debt, it was entitled to no relief respecting the Central Company's lands. From this decree of the Circuit Court of Appeals, the Southern Company prosecutes its appeal to this court. No other party appeals.

The question presented by the present motion is whether or not the case is one in which under the Statute (Act of March 3, 1891, Sec. 6, 26 Stat. L. 828), the decision of the Circuit Court of Appeals is final. We assert that it is, in that the sole ground of jurisdiction was the diversity of the citizenship of the Cambria Company and the defendants.

This question is to be determined upon the jurisdiction disclosed by the original bill of the Cambria Company. An abstract or digest of this original bill setting forth *verbatim* all the parts of the bill upon which any grounds of jurisdiction can be based is attached to this brief as Appendix "A." The bill itself appears at page 5 of the record.

For the convenience of the court there is also printed as Appendices "B" and "C" respectively to this brief, the prayers of the second amended and supplemental ancillary bill of the Belt and of the amended intervening petition of the Kansas City Southern. Said ancillary bill appears at page 456 of the record and the amended intervening petition of the Kansas City Southern appears at page 312.

For a more detailed statement of the facts and issues of the case, reference is made to the two opinions of the Circuit Court of Appeals, appearing respectively at pages 1163 and 1216 of the record. For the convenience of the court we have had printed copies of these opinions bound together, which are handed to the court with this brief.

It appears from the record, page 1250 and following, that after the decision of the Circuit Court of Appeals and nearly fourteen years after the original bill was exhibited, an application was made by the Cambria Company (evidently at the instigation of the Southern Company) for leave to amend the original bill by setting forth explicitly that relief was sought under the Federal Statute (Act of Aug. 1, 1888; Secs. 1 and 2, 25 Stat. L. 357), providing that the lien of the judgments of Federal Courts shall have only the extent of liens of judgments of State Courts in the same states. This application the Court of Appeals denied. But from the language of the application it is assumed by the appellee that it will be contended by the appellant in opposition to this motion that this record contains a Federal question growing out of the construction or application of that Statute and that therefore the jurisdiction of the Circuit Court of Appeals is not final, in that it rests not alone upon diversity of citizenship.

ARGUMENT.

The sole ground of jurisdiction appearing is diversity of citizenship.

It is, of course, difficult to present an argument in support of a negative proposition. We can only point to the original bill and assert that we are unable to perceive in it any question involving the construction or application of the Federal Statute mentioned in the proposed amendment, nor any ground of Federal jurisdiction save diversity of citizenship. To us it seems manifest that the claim that such a question is involved is merely an afterthought.

But while it is impossible to forecast the exact line of the argument which eminent counsel for the appellant may present, we confidently predict that such argument will be controlled by the following propositions:

(a) **The jurisdictional questions raised by this motion are to be determined by the issues raised and litigated under the original bill of complaint. Questions raised in subsequent pleadings, whether by answer, supplemental bill, or intervention, do not enlarge the jurisdiction.**

Denver v. *N. Y. Trust Co.*, 229 U. S. 123.
Shulthis v. *McDougal*, 225 U. S. 561.
Third St. etc. Ry. Co. v. *Lewis*, 173 U. S. 457, l. c. 460.
Huguley Mfg. Co. v. *Galeton Cotton Mills*, 184 U. S. l. c. 295.

(b) **The only ground of jurisdiction set out in the bill is diversity of citizenship. The ground pretended to exist by appellant can only be inferred argumentatively from statements in the bill. Jurisdiction cannot rest on any ground not affirmatively and distinctly set forth.**

Shulthis v. *McDougal*, 225 U. S. l. c. 569.
Hanford v. *Davies*, 163 U. S. 273.
Mountain View Mining Co. v. *McFadden*, 180 U. S. 533.
Bankers Casualty Co. v. *Minneapolis Co.*, 192 U. S. 371.
Devine v. *Los Angeles*, 202 U. S. l. c. 333.

(c) **Even if relief were sought under the Statute, no genuine controversy involving the construction or application of this Statute appeared in the case or appeared in the decision of the Circuit Court of Appeals appealed from.**

East Tenn. V. & G. Ry. Co. v. *Frazier*, 139 U. S. 288.
Roby v. *Colehour*, 146 U. S. 160.
Mobile Transfer Co. v. *Mobile*, 187 U. S. 479.
Winous Point Shooting Club v. *Caspersan*, 193 U. S. 189.
New York & N. E. Ry. Co. v. *Bristol*, 151 U. S. 555.
Southern Ry. Co. v. *Carson*, 194 U. S. 136.
Chapin v. *Fry*, 179 U. S. 127.

(d) **Even if there be read into the original bill or the subsequent bills, a ground for relief sought in establishing a lien upon lands of any of the parties, such relief was sought under general equitable principles and not under the Federal Statute, and hence there is no Federal question.**

Blake v. *Openhym*, 216 U. S. 322.
Telluride Power Co. v. *Rio G. Ry.*, 175 U. S. 639.
Rockhold v. *Rockhold*, 92 U. S. 129, 130.
United States v. *Thompson*, 93 U. S. 586, 588-9.
Chouteau v. *Gibson*, 111 U. S. 200, 201.

On the Motion to Affirm.

Even if some color be found by appellant for jurisdiction beyond mere diversity of citizenship, it is manifest that such question is one of no moment in the determination of this case. This conclusively appears from the assignments of error upon appeal to this court.

The assignments of error are attached hereto as Appendix "D."

These assignments of error were filed by the appellant *two days* after the motion of the Cambria Company made to the Court of Appeals for leave to amend the original bill, and while the subject of the jurisdiction was fresh in counsel's mind. The most careful scrutiny will fail to disclose in them a reference to any subject upon which the Federal jurisdiction would be invoked.

Obviously therefore, a question which the appellant does not seek to have reviewed by this court can be nothing more than frivolous.

Comments in Conclusion.

In its inception, as is manifest from the record and the decisions of the Court of Appeals, this case was nothing more or less than an ordinary resort to the equitable jurisdiction of the Federal Court with the view to compelling an accounting between the Belt Company and the Trust Company. That accounting terminated in favor of the Trust Company. No appeal was taken by any of the parties against whom the accounting was decided, and the validity of the indebtedness of the Belt Company to the Trust Company stands unquestioned.

The Southern Company became a voluntary intervenor in this case, and the sole question presented by its assignments of error is an endeavor to escape from the payment of the debts of the Belt Company for which it became liable. While the subject matter of the accounting was involved and intricate and while a record of unparalleled proportions was made in the presentation of these issues, it is obvious that the general purpose and object of the litigation was that of a simple proceeding for an accounting. No Federal question was actually involved; no genuine controversy over anything, save the general merits of an accounting suit, and the rights and equities arising therefrom was at any stage of the case litigated or submitted to any court.

It is most respectfully urged that one of the alternatives of the motion to dismiss or affirm be sustained, and that the Trust Company be permitted to have the relief to which it has so long been entitled and which it has been so long denied.

Respectfully submitted,

EDWARD P. GATES,
WALTER C. CLEPHANE,
Solicitors for Guardian Trust Co.

GEO. H. ENGLISH, JR.,
Of Counsel.

APPENDIX "A."

The Original Bill of the Cambria Steel Company.

The following is an abstract of the original bill of complaint of the Cambria Steel Company, the portions alluded to in this argument being quoted *verbatim* and the residue abstracted.

"In the Circuit Court of the United States for the Western "Division of the Western District of Missouri, "in Equity.

"Cambria Steel Company, Complainant,

vs.

"The Kansas City Suburban Belt Railroad Company, The "Union Terminal Railroad Company, Kansas City & "Independence Air Line, Guardian Trust Company, Mis-"souri Elevator and Terminal Company, Central Im-"provement Company, Second Street Improvement Com-"pany, Fairmount Amusement Company, and Northern "Town-site Company, Defendants.

"ORIGINAL BILL OF COMPLAINT.

"To the Judges of the United States Circuit Court for "the Western Division of the Western District of Mis-"souri, in the Eighth Circuit:

"Sitting in Equity.

"Your orator, the Cambria Steel Company, a corporation "organized and existing under and by virtue of the laws of "the State of Pennsylvania and a citizen of said State, brings "this its Bill of Complaint against the Kansas City Suburban "Belt Railroad Company, Kansas City and Independence Air "Line Guardian Trust Company, Missouri Elevator and "Terminal Company, Central Improvement Company, Second "Street Improvement Company, Fairmount Amusement Com-"pany, and Northern Town-site Company, each and all of "them corporations organized and existing under and by vir-"ture of the laws of Missouri and citizens and residents of "said State, and each of them having their principal office "and place of business at Kansas City in said State, and an in-"habitant of the Western Division of the Western District "thereof, and against The Union Terminal Railroad Com-"pany, a corporation organized and existing under and by "virtue of the laws of the state of Kansas and a citizen and "resident of said state, having its principal office and place of

"business at the city of Kansas City in said State, and an in-
"habitant of the First Division of the District of Kansas.

"And thereupon your orator complains and says that your "orator is a corporation duly organized and existing under "and by virtue of the laws of the State of Pennsylvania, hav-"ing its principal office in said state and is a citizen and resi-"dent of said state; that the defendants, The Kansas City "Suburban Belt Railroad Company (hereinafter called the "Belt Company), the Kansas City and Independence Air "Line (hereinafter called the Air Line), the Guardian Trust "Company (hereinafter called the Trust Company), the Mis-"souri Elevator and Terminal Company (hereinafter called "the Elevator Company), the Central Improvement Com-"pany (hereinafter called the Central Company), the Second "Street Improvement Company (hereinafter called the Second "Street Company), the Fairmount Amusement Company "(hereinafter called the Amusement Company), and the "Northern Town-site Company (hereinafter called the Town-"site Company), are each and all of them corporations or-"ganized and existing under and by virtue of the laws of "the State of Missouri; that each of them has its principal "Office in Kansas City in said State, and that each of them "is a citizen and resident of said State of Missouri and an "inhabitant of the Western Division of the Western District "thereof, and that the defendant, The Union Terminal Rail-"road Company (hereinafter called the Union Company), is "a corporation organized and existing under and by virtue "of the laws of the State of Kansas, has its principal office "in the City of Kansas City in the county of Wyandotte in "said state of Kansas, and is a citizen and resident of said "state of Kansas and an inhabitant of the First Division of "the District of Kansas."

Then follow averments of the change of name of the Trust Company; the procuring of judgment by the Cambria Company against the Belt Company, the issue of execution and its return *nulla bona;* and that the Belt Company is insolvent.

It is then charged that the Trust Company conceived the plan to cause to be constructed a large number of railroads in and about Kansas City and to dominate and control the actions of said railroads.

"That it was still further a part of said plan and purposes "of said Trust Company to organize a large number of auxil-"iary corporations, either in the way of construction com-"panies to construct and build said several lines of railroad "or in the way of companies to hold the legal title to lands, "buildings and other structures necessary to be used by the

"said railroad companies in their operations or for purposes "incident thereto, and to also cause various officers, agents, "employees and other representatives of said Trust Company "to become the officers and directors of each and all of the "said last mentioned construction and auxiliary companies "so as thereby to be enabled to completely dominate and control "the actions of the said construction and auxiliary companies "and of their several officers and directors."

The bill further charges that the Trust Company planned to foist upon the railroad or auxiliary companies all losses and to gather for itself all the profits of the enterprises; that the Trust Company assumed the position of trustee and agent in managing and disposing of the bonds, stocks, funds, etc., of the railroad and auxiliary companies.

That the Trust Company caused the Suburban Company to be organized to build a belt line about Kansas City; and caused it to execute a mortgage and issue bonds which the Trust Company sold; and caused the Terminal Company to be formed, to issue bonds and be consolidated with the Suburban Company; and caused the Union Company to be formed to build the part of the belt line in Kansas and to issue bond; that the Trust Company caused the Belt Company to be formed, to issue bonds and be consolidated with the Terminal Company; that the Trust Company caused its officers and agents to be elected officers of the Belt Company and thus dominated and controlled the Belt Company; that the Trust Company caused the Air Line Company to be created, to issue bonds which the Trust Company sold and dominated and controlled it; that the interest bonds of the Union Company, the Belt Company and the Air Line Company had not been paid and foreclosure proceedings were pending against them.

That the costs of the lines consolidated into the Belt Company did not exceed $1,700,000 and the companies delivered to the Trust Company bonds and stocks aggregating over $5,000,00; that the Trust Company has applied the excess in payment of its own commissions and services; that the cost of the Union Company's lines did not exceed $865,000 and the Trust Company received $4,000,00 of its stock and bonds applying the excess to payment of its services and commissions; that the cost of the Air Line did not exceed $200,000 and the Trust Company received its stocks and bonds to the amount of $850,000, applying the excess to its services and commissions.

That the Trust Company, though often requested, has failed to make a true and correct accounting; that upon a true accounting the Trust Company would owe the Belt Company a large amount, all of which is justly and equitably applicable to the orator's judgment against the Belt Company.

"Your orator further shows that in pursuance of its "aforesaid plans and purposes to organize auxiliary com- "panies for the purpose of taking and holding the legal title "to property necessary to be used in connection with the rail- "roads of the said several railroad companies above mentioned "or incidental thereto, and with the fraudulent intent and pur- "pose of preventing the properties so taken in the names of "said auxiliary companies, respectively, from being reached "by the creditors of said railroad companies or either of them "and particularly by the creditors of the said Belt Company, "said Trust Company did contrive the formation of the said "Elevator, Amusement, Central Second Street and Town-site "companies, respectively that the said Trust Company did "cause various of its officers, agents and employees to be "selected as the incorporators, stockholders, officers and di- "rectors of the said several auxiliary companies, and by means "thereof, did at all times dominate and control the manage- "ment of the said several auxiliary companies and the actions "of the stockholders and boards of directors thereof; that, as "your orator is informed and believes, all or substantially all, "of the moneys invested in the purchase, improvement and ac- "quisition of the several properties of the said auxiliary com- "panies and each of them, was paid and supplied by the said "Belt Company, and each and every one of the said auxiliary "companies was a mere device or 'dummy' contrived and pro- "vided by the said Trust Company as a means for taking and "holding the naked legal title to such properties as might be "vested in the said auxiliary companies, respectively, for the "use and benefit of the said Belt Company, and that, as to the "creditors of the said Belt Company and particularly as to "your orator, the properties and shares of stock of each and "every of the said auxiliary companies in equity belongs to "the said Belt Company and are chargeable with the lien and "payment of your orator's aforesaid judgment against the said "Belt Company; a list of real estate in the name of the auxil- "iary companies so far as known to complainant, is hereto "attached as "exhibit 2."

That the Trust Company, in 1897, contracted with railroads operating in Northwestern Missouri and Southwestern Iowa to provide them a railroad connection and entrance into Kansas City. This contract necessitated the construction of a railroad from Kan-

sas City to Pattonsburg, Missouri; that by its domination over the Belt the Trust Company caused the Belt to enter into a contract with the Northern Connecting Company (which the Trust Company had caused to be organized) to construct such road; and the Northern Connecting Company issued its bonds and stocks to pay for the construction which the Trust Company sold, charging the Belt Company with the moneys expended in construction and crediting it with the proceeds of the sale of said bonds and stocks, less such charges as the Trust Company saw fit to make for its services and commissions; that the result was a loss of over $300,000, which is justly chargeable to the Trust Company; that the contract was *ultra vires* the power of the Belt Company, and the act of the Trust Company in charging such loss to the Belt Company was fraudulent.

That the Trust Company caused to be organized the Kansas City, Pittsburg and Gulf Railroad Company under the laws of Missouri, to construct and operate a railroad from Kansas City to the Gulf of Mexico and caused it to issue bonds, the interest of which having defaulted, foreclosure proceedings are consequence pending in this court.

That the Trust Company, knowing that the default of the Gulf Company was inevitable and would result in defaults of payment of the interest upon the mortgages of the Suburban, Terminal, Union, Belt, Air Line and Northern Connecting Companies and of the auxiliary companies, planned to appropriate to itself the assets of said railroad and auxiliary companies and by its domination over the Belt caused the latter to go through the form of executing and delivering to the Trust Company a number of pretended promissory notes and of delivering to the Trust Company to secure the same all the bonds, stocks and other securities and all the movable personal property of the Belt Company.

Then follows a description of said notes and of the said property, and it is then charged said properties were taken possession of by the Trust Company fraudulently.

The Bill then proceeds with the averment that the Trust Company is insolvent and in process of liquidation; that it is threatening to sell the notes; that it has notified the Belt Company that it would sell the collateral.

"Your orator further shows that the property held in the "name of the Elevator Company, a corporation contrived by

"the said Trust Company as aforesaid, as a device and dummy "to take and hold the legal title to said property for and on "behalf of the Belt Company, and which property is equitably "and justly chargeable with the debts and liabilities of the "said Belt Company, consists, among other things, of three "(3) elevators known respectively as the "Star," "Eclipse," "and "Diamond" Elevators, which are located in the North-"eastern part of Kansas City, Missouri, and adjacent to the "railroad of said Belt Company, and that the same are neces-"sary and indispensable to a proper operation of said Belt "Company's property; that the property held in the name of "said Central Company consists, among other things, of va-"rious tracts of real estate in Kansas City, Missouri, ac-"quired for the use of the said Belt Line and necessary and "indispensable to such use, for station grounds, yards and "switches, side tracks and necessary buildings, and that said "property as hereinbefore alleged, is in equity the property "of the said Belt Line, the said Central Company being a mere "device and dummy contrived by the said Trust Company to "hold and carry the legal title thereto for the use and benefit "of the said Belt Line and its creditors; that the property held "in the name of the said Second Street Company consists, "among other things, of certain tracts of real estate in or near "Kansas City, Missouri, and used and indispensably necessary "to be used by the said Belt Company for depot grounds, nec-"essary buildings, right of way, yards, freight houses and "machine shops; that the said Second Street Company was "contrived by the Trust Company as aforesaid, as a mere de-"vice and dummy to take and hold the legal title to said prop-"erty for the use and benefit of said Belt Company, and that "the said property in equity belongs to the said Belt Company "and is chargeable with the debts and liabilities thereof, in-"cluding the judgment of your orator as aforesaid; that the "property and assets, the legal title to which is held by the "said Amusement and the said Townsite companies, re-"spectively, are likewise essential and indispensably necessary "to the successful operation of the property of the said Belt "Line, and that the said two last mentioned companies are "likewise devices and dummies contrived by the said Trust "Company for the purpose of taking and holding the legal "title to said assets and properties for the use and benefit of "said Belt Company as the equitable owner thereof, and that "such assets and property so held are equitably and justly "chargeable with the claims and demands of the creditors of "the said Belt Company, and particularly the judgment so "obtained by your orator as aforesaid."

The bill then charges that the management of the assets of the auxiliary companies is still under the domination of the Trust

Company and that it is necessary that receivers be appointed for the auxiliary companies and the railroad companies.

That the bill is brought both for the orator and all others similarly situated.

The prayer is:

(a) That an accounting be taken between the Belt and Trust Companies, in which the Trust Company be charged with all losses in its transactions with the Belt assets.

(b) That the Trust Company be decreed to hold the stock of the auxiliary companies and the bonds of the Northern Connecting Company in trust for the creditors of the Belt.

"(c) That the property and assets, the legal title to "which is held, respectively, by the said Elevator Company, "Amusement Company, Central Company, Second Street "Company, and Townsite Company be declared to be in equity "the property of the said Belt Company, and chargeable with "the lien and payment of the debts and liabilities of the said "Belt Company, and, particularly, the judgment aforesaid of "your orator."

(d) That the assets of the Belt be marshalled.

(e) That the rights of all persons in the assets of the Belt be adjudicated.

(f) That said assets and property be sold and the proceeds distributed among those found to be entitled thereto.

(g) For general relief.

The bill then prays for the appointment of receivers for the properties of the various companies and for an injunction against the Trust Company enjoining it from disposing of any of the notes and the property, and concludes with the prayer for a subpoena and waiver of answer under oath.

APPENDIX "B."

The prayer of the Second Amended and Supplemental Ancillary Bill of the Receivers of the Kansas City Suburban Belt Railroad Company (Rec. p. 532).

"In consideration whereof and for as much as your ora-"tors are remediless in the premises except in a court of equity, "your orators therefore pray the aid of this court;

"(a) That an accounting be taken of the various trans-"actions and dealings between the Trust Company and the Belt "Company; or by the Trust Company for the use and benefit "of and as trustee and agent for the Belt Company, and that "the Trust Company be required to pay the balance found to "be due by it, if any, upon such accounting; that in taking "such accounting all claims and demands alleged to be held "by the Trust Company against the Belt Company in Kansas "and Missouri, where the Trust Company used the Belt "Company simply as an instrumentality and agency for its own "use and benefit, be charged against the Trust Company, and "it be held liable for all losses incurred or claimed to have "been incurred by the Belt Company about the same.

"(b) That the said notes hereinabove described may be "found and decreed by this court to have been executed in "the fraudulent manner and for the fraudulent purposes above "set forth and without consideration; and that said notes may "be by this court directed to be surrendered up and cancelled, "and that each and all of the stocks, bonds and other securi-"ties, including the assigned account above mentioned, fraud-"ulently delivered to the Trust Company by its officers and "employes in the manner hereinabove set forth, may be or-"dered by this court surrendered and delivered up or re-"assigned to the Belt Company.

"(c) That each and all of the property purchased with "the money of the Belt Company and belonging in equity to "it, the legal title to which is held in the name of any of the "companies hereinbefore set forth, may be required by the "decree of this honorable court to be conveyed to the Belt "Company, or to its receiver for it.

"And your orators pray for a continuance of the writ "of injunction herein against the Guardian Trust Company, "its agents, servants and employes, restraining and enjoining "them and each of them from selling, transferring or in any "wise disposing of the said notes above mentioned and so "executed by the Belt Company to the Trust Company; and "from selling, transferring or in any wise disposing of the "said bonds and stocks and other property hereinabove de-

"scribed, delivered to said Trust Company as collateral se-"curity for said notes.

"And may it please Your Honors to grant unto your "orators the subpoenae of the United States of America issu-"ing out of and under the seal of this Honorable Court di-"rected to the Guardian Trust Company, the Missouri Eleva-"tor, Terminal Company, the Fairmount Amusement Com-"pany, the Central Improvement Company and Thomas T. "Crittenden, its receivers, the Northern Townsite Company, "and the Cambria Steel Company, the defendants herein re-"spectively, therein and thereby commanding them on a day "certain therein to be named and under a certain penalty to "be and appear before this Honorable Court then and there "to answer (but not under oath, an answer under oath be-"ing hereby expressly waived), all and singular the premises, "and to stand and perform and abide by such orders, direc-"tions or decrees as may be made in the premises, and as shall "seem meet and agreeable to equity and good conscience.

"And your orators will every pray.

"S. W. MOORE & T. R. MARKS,
"Solicitors for Complainants."

APPENDIX "C."

The prayer of the Amended Intervening Petition of the Kansas City Southern Railway Company (Rec. p. 337).

"Wherefore your intervener prays:

"a. For the judgment, order and decree of this court re-"quiring the Central Improvement Company and its Receiver "to convey to your intervener all the real estate or other prop-"erty standing in its name and to turn over to your intervener "all the moneys held by the Central Improvement Company, "or its Receiver, or owing to it, or them, arising from the "sale or the proceeds of said property;

"b. That the defendant, Guardian Trust Company, be "required to account for and pay to your intervener the value "of the steel rails and fastenings mentioned in paragraph "seven (7), together with interest thereon;

"c. That the defendant, Guardian Trust Company, be "required to account for and pay to the intervener the value "of the five thousand (5,000) shares of Union Terminal "stock, together with the value of four thousand nine hundred "and ninety-four (4,994) shares of the capital stock of the

"Air Line and also the value of the fourteen thousand nine "hundred and ninety-seven (14,997) shares of the capital "stock of the Terminal Company, together with interest there- "on.

"d. That the defendant, Guardian Trust Company, be "required to account for and pay to your intervener the value "of the bonds and stock of the Kansas City and Northern "Connecting Railroad Company mentioned in the preceding "paragraph nine.

"e. That the defendant, Guardian Trust Company, be "required to assign to your intervener the account of the Belt "Company against the Gulf Company mentioned in the fore- "going paragraph ten.

"f. That the defendant, Guardian Trust Company, be "required to release to your intervener all of the capital stock "of the Northern Townsite Company and that said Northern "Townsite Company and its receivers be required to convey "to your intervener all of the property held by said Northern "Townsite Company and its receivers, together with all the "moneys in their possession or owing to them as the proceeds "of the property formerly held by said Townsite Company "upon repayment to the Trust Company for such sum as the "court may find was contributed by said Trust Company for "the purchase of property taken in the name of the Townsite "Company.

"g. That the defendant, Guardian Trust Company, be "required to account for and pay to the intervener the amount "of the proceeds of the bonds of the Union Company diverted "by it from the purposes for which said bonds were issued, "as set forth in paragraph thirteen.

"h. And for such other relief as may be equitable and "just.

"SAMUEL W. MOORE,
"THOMAS R. MARKS,
"Solicitors for Intervener."

APPENDIX "D."

The Assignment of Errors of the Kansas City Southern Railway Company on this appeal (Rec. p. 1253).

"Now comes the appellant, The Kansas City Southern "Railway Company, and says that in the record and proceed- "ings herein, there is manifest error, and that the United "States Circuit Court of Appeals for the Eighth Circuit erred "in this, to-wit:

"1. In holding and deciding that The Kansas City "Southern Railway Company was liable for and required to "pay to the Guardian Trust Company the indebtedness of the "Kansas City Suburban Belt Railroad Company, to the "Guardian Trust Company.

"2. In holding and deciding that the rights and equities "of the Guardian Trust Company in the properties and capital "stock of the Central Improvement Company were prior and "superior to the rights and equities therein of The Kansas "City Southern Railway Company.

"3. In holding and deciding that the Guardian Trust "Company was not estopped by its participation in, and the "benefits received and retained by it from, and growing out of "the plan of reorganization involved herein, from maintain- "ing that The Kansas City Southern Railway Company was or "is liable for the indebtedness of the Kansas City Suburban "Belt Railroad Company to the Guardian Trust Company.

"4. In deciding and passing upon the issue of the al- "leged liability of the appellant for the indebtedness of the "Belt Company, in the absence of any exception taken be- "fore the master, or in the lower court, challenging the cor- "rectness of the finding of the master that the appellant was "not liable for such indebtedness.

"Wherefore, the appellant prays that said judgment and "decree of the said Circuit Court of Appeals may be reversed "in all things."

OCT 20 1915
JAMES D. MAHER
CLERK

—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1915.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Appellant and Petitioner*,
vs.
GUARDIAN TRUST COMPANY, CENTRAL IMPROVEMENT COMPANY, CAMBRIA STEEL COMPANY, and KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, *Respondents*.

No. 85.

BRIEF OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY, APPELLANT AND PETITIONER.

SAMUEL UNTERMYER,
SAMUEL W. MOORE,
Solicitors for Appellant and Petitioner.

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—IN THE—

Supreme Court of the United States

OCTOBER TERM, 1915.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Appellant and Petitioner,*
vs.
GUARDIAN TRUST COMPANY, CENTRAL IMPROVEMENT COMPANY, CAMBRIA STEEL COMPANY, and KANSAS CITY SUBURBAN BELT RAILROAD COMPANY, *Respondents.*
No. 85.

BRIEF OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY, APPELLANT AND PETITIONER.

THE MAIN QUESTION PRESENTED BY THIS RECORD.

The main question involved is whether, in a reorganization of several allied railway companies, participated in by both bondholders and stockholders, the respondent, Guardian Trust Company, herein referred to as the Trust Company, which was a stockholder and bondholder in several, and an unsecured creditor of one of the subsidiary companies involved, could, as such unsecured creditor, impose a liability for that debt on the new company, The Kansas City Southern Railway Company, herein referred to as the Southern Company, based upon the alleged fraudulent character of the reorganization plan, under the rule of *Northern Pacific*

Railway Company v. *Boyd*, 228 U. S., 482, *in the face of the following conceded facts*:

(a) The Trust Company, as bondholder and stockholder of five of the companies involved in the reorganization, had previously exchanged its securities ($1,294,841.00 par value) *under the reorganization plan and agreement* (its stock alone amounting to $517,199, which, but for the plan, would have been a total loss), and received, in lieu thereof, *and still retains* $865,927.70 par value of the stock (of which $407,606.70 par value was received in exchange for stock of the old companies), and $614,981.50 par value of the bonds of the new company, or an aggregate of $1,480,909.20 par value of the securities of the new company.

(b) The Trust Company, at the time it became a party to the reorganization plan and as a part of the reorganization agreement, had executed a covenant in consideration of the stocks and bonds of the new company which it received under the plan in exchange for its bonds and stocks of the old companies by which the appellant claims that it *agreed* not to hold the new company for the debt of the old companies, the covenant being, in substance, as follows:

> No right is conferred nor any trust, liability, or obligation is created by this agreement or the plan, or is assumed hereunder by or for any new company, in favor of any creditor or any holder of any claim whatsoever against the said companies (including the Belt Company), with respect to any moneys paid to or received by the Committee, *or with respect to any property acquired by purchase at any foreclosure sale*, or with respect to any other matter or thing.

(c) The appellant purchased the properties involved under decrees of foreclosure and sale, rendered by the circuit court of the United States, which purported to convey to it the properties free and clear of claims or liens, but without prejudice to the rights of the Trust Company in certain particulars.

(d) The property of the Kansas City Suburban Belt Railroad Company, herein referred to as the Belt Company, (which was the debtor of the Trust Company), was encumbered with a mortgage of $1,000,000, in which the Trust Company was the trustee; its property was sold to the Southern Company at foreclosure

sale for that amount, and the proceeds of the sale were paid in and distributed under the order of the court. The "fair market value" of the property of the Belt Company at the time of the foreclosure sale and during the reorganization was litigated in the case at bar, and the master found (this finding is not conceded, but it is established by the record, pp. 852, 853) *that the value of its property at that time did not exceed the mortgage indebtedness.* The Trust Company did not except to this finding, nor assign it as error.

The circuit court of appeals (reversing the lower court which affirmed the findings of the master) holds that, under these circumstances, the Trust Company may hold the Southern Company for the debt of the Belt Company and is, therefore, entitled to judgment against the Southern Company in an amount exceeding $800,000 on that account.

Among other important questions raised for determination by this court, is the question whether the after-acquired property clauses contained in the mortgages of several of the reorganized companies, operated to impress an equitable lien upon certain real properties located at Kansas City, standing in the name of a dummy corporation so as to vest the title to the properties in the Southern Company, as the purchaser at foreclosure sale.

AN OUTLINE OF THE PLEADINGS AND A BRIEF HISTORY OF THE CASE.

1. *The bill of the Cambria Company.* A consideration of this bill and the issues made by it are only important *for the purpose of ascertaining if the bill sets forth a distinct ground of Federal jurisdiction independent of that of diversity of citizenship.*

In September, 1900, the Cambria Company filed a creditor's bill (Rec., 3-27), based upon the judgment rendered in its favor by the United States circuit court for the Western District of Missouri against the Belt Company, and brought against the Belt Company, the Trust Company, and others, asserting that *the lien of this judgment* attached to the equitable title of the Belt Company to certain real properties, the *legal title* to which was held or claimed by the Trust Company and certain other companies, and

seeking a foreclosure of this *judgment lien* and a sale of the real properties *thereunder;* and also demanding an accounting between the Belt Company and the Trust Company, and seeking to subject certain stocks and bonds, held by the Trust Company as collateral, to the payment of the complainant's judgment, if, as a result of the accounting, the alleged indebtedness should be canceled and the collateral should be released. The litigation of the accounting feature was carried on under the ancillary bill of the Belt Company and its receivers, *infra,* as provided by stipulation (Rec., 942-944). The finding and decree of the circuit court were against the complainant on the issues made by the bill, and no appeal was taken. A more detailed reference will be made hereafter to the bill of the Cambria Company in considering the motion made by appellee to dismiss this appeal.

2. *The ancillary bill of the Belt Company and its receivers.* The Belt Company and its receivers, by direction of the court (Rec., 29), and by stipulation (Rec., 890), which provided that there should be an accounting between the Belt Company and the Trust Company, filed an ancillary bill and amendments (Rec., pp. 97, 202, 392) against the Trust Company and others, seeking an accounting as between the Belt Company and the Trust Company, and the release of the collateral held by the latter. A great number and variety of issues were involved in the accounting and a vast amount of testimony taken. The report of the master upon this issue is contained in the record (pp. 575-735). The decree of the circuit court (Rec., 903), eliminated three items from the account and gave judgment (Rec., 906), in favor of the Trust Company and against the Belt Company in the total sum of $639,658.86. No appeal was taken by the Belt Company or its receivers for the reasons hereafter stated.

3. *The intervening petition of the Southern Company.* The questions raised by this appeal have *solely* to do with the issues made by the *intervening petition* of the Southern Company, and the Trust Company's *answer* thereto.

In February, 1905, it was stipulated (Rec., 164), that the Southern Company should be made a party to the cause either as joint complainant or by bill of intervention, as it might elect, and that the testimony theretofore or thereafter taken in the case should be considered in support of the issues made. Its intervening pe-

tition, *which was in the nature of an original bill,* was immediately filed (Rec., 166), and afterwards amended by stipulation (Rec., 267-269), in which it alleged that it was the purchaser at foreclosure sales under foreclosure decrees, of the United States circuit court at Kansas City, of the railroad properties of the Belt Company, the Kansas City, Pittsburg & Gulf Railroad Company, hereinafter referred to as the Gulf Company, and the Kansas City & Independence Air Line, herein referred to as the Air Line; that the mortgages executed by those companies upon their properties respectively contained after-acquired property clauses, and that the liens of said mortgages attached in equity to the property and collateral held by the Trust Company as security for the alleged indebtedness of the Belt Company to it; and the Southern Company prayed that the collateral be awarded to it. In particular, the Southern Company alleged that certain railroad terminal properties in Kansas City, Missouri, and in Kansas City, Kansas, had been purchased by the Belt Company, Gulf Company, and the Air Line, with moneys contributed by those companies respectively for terminals and rights of way needed by them respectively, the legal title being taken, for convenience, in the name of the Central Improvement Company, herein referred to as the Central Company, which it was charged had been organized solely for the purpose of conveniently holding the legal title to such properties. The Southern Company averred that the lien of the mortgages of the Belt Company, the Gulf Company, and the Air Line, attached in equity to these properties at the times of their purchase and acquisition, and that the equitable title thereto had passed to it as purchaser under the foreclosure sale, and it demanded either a conveyance of the properties to it, or a return to it of the capital stock of the Central Company, which was held by the Trust Company as a part of its collateral security.

4. *The answer of the Trust Company to the intervening petition of the Southern Company.* The answer of the Trust Company sought to invoke the rule of *Northern Pacific Railway Company* v. *Boyd,* 228 U. S., 482, and asserted that the reorganization of the Gulf Company, Belt Company, and their associated companies, resulting in the organization of the Southern Company, was a *fraudulent scheme* which made the Southern Company liable for the debt of the Belt Company, *notwithstanding the fact that*

the Trust Company was a party to the reorganization plan and benefited therefrom to the extent of approximately $1,500,000, *in securities of the reorganized company, issued to it under the plan, which it still retains.*

The Trust Company, in its answer filed in March, 1905, (Rec., 186), alleged (Rec., 199-201), that a reorganization plan, contemplating the reorganization of the Gulf Company and its allied companies, had been prepared and promulgated by a reorganization committee; that such plan contemplated the deposit with the committee of the stocks and bonds of the companies involved in the reorganization, and the organization of a new company, to-wit, the Southern Company, which should issue its stocks and bonds in exchange for the stocks and bonds of the old companies in certain specified proportions; that the exchange of stocks resulted in the stockholders of the Belt Company securing a large amount of the stock of the Southern Company, which was alleged to be more valuable than the Trust Company's claim against the Belt Company, and it was averred that said scheme legally implied the payment by the Southern Company of the Trust Company's claim against the Belt Company.

5. *The master's report and final decree rendered by the lower court.* The master's report (Rec., 575-887), was filed in May, 1910. It occupies 316 pages of the record. The accounting between the Belt Company and the Trust Company is disposed of at pp. 575-735. The report upon the issues made by the intervening petition of the Southern Company is disposed of at pp. 735-887. The general conclusions of the master are stated at pp. 887-888.

The finding of the master was against the Cambria Company upon its original bill and was in favor of the Belt Company and its receivers upon three items in the account (Rec. 887), and against them as to all other items. The master found (Rec., 887), that the Southern Company was entitled to a conveyance to it of the lands of the Central Company; and that the Southern Company did not, by reason of the reorganization plan, or otherwise, assume or agree to pay, or become liable for, the indebtedness of the Belt Company to the Trust Company.

The Trust Company filed exceptions to the master's report (Rec., 892). It excepted (Rec., 893-894), to the *inclusion* in the report of *any finding* on the issue of the liability of the Southern

Company, but did not except to the *correctness* of the finding itself. The Southern Company, the Belt Company, and its receivers, also excepted to the master's report. The final decree was entered by the lower court on June 25, 1910 (Rec., 903), overruling the exceptions of the Trust Company, the Southern Company, the Belt Company, and its receivers (Rec. 913), rendering a judgment in favor of the Trust Company and against the Belt Company in the sum of $639,658.86, and finding that the Southern Company did not assume or agree to pay or become liable for the indebtedness of the Belt Company, and also directing the Central Company to convey certain specified lands to the Southern Company.

6. *The appeal to the Circuit Court of Appeals.* The Trust Company was allowed an appeal without supersedeas to the circuit court of appeals for the eighth circuit on August 10, 1910, (Rec. 920). An appeal was allowed on behalf of the Central Company on August 19, 1910 (Rec. 922), but on October 8, 1910 (Rec. 934), the orders allowing the appeal of the Central Company and approving its supersedeas bond were set aside and vacated by the circuit court upon the ground that counsel purporting to represent the Central Company were not, in fact, authorized to appear for or represent it.

The record, on appeal to the circuit court of appeals, contained only the pleadings, the report of the master, and certain orders and stipulations. It did not contain any of the evidence.

7. *Proceedings in the Circuit Court of Appeals.* The case was argued before the court of appeals composed of a circuit judge and two district judges, in May, 1911. Three questions only were raised by the assignments of error of the Trust Company: *first*, that the issue of the liability of the Southern Company for the debt of the Belt Company was *not* in the case and should *not* be decided; *secondly*, that the decree was erroneous in requiring the Central Company to convey the specified property to the Southern Company; and *thirdly*, that the court erred in requiring one-third of the costs to be paid by the Trust Company (Rec. 915). There was no assignment of error directed to the *correctness* of the finding on the liability issue; in fact, counsel for the Trust Company insisted that the liability issue was not in the case and should not

be decided. They said in their return to a rule to show cause, etc., (Rec. 970):

> That by reason of the former decision of this court, and by reason of the state of the pleadings and record in the cause from which this appeal is taken, *the question of the personal liability of The Kansas City Southern Railway Company for the debt of the Belt Company is not in issue and cannot be determined upon this appeal.*

In June, 1911, the judges of the circuit court of appeals advised that they thought the liability issue was one of the issues made by the pleadings (Rec. 974), and asked counsel to brief that question so that the court might determine whether it could consider the liability issue under the state of the record, and if so, whether there was plain error in that regard which the court could notice of its own motion. Briefs were accordingly filed on December 1, 1911, and the case was submitted thereon, oral argument being denied.

On October 22, 1912, the circuit court of appeals handed down the opinion reported in 201 Fed., 811 (Rec. 986), reversing the decision of the circuit court and directing the lower court to enter a specific decree in favor of the Trust Company and against the Southern Company for the entire indebtedness of the Belt Company. In January, 1913, a re-argument was had, and on December 2, 1913, a second opinion was handed down, adhering to the former conclusions of the court (Rec. 1027), reported in 210 Fed., 696.

8. *Appeal to this court.* On January 24, 1914, the circuit court of appeals allowed the Southern Company's appeal to this court (Rec. 1057), fixing the supersedeas bond in the sum of $600,000, which has been duly given.

9. *Application to this court for a writ of certiorari.* The Trust Company filed herein its motion to dismiss the appeal, claiming that the decision of the court of appeals was final. Out of an abundance of caution, and in accordance with the settled practice where the right to appeal to this court from a court of appeals is controverted, the Southern Company submitted to this court its application for a writ of *certiorari* at the same time that the Trust Company's motion to dismiss was submitted, and the motion and the application were by this court considered together.

10. *This court's action upon the Trust Company's motion to dismiss, and upon the Southern Company's application for certiorari.* On May 11, 1914, this court, having had under consideration the motion of the Trust Company to dismiss the appeal, and also the application of the Southern Company for a writ of *certiorari,* announced the following opinion:

> In view of the serious nature of the question of jurisdiction, the court does not desire to pass upon the same without the benefit of an oral argument, to be heard when the case is regularly reached on the call. The motion to dismiss is hence postponed to the hearing on the merits; and, being of opinion that the nature of the case is such as to authorize the granting of the writ of *certiorari* which is applied for, in the event it develops on the hearing that there is no jurisdiction to review the same, the application for the writ of *certiorari* is therefore also postponed to the hearing.

The case is here for argument on the merits, as well as upon the motion to dismiss and the application for *certiorari.*

STATEMENT OF FACTS.

1. *The state of the record.* The record brought by the Trust Company to the circuit court of appeals did not contain any of the evidence which consisted of over 34,000 pages of testimony (Rec., 579). The appeal to this court brings up the identical record which was before the circuit court of appeals. The record contains the pleadings, the report of the special master and certain orders and stipulations.

2. *The relations of the Trust Company to the Belt Company and the other companies involved.* The Trust Company was incorporated in 1889 under the laws of Missouri as the Missouri, Kansas & Texas Trust Company, and so continued until 1899, when by proper statutory proceedings its name was changed to Guardian Trust Company (Rec., 583). Its president was Arthur E. Stilwell, the dominant and controlling influence in the operations of the Trust Company and of all of its subsidiary and auxiliary companies. It was engaged in the business of organizing companies and acting as their financial agent in the sale of their stocks and bonds (Rec., 593). The bulk of its business was the promotion of the railroads involved in this reorganization and

their subsidiary companies (Rec., 594). Originally the business of the Trust Company was that of building houses and making loans upon real estate, but subsequently it developed broadly into a general promotion business; the profits of the business being through the acquirement of securities for its services, and on account of the securities bought by it and resold, and also through the commissions, bonuses, earnings or profits on securities it might sell for the subsidiary companies. *The bulk of the Trust Company's business arose out of its original promotion projects, and the handling of the securities of the companies promoted* (Rec., 600).

The Trust Company secured control of the Suburban Company (see Rec. 578, 579 for abbreviations of corporate names), in 1890 and elected its nominees as its officers and directors (Rec., 609). The Trust Company afterwards caused to be incorporated the following companies involved in this reorganization, paying the incorporation fees and naming its own employees and officers as the officers and directors of the new company:

Consolidated Terminal Railway Company, (Rec., 610).
Kansas City & Independence Air Line, (Rec., 610).
Union Terminal Railway Company, (Rec., 610).
Kansas City, Pittsburg & Gulf Company, (Rec. 611).
Port Arthur Channel & Dock Company, (Rec., 597).

The Belt Company was formed in 1892 by the statutory consolidation of the Suburban Company and the Consolidated Company (Rec. 609).

Also, among others (about 40 in all, Rec., 597), the following companies, subsidiary and auxiliary to those above named, were organized by the Trust Company:

Kansas City Terminal Construction Company, (Rec., 608).
Missouri Elevator & Terminal Company, (Rec., 610).
Central Improvement Company, (Rec., 611).
Fairmount Amusement Company, (Rec., 611).
Kansas City Connecting R. R. Co., (Rec., 611).
Northern Townsite Company, (Rec., 611).
State Realty Company, (Rec., 611).
Second Street Improvement Company, (Rec., 612).
Kansas City Fruit, Auction & Cold Storage Company, (Rec., 612).

> "The Trust Company," says the master (Rec., 643), "was *the central and important and controlling corporation* of the aggregation, known as the Stilwell companies, and which in large measure was influential in *bringing into existence* all the corporations, whose operations are involved in complainant's bill and which were substantially *financed* by it."

The books, bond and stock ledgers, stock certificate books and minute books of Belt, Union, Consolidated, Air Line, Connecting Company and other companies, as well as their securities until disposed of, were kept in the Trust Company vaults (Rec., 605, 599). Their minute books were O. K'd by employees of the Trust Company (Rec., 610-611). Their officers were substantially identical (Rec., 609-612).

Stilwell was president of the Trust Company (Rec., 594), the leading officer of the other companies (Rec., 593), and "all powerful" (Rec., 595), in all of them.

> "It cannot be questioned," says the master (Rec., 644), "that A. E. Stilwell was the influential and dominant personage, who more than any other person connected with it, outlined the *policies* of the Trust Company, and likewise, with E. L. Martin, and other associates, *practically determined those of the railroad companies interested in this accounting.*"

When a new project was contemplated Stilwell, Martin and others would cause a new company to be formed, provide officers for it from among themselves and their associates in the Trust Company, acquire the necessary property for it, the Trust Company advancing the money for that purpose when necessary, direct the issue of stocks and bonds by the new company, and the Trust Company would take an active part in marketing them, paying itself commissions, bonuses and trustee fees for its services; in other words the Trust Company undertook the general financing and managing of those companies, and in view of their relations with the Trust Company, they were usually operated in a manner following the policy desired by the Trust Company, the books of a majority of the companies, including the books of the Belt Company and the Central Company, being kept in the office of the Trust Company and by its clerks (Rec., 598-599). The offices of the Belt Company were in the same building adjoining the Trust

Company's office from 1894 to 1900 (Rec., 602). The Trust Company financed the Gulf Company in the same general manner that it financed the other railroads (Rec., 608).

Substantially all the officers and directors of the Belt Company from the date of its creation by the consolidation of the Suburban Company and the Consolidated Company in 1892, were officers, directors and employees of the Trust Company (Rec., 756, 609).

The Trust Company was the *trustee in the mortgage* of the Suburban Company (Rec., 737), a co-trustee with the Provident Company in the mortgage of the Consolidated Company (Rec., 738), a trustee in the mortgage of the Air Line (Rec., 739), a co-trustee with the Provident Company in the mortgage of the Union Company (Rec., 739), and a co-trustee with the State Trust Company in the mortgage of the Gulf Company (Rec., 740), all of which mortgages have been foreclosed in actions to which the Trust Company was a party, and the titles conveyed pursuant to foreclosure sale have been acquired by the Southern Company.

3. *The situation at the time of the appointment of receivers for the Gulf Company in April,* 1899. The Gulf Company had constructed a line of railroad which (with a Louisiana company and a Texas company organized to comply with local laws), extended from Kansas City, Missouri, to Port Arthur, Texas, a distance of approximately 777 miles. The terminals at Port Arthur, consisting of a ship canal, docks, wharves, etc., were owned by the Port Arthur Channel & Dock Company. The terminals at Kansas City were owned and controlled by the Belt Company and its allied companies, which were the Union Terminal Company, the Consolidated Terminal Company, and the Air Line.

The bond issues of those companies were as follows (Rec. 818):

Gulf Company	$24,000,000
Belt Company	1,000,000
Union Terminal	2,000,000
Consolidated Company	750,000
Air Line	300,000
Dock Company	1,635,000
Total	$29,685,000

The issued and outstanding shares of stock were as follows:

Gulf Company	$24,000,000
Belt Company	4,750,000
Dock Company	1,575,000
Total	$30,352,000

The Belt Company owned the stock of the Air Line, Union Terminal Company, and Consolidated Company.

The Trust Company had been, in a large measure, influential in bringing into existence all of these companies, in financing them, providing officers for them from its own directorate and employes, and had marketed their securities (Rec. 643-645). The officers of the Trust Company were, at all times, officers of these railway companies, and in a position to control them and their properties (Rec. 609-612). These companies as well as the Trust Company, were known as "Stilwell Companies," having been organized and, to a certain extent, controlled, by Arthur E. Stilwell (Rec. 643-644).

On April 1, 1899, (Rec. 825) the Gulf Company defaulted in the payment of its interest and receivers were appointed. At that time, the indebtedness of the Belt Company to the Trust Company was $360,000 (Rec. 668). This indebtedness was made up almost entirely of losses sustained by the Belt Company under a construction contract for the construction of the Northern Connecting Railroad extending from Kansas City north to Pattonsburg, Mo. (Rec. 668-669), which contract it is claimed by the appellant, was not only *ultra vires,* but was made between the Belt Company and the Northern Connecting Company at the instance of the Trust Company, through its control of both of those companies by means of its interlocking directorates. This reference is made to the origin of the indebtedness only for the purpose of making it plain that it is not entitled to any special or particular equities, by reason either of the relationship of the parties or the character of the indebtedness.

4. *The Reorganization Plan and Agreement.* A reorganization committee was formed in June, 1899, a few months after the appointment of receivers for the Gulf Company. A reorganization agreement dated June 14, 1899, which authorized the com-

mittee to formulate and to put into effect a plan of reorganization, was executed by the Trust Company and other depositing security holders of the Gulf Company and its allied companies (Rec. 814). The committee published a plan dated August 17, 1899, and this was afterwards modified in some particulars and was known as the modified plan of November 7, 1899, which was made effective. The Trust Company was one of the depositaries under this plan. An analysis of the plan will be found in the report of the master (Rec., 813-824). In a general way, and so far as is deemed material here, the plan contemplated:

(a) The purchase of the property of the *Gulf Company* by the committee, at foreclosure sale, and the conveyance of it by the committee, together with the stocks and bonds of the terminal companies (if sufficient of their securities should be deposited to warrant their retention) to a new company to be organized, which should issue certain securities to be disposed of as therein specified (Rec. 815).

(b) By this means the new company would own the main line of the Gulf Company and the stocks and bonds of the terminal companies, all of which would go under the mortgage of the new company. Provision would be made for the payment of the floating debt and car trust obligations, for working capital, for future requirements, for the reduction of fixed charges within the probable income of the property, and for control of the reorganized company through a voting trust until it should be in a satisfactory financial position (Rec. 815).

(c) If the securities of the terminal companies should not be deposited in sufficient amount, then other terminals at Kansas City and Port Arthur would be used, under arrangements already made in that behalf. It was intended, as soon as practicable, that the new company should acquire the properties of the terminal companies in fee, and bring them directly under the lien of the mortgage (Rec., 815).

(d) Payment of $10 per share was required as a condition of participation in the plan by stockholders of the Gulf Company (Rec. 815).

(e) The new company should issue $30,000,000 par value 3 per cent bonds, $21,000,000 par value of preferred stock, and $30,000,000 par value of common stock (Rec. 816, 817), which should be disposed of as follows (Rec. 816-820):

BONDS.

For exchange for old securities	$23,197,500	
For cash requirements	3,000,000	
For future requirements	3,802,500	
Total		$30,000,000

PREFERRED STOCK.

For exchange for old securities	$17,417,500	
For cash requirements	3,000,000	
Unappropriated balance	582,500	
Total		21,000,000

COMMON STOCK.

For exchange for old securities	$29,561,250	
Unappropriated balance	438,750	
Total		30,000,000

(f) The ratio of exchange of old securities for new securities should be as follows (Rec. 819-820):

For Gulf Company bonds, 75% of new bonds and 50% of new preferred stock.

For Gulf Company stock, 100% of new preferred stock.

For Belt Company bonds, 133% of new bonds and 25% of new preferred stock.

For Belt Company stock, 25% of new preferred stock and 75% of new common stock.

For Union Terminal bonds, 100% of new bonds and 25% of new preferred stock.

For Consolidated Terminal bonds, 100% of new bonds and 25% of preferred stock.

For Air Line bonds, 100% of new bonds and 25% of new preferred stock.

For Dock Company bonds, 50% of new bonds, 50% of new preferred stock, and 50% of new common stock.

For Dock Company stock, 75% of new common stock.

(g) In order that the depositing security holders might know what it was proposed to do with the securities reserved for *cash requirements*, the plan set forth (Rec., 820), that it was expected to realize the sum of $5,900,000 for this purpose, made up as follows:

By sale of $3,000,000 first mortgage 3 per cent bonds and $3,000,000 preferred stock	$3,500,000.00
From payments of $10 per share by participating stockholders or the syndicate	$2,400,000.00
Total	$5,900,000.00

Then it was set forth that the probable disposition of this fund of $5,900,000 to be raised for *cash requirements* would be as follows (Rec. 821-822):

For payment of car trusts and interest adjusted to date of payment, say	$1,900,000.00
For payment of floating debts	475,000.00
For payment of receiver's certificates	800,000.00
For payment first mortgage coupons, due April 1, 1899	575,000.00
Working capital and expenses of reorganization	2,150,000.00
Total	$5,900,000.00

The purpose of the appropriation of $475,000 for the payment of floating debt was to provide for

> —all kinds of items which the committee deemed necessary to take care of *so as to secure absolutely the first mortgage lien on the properties transferred to the Southern Company* (Rec. 860).

The master summarizes the testimony in respect to the floating debt provision as follows (Rec. 860-861):

> The testimony of Shipley, Smith, Petitt, Pam, Harrity, Sielcken and Hecksher, members of the reorganization committee, and found in Vol. 57 of the Record, is to the effect that the $475,000 appropriated, as above stated, for the payment of floating debts, was a lump sum set aside by the committee to make provision for the payment and discharge of such obligations as the committee might find necessary to discharge *in order to relieve the properties, to be included in the Southern mortgage, from any liens claimed thereon or from*

any interference as a matter of business policy, and that said $475,000 was simply an estimate or reservation to cover such charges, and further, that at no time did the committee, in making such estimate, contemplate or include therein the indebtedness of the Belt Company to the Trust Company, but the contracting parties to the reorganization plan and agreement, made an express provision, intending to exclude, and *excluding*, the Trust Company or any other creditor of the constituent companies from enforcing against the new company to be formed, any right of action which such creditors might have had against the old companies.

The estimates of probable expenditures for the purposes indicated in the foregoing list, aggregating $5,900,000, including the estimate of $475,000 for the payment of floating debt, were largely exceeded, the amount actually expended by the committee and by the Southern Company in the payment of floating debt of all the companies of the character above described was $1,164,172.56. The master, speaking of the provision for the cash requirements of the new company in the amount of $5,900,000, above referred to, says (Rec. 859-860):

> From the undisputed facts in the record, it can hardly be claimed that the Trust Company, or any other unsecured creditor of the Belt Company, had a direct interest in the floating debt reservation provision of the reorganization plan, for the carrying out of such provision was clearly within the discretionary powers of the reorganization committee in every way whatever. The committee was fully authorized to do as they thought best in respect to paying off such indebtedness as, in their judgment, was necessary or expedient, in furtherance of the purposes of the reorganization plan and agreement; and, hence it appears, in Ingel's testimony (Rec. Vol. 56, pp. 34354 to 34380) and particularly in his exhibit 192, in Vol. 56, pages 34357 to 34368, that the Committee and the Southern Company together paid out in connection with the obligation of $5,900,000 set out in the modified plan of reorganization, the following amounts:
>
> Car Trust certificates; amount called for under the plan. $1,900,000
>
> Amount actually paid out by Committee and Southern Company $2,192,580.40

First mortgage coupons and *ad interim* interest; amount called for in the plan....	575,000	
Amount actually paid out by Committee		891,913.41
Receivers' certificates; amount called for under the plan.	800,000	
Amount actually paid out by Committee and Southern Company		821,543.74
Appropriated to floating debt; amount called for in modified plan	475,000	
Amount actually paid out by mittee and Southern Company . .....-...		1,164,172.56

This statement shows that, as to each item, the amount paid out largely exceeded the original estimate, and, that the joint payments of the Committee and Southern Company, on account of the floating debt appropriation, exceeded the estimate to the extent of $689,172.56. This fact certainly shows the exercise of the widest discretionary power as to shaping up the details of the reorganization scheme for the benefit of the new security holders and one of the largest of which is the Trust Company, as it received bonds and stock of the Southern Company in exchange for, approximately, $850,000, par value, of the securities of the old companies. (Rec. Vol. 49, pp. 29972 to 29974.)

In other words, the Trust Company, presumably, received its proportionate benefit from this large expenditure in payment of what are called the *floating debts*, but which in reality consists of all kinds of items, which the committee deemed necessary to take care of, so as to secure absolutely the first mortgage lien on the properties transferred to the Southern Company

(h) The reorganization agreement of June 14, 1899, which was duly executed by the Trust Company, contained the following covenant (Rec. 823):

> No right is conferred, nor any trust, liability or obligation (except the agreements herein contained in favor of the holders of certificates of deposit hereunder), is created by this agreement or the plan, or is assumed hereunder, or by or for any new company in favor of any bondholder or any other

creditor or any holder of any claims whatsoever against the said companies, nor in favor of any company now existing or to be formed hereafter (whether such claim be based on any bonds, coupon stocks, securities, lease, guaranty or otherwise) with respect to any security deposited under this agreement or any moneys paid to or received by the Committee or by the depositor hereunder, *or with respect to any property acquired by purchase at any foreclosure sale*, or with respect to any new certificates to be issued hereunder, or with respect to any other matter or thing.

Other provisions of the contract will be referred to in the course of the argument.

5. *The Trust Company's participation in the reorganization.* On July 26, 1900, the Trust Company received from the depositary *under the reorganization plan*, the following securities of the Southern Company:

$614,981.50 par value of bonds.
$295,196.70 par value of preferred stock.
$570,731.00 par value of common stock.

$1,480,909.20

These securities of the Southern Company were issued in exchange for and upon surrender by the Trust Company of the following securities of the old companies owned by it (Rec. 867):

$ 410,000 par value Union Terminal bonds.
42,000 par value Air Line bonds.
325,000 par value Channel and Dock bonds.
642 par value Gulf bonds.
1,327 par value Gulf stock.
76,972 par value Belt stock.
438,900 par value Channel and Dock stock.

$1,294,841.00

In speaking of this exchange of securities by the Trust Company, and its attitude toward the reorganization plan, the master says (Rec. 825):

> The Trust Company, being the owner of a large amount of these securities, including those of the Belt Company, deposited them with the reorganization committee, and obtained in lieu thereof certain stocks and bonds of the South-

ern Company, which the Trust Company still retains. The Trust Company was also one of the depositaries in the modified plan of reorganization, and it is claimed by intervenor and it is abundantly shown by the testimony in the record, that the respondent actively co-operated in the reorganization of the Belt properties, and induced its correspondents to accept said plan and to exchange their securities for the Southern Company securities.

The master also says (Rec. 869):

> It is not controverted that the Trust Company, a depositary in the reorganization plan, co-operated with the committee, and used its influence, by correspondence and otherwise, to induce other bondholders and stockholders to deposit their securities with the committee, as will more fully appear by reference to letters, passing between it and the committee, during the reorganization period, and found in Vol. 55, pp. 34488 to 34564 of the record. The respondent was well acquainted with the purposes of the reorganization scheme, and with such knowledge, entered into the same, depositing its own securities and exchanging them for the new Southern securities, and advising others to make like exchanges.

The market quotations of the stock of the Southern Company are not in the master's report, but both parties, for the purposes of argument, have resorted to the daily market reports. The following is quoted from page 80 of the brief of the Trust Company entitled "Reply of Guardian Trust Company to Kansas City Southern Railway Company's argument and brief on reargument," previously filed by it in the court of appeals, and now on file with the clerk of this court:

> The lowest price quoted on the preferred stock of the Southern Company during the year 1900, (that being the time of the exchange of securities) was $27.50 per share, and the highest price during that year was $40 per share; the lowest price quoted on the common stock during the same period was $7 per share, and the highest $14.75 per share.
>
> The range of prices at the date of the acquisiton of the Belt properties by the Southern through the foreclosure (during year of 1901) was as follows:
>
> Lowest price of sale of preferred stock, $35 per share.
> Highest price of sale of preferred stock, $49 per share.
> Lowest price of common stock, $13.50 per share.
> Highest price of common stock, $25 per share.

6. *Foreclosure and sale of the property of the Gulf Company.* A decree of foreclosure and sale was rendered in the Gulf receivership proceedings on February 5, 1900, and the property was sold by the master on March 19, 1900, and purchased by the Southern Company, which entered into possession April 1, 1900, and has continued to operate the property since that time (Rec. 825). The Southern Company also became the owner of the old securities which had been surrendered to the reorganization committee by the holders thereof for exchange for the stocks and bonds of the Southern Company which it had issued as provided in the plan. The property formerly owned by the Gulf Company and also the stocks and bonds of the old companies, including those of the Belt Company, were mortgaged by the Southern Company to secure its new bonds. The Southern Company, by virtue of its ownership of a majority of the stock of the Belt Company, elected its nominees as officers of the Belt Company on April 1, 1900, and thereafter the affairs of that company were managed by its own officers until receivers were appointed for the Belt Company in September, 1900, as hereafter stated (Rec. 779, 838).

The reorganization committee completed its labors and made its settlement with the Southern Company in October, 1900.

7. *The foreclosure of the mortgage of the Belt Company and the sale of its property.* From April 1, 1900, the Belt Company continued to own and manage its own properties with its own officers until September, 1900, when receivers were appointed for it by the federal court at Kansas City, and the receivers continued to manage its affairs until January, 1902, when it was taken over by the Southern Company as a purchaser at the foreclosure sale (Rec., 825). The mortgage of the Belt Company was in the sum of $1,000,000 (Rec., 737). At the foreclosure sale in November, 1901, the upset price was $1,000,000 and the property was sold for that amount, the Southern Company becoming the purchaser and entering into possession in January, 1902. On April 27, 1903, the court, in the foreclosure proceeding, rendered a deficiency judgment for $242,854.40 against the Belt Company (Rec. 838). The floating debt of the Belt Company on February 1, 1900, was approximately $900,000 (Rec. 755), its indebtedness to the Trust Company at that time being something like $500,000, the greater part of which had been

incurred on account of the contract entered into by the Belt Company for the construction of the Connecting Railroad (Rec. 755).

The Trust Company was a trustee in the mortgages of the Gulf Company, the Belt Company, and others. It was a party to the foreclosure suit against the Belt Company, but by stipulation, the foreclosure decree provided that it should be without prejudice to the rights of the Trust Company (Rec. 867), the provision of the decree in that behalf being as follows:

> This decree is entered on the express condition, to which the complainant has assented, that it shall be without prejudice to and shall not bar the right of the Guardian Trust Company, or its receiver, to plead and insist in any litigation now pending or hereafter brought, that the Kansas City Southern Railway Company, by virtue of the manner in which it was organized, or for any other reason, is legally or equitably liable for and bound to pay the unsecured debts of the Kansas City Suburban Belt Railway Company, either in full or to pay them to the extent of the value of any property heretofore acquired by it from the Kansas City Suburban Belt Railway Company or that hereafter may be acquired by it from said company by virtue of these foreclosure proceedings; and without prejudice to the right of said Guardian Trust Company or its receiver, to plead and insist, in any pending litigation or litigation hereafter brought, that the members of the Reorganization Committee of the Kansas City, Pittsburg & Gulf Railroad Company assumed to pay and are liable to pay the unsecured debts of the Kansas City Suburban Railroad Company existing at the time the alleged reorganization was undertaken.

The conclusions of the master, to which no exceptions were filed by the Trust Company, with respect to the effect of the foreclosure sale of the properties comprising the Belt system and now owned by the Southern Company, are stated by him to be as follows (Rec. 852-854):

> 1. The foreclosure sales were legally made, and the Trust Company, though a party to the foreclosure proceedings, has not at any time objected to the *regularity* thereof, or the *sufficiency* of the amounts received for the properties sold.
>
> 2. In the record there is no *direct* testimony by either party showing the actual, fair, reasonable value of said properties at the time of, or prior to, the foreclosure of the mortgage liens thereon.

3. The union, or combination, of all the roads of the Belt system and Gulf road into the Southern Company, pursuant to the reorganization scheme, created and gave to the reorganized system a *much larger value* than was the aggregate value of all said roads as separate institutions, managed as they were prior to the date they were sold to the reorganization committee; and, further, that by reason of the additional value given to said properties as parts of the reorganized railroad system, the Southern Company was enabled to issue its thirty million dollars of bonds, twenty-one million of preferred stock, and thirty million of common stock, the whole aggregating eighty-one million, par value, and approximately, more than four times the amount paid by the committee for said properties at the foreclosure sales thereof.

4. There is no sufficient proof, in the record, showing what was the market or other value of the stocks and bonds of the Southern Company, which were given to the stockholders of the Belt Company, though such values, if shown, would be no fair criterion on which to base the actual value of the Belt property, turned over to the Southern Company, in the manner hereinabove stated.

5. If respondent's contention is correct to the effect that there was a consolidation, *de facto*, by which the intervenor became liable for the Belt indebtedness, still *there is no proof in the record to show that the Belt properties, sold under the mortgage foreclosures, were worth anything in excess of what they brought at the sale;* and in the absence of such proofs, the master finds that the amount, for which they were, respectively, sold, *was and is their fair, market value at that time.*

6. There is *no evidence* in the record showing *actual frauds* either at or in the inception of the reorganization scheme, or in any proceeding thereunder; including the foreclosures of the mortgage liens on the properties sold and the conveyance to the Southern Company.

7. That, for their mutual protection and self interest, the bondholders interested in all the railroad companies involved, had the right to combine together for the purpose of acquiring all the properties thereof, and then uniting them in one system, and without consulting either the stockholders or creditors of the constituent companies owning such railroads; and, furthermore, that it was competent for the bondholders, in furtherance of their own business interests, to use the stocks and bonds of the new company as they saw

fit, *provided, that it is not shown that in so doing, it was part of their scheme to give something of value to the stockholders that should have gone to the creditors.*

8. It is not shown in the record that the reorganization scheme *in any way* deprived the unsecured creditors of any rights they would otherwise have had in case such scheme had never been consummated. There is no pretense that the Trust Company was prevented from bidding on, or buying, said properties, because of any secret understandings, nor is there any satisfactory proof in the record to the effect that the conduct of the Trust Company, in respect to said foreclosure sales, was in any wise changed or altered on account of the reorganization plan and agreement.

8. *The properties of the Central Improvement Company.* These properties are dealt with by the master in his report (Rec., 781-804), the conclusion of the master being that the Southern Company is entitled to the conveyance of the properties standing in the name of the Central Company. This finding was affirmed by the lower court, and reversed by the court of appeals.

The Central Company was organized in 1895 for the purpose of holding the legal title to certain real estate needed for right of way purposes by the Gulf Company, Belt Company, Air Line, and Union Terminal Company (Rec., 783). The lands so acquired were necessary for those companies respectively for right of way and terminal purposes. Prior to the organization of the Central Company, another corporation,—the State Realty Company—had been used for the same purpose (Rec., 784).

The moneys employed for the purchase of Central properties were furnished by the company in whose interest the property was purchased. As the Belt Company, for illustration, required a piece of right of way for terminal property, the same was purchased, the Belt Company furnishing the money, and the title was taken in the name of the Central Company. In this way, properties were purchased and conveyed to the Central Company, the aggregate considerations paid being as follows (Rec., 786):

Belt Company	$129,571.50
Air Line	16,104.41
Gulf Company	23,673.89
Total	169,349.60

As one of the railroad companies would purchase property and pay for the same, taking the title in the name of the Central Company, the latter would issue its capital stock to the company furnishing the money in an equal amount par value. In this way there were issued (Rec., 787):

To the Belt Company	817 shares
Gulf Company	234 shares
Union Terminal	334 shares
Air Line	22 shares
Total	1,407 shares

It is important to remember that the railroad of the Belt Company was constructed with the proceeds of its bonds. At the time of the execution of its mortgage, *in which the Trust Company was the trustee*, the Belt Company possessed nothing except its charter. Provision was made in the mortgage for the issue of bonds from time to time as the work of construction progressed, and the road as constructed came under the mortgage by virtue of the after acquired property clause. As each bond of $1,000 was issued the Belt Company acquired an equivalent of property of the value of $1,000 which came under the mortgage; as the indebtedness secured by the mortgage increased, the physical property increased in a corresponding amount. This is stated in the finding of the master (Rec., 737), as follows:

> In the building of the railroads belonging to the Suburban Belt, and its allied railroad companies, a mortgage was first placed upon the properties of each road, respectively, and providing, generally speaking, that the mortgage lien should cover the railroad constructed, and to be constructed and properties described in such mortgage, then owned or controlled by such road, and also such properties as should thereafter be acquired by it. The object being to secure the money required to build the roads from the sale of the bonds secured by the mortgage, it was important, as a protection to future bondholders, that the proceeds of the bond sales should be used for and go into the building of the respective railroads, or in the purchase and acquirement of properties connected with the building or operation thereof, or otherwise for the betterment of the railroad company, so as thereby to enhance in value the security for its bonds. In other words, that the properties then owned or possessed, as well as those

> thereafter to be acquired, should alike come under the lien of the mortgage by virtue of the "after-acquired property" clause thereof, as the purchasers of the bonds were bound to know the contents of the mortgage securing the same, and had the right to rely thereupon, and to claim all the benefits to be legitimately obtained by reason of its provisions.

The mortgages of the other companies contain substantially the same provision (Rec., 737).

While there is nothing to positively identify the money which was used by the various companies in the purchase of the Central Improvement properties, yet it is a fair presumption that the funds came from the proceeds of the mortgage bonds, inasmuch as that was the only source from which moneys for construction purposes were derived.

The plan employed was for the Belt Company, Gulf Company or the Air Line, as the case might be, to designate the real estate which it needed for its own purposes, and in reality to make the purchase, paying the purchase money and taking the title in the name of the Central Company. As the master found (Rec., 801):

> Each road interested in these respective tracts of land indicated what it desired the Central Company to buy, how much was to be paid for the tract bought and generally arranging the details of such purchase.

The State Realty Company, prior to the organization of the Central Company, had been used for these purposes, but upon the organization of the Central Company the properties were transferred to that company, and as the master found (Rec., 784):

> The Realty Company billed these properties so conveyed to the Central Company at their actual cost; that is to say, at their original purchase price, with all taxes and other fixed charges thereon, and thereupon the Central Company charged the amounts thus fixed against each property to the various railroads along whose route the lands thus acquired laid, and against those charges the Central Company credited itself with its own capital stock, which it issued out of its treasury to the railroad companies, respectively.

It stands admitted that the properties of the Central Company were paid for with the funds of the Belt Company, Gulf Company and Air Line, respectively, and that each company furnished the

money for the purchase of such of the lands as it needed for its own purposes. The Central Company acquired no other property, did no other buisness and had no other excuse for its existence than to hold the title of properties purchased in this way. The master found (Rec., 784):

> From time to time the Central Company made other purchases and the cost of such lands was in each instance charged to the particular railroad purchasing the same, the custom of conducting the business being to make a requisition upon such road for the necessary funds to pay for the land purchased, and the railroad company would respond by issuing to the Central Company its voucher, covering the cost of the land and the expenses incident to the purchase, such as attorney's fees, recording fees, abstract, etc., and all such advances made by any railroad company on account of land purchased were credited to it by the Central Company and for the exact amount of which the stock of the Central Company was issued to such railroad company.

The officers of the interested companies, who were, in the main, officers of the Trust Company, in the practical administration of their affairs, treated the Central Company as a trustee holding these various properties in trust for the use and benefit of the railway companies respectively furnishing the money for their purchase. The auditor of the Belt Company, in December, 1899, writes to the auditor of the Trust Company (Rec., 790), enclosing certain statements, a portion of the latter being "Statement of real estate, title to which is in the name of the Central Improvement Company and purchased by them *for the use* of the Union Terminal Railroad and the Kansas City Suburban Belt Railroad Company and the Kansas City & Independence Air Line."

Counsel for the Trust Company, who was also a director of the Central Company, in April, 1895, addressed a letter to the State Realty Company (Rec., 790), containing the following:

> The Central Improvement Company has now been incorporated for the purpose of taking title to all of such tracts of land and reimbursing you through the Suburban Belt for all moneys expended in reference to such purchases *for the benefit* of said railroad company.

Moneys advanced by the Belt Company to the Central Company were charged by the Belt Company to "Right of Way" (Rec., 791), the voucher bearing the following notation:

> The ownership of this stock represents right of way lands and lands adjacent to our right of way occupied by this company. *As this is practically a part of the cost of road* the above account is opened to show it as such.

The correspondence between the tax commissioner and the assistant treasurer of the Central Company (Rec., 792), contains a list of property, the title to which is in the Central Company, described as "property held *in trust* for the Kansas City Suburban Belt Railroad Company."

The master finds (Rec., 801):

> It has been conclusively shown by the proofs in this cause that each real estate purchase was made *at the direction of the railroad company interested in such purchase*, and not by the directors of the common interests of all of the stockholders alike, as should have been done in case all such stockholders were intended to be interested alike in each and all of the purchases so made.

The real purpose in the organization of the Central Company was that it should hold the title to properties for the various railway companies so that they might be handled without having to secure their release from the mortgages of the companies respectively (Rec., 801).

The master says (Rec., 803):

> The theory upon which the conclusion of the master is reached is based upon the principle that the Central Company was simply used for the purpose of holding the *titles* to the particular properties *belonging to each one of these railroads*, and to all intents and purposes, *it acted as a trustee*, and was *not a beneficial owner*, the intention being, as already stated, to place these properties beyond the lien of the general railroad mortgage, which covered after-acquired properties.

It is well enough to bear in mind the circumstances under which the Trust Company acquired the stock of the Central Company as security for the indebtedness of the Belt Company:

(a) The Trust Company was the *trustee in the mortgage of the Belt Company* (Rec., 737, 740), and as such it was its duty to insist that the rights of way and terminal properties acquired by the Central Company, but *owned in equity by the Belt Company*, (or the stock of the Central Company which represented these properties), should be subjected to the lien of the Belt Company's mortgage for the protection of its bondholders.

(b) The officers of the Trust Company were also the officers *in control of the Belt Company* (Rec. 754).

(c) The Trust Company, through its managing officers, knew prior to April 1, 1899, (the date of the receivership of the Gulf Company), that the Gulf Company would default in its interest; that receivers would be appointed for it, and that a reorganization plan would probably be adopted, and that the appointment of Gulf receivers would likely mean that the *Trust Company would not thereafter be as potential in the affairs of the Belt Company as it had formerly been* (Rec., 754-756).

(d) The Trust Company thereupon formed a plan to get possession of all the personal property of the Belt Company to secure its antecedent debt and, acting under instructions from Mr. Stilwell, president of the Trust Company, got from the Belt Company all its available securities, *against the protest of the Treasurer of the Belt Company* (Rec., 605). This action was taken in view of the probable loss of the controlling influence of the Trust Company in Belt matters, by reason of the proposed reorganization (Rec., 754, 756).

(e) The books of the Central Company were kept in the offices of the Trust Company, and the clerical work was done by the clerks of the Trust Company (Rec., 605).

The situation with respect to the property of the Central Company may be briefly summarized by the statement that as the Gulf Company, the Belt Company, and the Air Line Company needed terminal properties in Kansas City, they bought and paid for such as they needed, taking the title in the name of the Central Company in the mistaken belief that that course would prevent the mortgages of those companies from attaching to the properties; the officers and employes of all the interested companies regarded the properties, notwithstanding the

fact that the title was thus placed, and stock of the Central Company issued to each company in an amount corresponding to the purchase price, *as still remaining the property of the Company which had paid for it;* that when the Gulf Company became bankrupt and receivers were appointed, the Trust Company saw its control of the Belt Company slipping away and accordingly, by "strong arm" methods, it stripped the Belt Company of all its personal property, including the stock of the Central Company.

On December 9, 1901 (Rec., 143), the Trust Company filed its answer to the ancillary bill of complaint, in which it frankly admitted that the Belt Company and the Gulf Company were in equity the beneficial owners of all the property of the Central Improvement Company, the allegation being as follows:

> It is true that a corporation known as the Central Improvement Company was organized, but it was done at the instance and by the procurement of the Belt Company and the Kansas City, Pittsburg & Gulf Railroad Company for the purpose of securing and acquiring title to various tracts of land in and about Kansas City, *which were needed for the use of the said railroad companies.* It is true that the Suburban Belt Railroad Company furnished some of the money to be paid upon the purchase price of the lands bought by the Central Improvement Company; it is also true that the Kansas City, Pittsburg & Gulf Railroad Company advanced some money for the same purpose; upon such money being furnished by the said railroad companies, the said Central Improvement Company issued to the Belt Company 1,120 shares of its capital stock, and also issued certain shares of its stock to the Kansas City, Pittsburg & Gulf Railroad Company on account of the money furnished by it; all or practically all outstanding stock of the Central Improvement Company has been issued to and is held by the Belt Company and the Kansas City, Pittsburg & Gulf Railroad Company, or their assigns. That by reason of the fact that the Belt Company and the Kansas City, Pittsburg & Gulf Railroad Company, or their assigns, hold all of the stock of the Central Improvement Company, *they are in equity the beneficial owners of all of the property of the Central Improvement Company,* subject, however, to any liens thereon for unpaid portions of the purchase price thereof. That the Trust Company has not now and never has had any interest in the *property* of the Central Improvement Company, except that it holds a mortgage on a certain piece of the

property owned by the said Central Improvement Company, to secure certain promissory notes aggregating the principal sum of $5,000.00, which mortgage was a subsisting lien upon the property at the time the Central Improvement Company bought it, and which mortgage was subsequently purchased and is now held by the Trust Company.

SUPPLEMENTAL STATEMENT TO CORRECT CERTAIN MISCONCEPTIONS ON WHICH THE COURT OF APPEALS BASED ITS DECISION.

We wish to direct attention to various statements, conclusions and inferences contained in the second opinion of the court of appeals, which we respectfully submit are unwarranted or erroneous. (The references are to the pages of the opinion in 210 Fed. 696.)

1. The court reaches the conclusion which we believe to be wholly erroneous, that a recovery by the Trust Company in this case will work no hardship to any bondholder or stockholder of the Southern Company. It says, p. 720:

> Third, neither the Southern Company nor its stockholders nor bondholders will suffer any injury by proof of the truth in this transaction and the granting to the Trust Company of the equitable relief to which it was entitled in 1901. They took to themselves by a breach of trust and a transfer fraudulent as to creditors by the foreclosure sale on December 31, 1901, an equity in the property of the Belt Company of a value in excess of the amount of the Trust Company's claim, then about $360,000, which belonged to that company, and they have held and enjoyed it ever since. *Each stockholder and bondholder has had and still has the benefit of his just proportion of that equity.* If now the Southern Company is required to restore that equity or its value in 1901, with interest from that date, *each stockholder and bondholder will lose the benefit of its just proportion of that equity which it wrongfully holds and nothing more.* Nor will the Trust Company secure or retain any unjust share or advantage. While it will receive the value of that equity, to which it as a creditor of the Belt Company was entitled in 1901 with interest, its stocks and bonds issued by the Southern Company

> will lose the benefit of that equity in the same proportion as will the stocks and bonds of others. The stocks and bonds of the Trust Company and of all the other holders of stocks and bonds in the Southern Company will be diminished in value in the exact proportion by which they were enhanced in value by the wrongful appropriation of the equity of the Trust Company in the property of the Belt Company which the Southern Company wrongfully took and holds, and the justice and equity to all which should have been done many years ago will now as nearly as practicable be administered.

Is it correct to say that the Trust Company by a recovery in this case will not "secure or retain any unjust share or advantage?" Let us see what it secures and retains:

(a) It received $865,927.70 par value of common and preferred stock of the Southern Company, of which $407,606.70 par value has been issued in exchange for *stock* in the old companies, all of which would have been a total loss but for the reorganization plan. This latter amount, upon the court's theory, is a trust fund for the payment of creditors, which has been "fraudulently and by a breach of trust" diverted from them to the Trust Company.

(b) It received $614,981.50 par value of bonds and $458,321 par value of stock of the Southern Company, aggregating $1,073,302.50 par value, in exchange for its *bonds* of the old companies, which were of the aggregate par value of $777,642. We know that the new securities thus received were of greater value than the old securities, although the increased value cannot be accurately measured, and that the Trust Company received the benefit of the enhancement in value, for the master says, p. 858:

> The union or combination, of all the roads of the Belt system and Gulf road into the Southern Company, pursuant to the reorganization scheme, created and gave to the reorganized system a much larger value than was the aggregate value of all said roads as separate institutions, managed as they were prior to the date they were sold to the reorganization committee.

And now, in addition to the foregoing, the Trust Company by the decree of the court of appeals is to receive from the Southern Company its debt against the Belt Company in full with in-

terest to date, and we are told that this will not give any unjust share or advantage to the Trust Company, nor work any injustice to the Southern Company or to its shareholders.

Let us see if this bears the test of analysis. The committee pays to the Belt stockholders for their stock, $4,750,000 par value of Southern stock, which, for convenience in illustration, we will assume is ten per cent of the entire capital stock of that company. Its value, at $10 per share, as found by the court, is $475,000. The Trust Company's debt against the Belt Company is $360,000.

How are stocks and bonds of all the other holders of stocks and bonds—that is the other ninety per cent—*enhanced in value* by the transaction? True, the company has acquired an equity valued at $475,000 (subject to claims of creditors), but it has paid for it in its own stock of the par value of $4,750,000, of the actual value of $475,000. The other stockholders—the ninety per cent—have gained nothing by the transaction, for while $475,000 has been added to the assets of the Southern Company the latter, by the issue of its own stock, has paid for it dollar for dollar. The holdings of the other stockholders are certainly not *enhanced* in value.

If the Southern Company had purchased the securities of the Belt Company, giving in payment therefor its promissory notes for the exact amount of the purchase price, $475,000, the value of the stock of the Southern Company could not be said to be *enhanced* thereby.

Prior to the acquisition by the Southern Company of the stock of the Belt Company the "other stockholders" held *all* of the outstanding stock of the Southern Company, that is, they held one hundred per cent of stock interest, representing all the reorganized properties (except the Belt), which may be represented by one hundred per cent of value. Then ten per cent in value (the Belt property), is added, making the aggregate one hundred and ten per cent of the former value; and ten per cent additional stock is issued making the total outstanding stock one hundred and ten per cent of the original issue. The "other stockholders" have gained nothing either in par value or actual value of their interest.

How can it be "that the stocks and bonds of the Southern

Company were enhanced in value by the wrongful appropriation of the equity of the Trust Company in the property of the Belt Company?" The utmost that can be said is that certain property was acquired by the Southern Company, but that by the issue of additional Southern stock the proportional interest of each stockholder in the entire Southern property was decreased in a corresponding ratio.

What happens when a recovery is had in this case? The Southern Company is required to pay over $800,000 to the Trust Company and the burden falls equally on *all* the stockholders of the company.

The holdings of the "other stockholders" whose securities have never been "enhanced" by the original acquisition of the equity of the Belt Company, will most certainly be "diminished" in value because of the payment of over ninety per cent of the judgment will fall upon them. The situation will then be that the Southern Company has purchased property of the value of $475,000 and paid for it by the issue of its capital stock of an equal value; the title to the property so purchased fails through the assertion of a superior title or equity, and the loss falls on *all* the stockholders.

The obvious equity of the situation is that when the title fails the loss should fall on those who received the consideration, and they are the stockholders of the Belt Company, of whom the Trust Company was one.

Nor is it perceived how the value of the bonds of the Southern Company could have been enhanced in value "by the wrongful appropriation of the equity of the Trust Company." The bonds were secured by the securities of the Belt Company, and the foreclosure proceedings only operated to change an equitable title into a legal title.

2. The court finds that the creditors' equity diverted to stockholders was of the value of $475,000, that the debt of the Belt Company to the Trust Company was $360,000 at the time, and that therefore, the Trust Company must be paid in full *regardless of the rights of other creditors of the Belt Company*. It says at page 707:

> The master's report also shows that the Southern Company gave $1,187,500 of its preferred stock and $3,562,500

of its common stock to the stockholders of the Belt Company for their equitable interest in the property of that company, that at the same time stockholders of the Gulf Company paid, and the Southern Company received $10 per share in cash and an equal number of shares of the stock of the Gulf Company for tens of thousands of shares of the Southern Company's common stock. That stock must therefore have been worth at least the $10 cash per share which was paid for it, and it was worth as much more as the value of the stock of the Gulf Company. The preferred stock of the Southern Company could not have been worth less than its common stock. The Southern Company therefore paid in value at least $475,000 for the equitable interest of the stockholders of the Belt Company in its property when it gave them $4,750,000 of its preferred and common stock for their stock in that company. But the equitable interest of the creditors in the property of the Belt Company was superior to that of the stockholders, and its value could not have been less, and was undoubtedly greater than the $475,000. *That interest was therefore worth more than enough to have paid the $360,000 which the Belt Company owed to the Trust Company, and the Southern Company cannot escape liability on the ground that it was worthless.*

But according to the president of the Belt Company (Rec., p. 755)—there was no testimony to the contrary—"the total debts of the Belt Company were approximately $900,000."

How are the claims to the extent of $900,000 to be paid *in full* by the restoration of the diverted creditors' equity of $475,000? It would have required the issue to Belt stockholders of $9,000,000 par value of stock of the Southern Company, of the value of $10 per share to have realized enough to pay all the creditors in full; but in fact only $4,750,000 par value of Southern stock of the aggregate actual value of $475,000 was issued in exchange for Belt securities.

The only fund to which unsecured creditors of the Belt Company could resort, according to the court's finding, was $475,000, and, as this was not sufficient to pay all unsecured creditors in full, the obvious equity was to distribute it among them *pro rata*.

But the court, with only $475,000 available for the payment of $900,000 of unsecured debts of the Belt Company, proceeds to direct the payment of the Trust Company's debt *in full* in disregard of the claims of other unsecured creditors.

Upon the court's theory of this case the equity of the Trust Company would be satisfied by awarding it a *pro rata* share of the total fund available for unsecured creditors. The decree of the court, in order to be consistent with the reasoning of the court, should have been for approximately one-half of the Trust Company's claim instead of for the full amount, which would make a difference of some $400,000. Any other conclusion involves the assumption that Peter is to be robbed to overpay Paul.

3. The court in speaking of the sufficiency of the exceptions of the Trust Company to the report of the master, says at page 699:

> From all the facts pertinent to the issue which are set forth in many printed pages of his report, the master deducted this decisive conclusion: "That the Southern Company is not liable in any way for the floating indebtedness of the Belt Company." *To this conclusion the Trust Company excepted* on the ground that in view of other conclusions which the master reached adverse to it, it was unnecessary for him to determine that issue.

It is respectfully submitted that the Trust Company did *not* except "to this conclusion." It significantly refused to do so and based its appeal upon a theory that was inconsistent with such an attitude. The Trust Company excepted to the *inclusion* in the master's report of any "reference to or recommendation concerning the question of the liability of the Southern Company for said floating indebtedness of the Belt Company" for certain specified reasons. It insisted that there was no such issue before the court.

The exceptions of the Trust Company (omitting that portion referring to the property of the Central Company), are here reproduced (Rec. 892-894):

> And now comes Guardian Trust Company, defendant, and *excepts to the report* of the Honorable Shannon C. Douglass, Special Master, filed in this cause on the 21st day of May, 1910, and for cause for exception shows: * * *
>
> Second: The master has in said report stated (on page 461 thereof) as follows: That the Southern Company is not in any way liable for the floating indebtedness of the Belt Company, *whereas the master in his report should have omitted reference to or recommendation concerning the question of the liability of the Southern Company for said floating indebtedness of the Belt* for the following reasons:

(a) The master having found and stated in his report that by reason of the laches of the Southern Company and the Statute of Limitations said intervening bill was not maintainable against this defendant, therefore the said bill should be dismissed as to each and all the parts thereof.

(b) That said finding is unnecessary for the determination of this cause upon the facts found by him, and its *incorporation in a decree* in this cause would be *unnecessary* and immaterial.

(c) That *by reason of the fact and for the cause that no relief was asked by this defendant against said intervenor* and because the master found that the other defenses interposed by this defendant to the intervention of the Southern were valid, such finding is *unnecessary* and immaterial in the rendition of the decree in this cause.

(d) That in a cause determined on a supplemental petition in this cause exhibited by said intervenor and said Belt Company against this defendant, which was finally decided by the United States Circuit Court of Appeals for the Eight Circuit in a cause entitled *Guardian Trust Company, Appellant,* v. *Kansas City Southern Railroad Company, et al. Appellees,* numbered 2827, and reported in Federal Reporter, volume 171, page 43, the law of this case was enunciated by said United States Circuit Court of Appeals that the *personal liability of said intervenor was not in issue in this cause* and that said matter was for the determination of the Circuit Court of Jackson county, Mo., *in three causes then and now pending in said Circuit Court of Jackson County, Missouri,* at Kansas City, and that said ruling and determination is binding upon all the parties to this cause, and upon this court and upon the master appointed by this court. Said finding and decision of said circuit court of appeals is as follows:

> The liability of the Southern Company to pay the debts which the Trust Company alleges in the actions at law it has promised to pay, is not in issue and cannot be determined in the suit in equity, and the state court has no jurisdiction over and cannot interfere in those actions *in personam* with the specific property which is the subject of the litigation in the federal court.

(e) That by reason of the law and the evidence, as stated in the report of said master, requiring the dismissal of the original bill of the Cambria Steel Company in this cause, said intervenor is not entitled to relief under the intervening petition filed herein by the Kansas City Southern Railway

Company, and that said petitions as to each and all of the parts thereof should be dismissed.

So far from excepting "to the conclusion" of the master on the liability issue, so as to challenge the *correctness* of his conclusion, the Trust Company consistently at all stages of this proceeding (until the time for an appeal by its adversaries on the stoutly contested issue as to the existence of any claim against the Belt Company had been lost by lapse of time), insisted that the liability issue was *not* in the case, and could *not* be decided.

The reasons assigned by the Trust Company in its exceptions quoted above, "that no relief was asked by this defendant against said intervenor," and "that the personal liability of said intervenor is not at issue in this case," and "that said matter was for the determination of the Circuit Court of Jackson County, Missouri, in three cases then and now pending in said circuit court" are all inconsistent with the statement of the court that the Trust Company excepted "to this conclusion" of the master on the liability issue, so as to bring that issue before the lower court for determination, or before the court of appeals upon appeal.

Even in June, 1911, after the first argument of the case in the court of appeals, a year (lacking a few days) after the final decree, we find the Trust Company then insisting (Rec. 970), that "the question of the personal liability of the Kansas City Southern Railway Company for the debt of the Belt Company is not in issue and cannot be determined upon this appeal."

Surely when counsel, in formulating and filing their exceptions, were exerting themselves to *avoid* a decision of the liability issue, by insisting that the report of the master was erroneous because he "should have omitted reference to a recommendation concerning" that question, in all fairness it ought not to be said that "to this conclusion the Trust Company excepted," *so as to make the merits of the liability question one of the issues upon appeal.* The larger portion of the 34,000 pages of testimony, no part of which is included in the record here, was directed to establishing on the one side and defeating on the other, the claim that the Trust Company was a creditor of the Belt Company. When the master decided that the Southern was not liable for the debt of the Trust Company, the latter placed itself on the broad ground that the question of the liability of the Southern Company for the debt

was not involved in the action and urged the *inclusion* of that finding in the decree as a ground of error. The Southern was justified in regarding the latter question as out of the case and hence did not appeal from that part of the decision establishing the existence of the debt, which it would otherwise have done. The Southern Company now finds itself confronted with a finding by the appellate court that the question of its liability *was* in issue, although the Trust Company has throughout insisted to the contrary, and that the Southern Company is liable for the debt. *The Southern Company, therefore, is deprived of its contention that there was no debt for which it could be liable.*

4. The court in speaking of the power of the committee to discharge the floating debt of the old company, says at page 712:

> It (the plan) set apart $475,000 for the payment of floating debts; it expressly authorized the committee to acquire, hold or extinguish "any obligation in the nature of floating debt or otherwise against any company or property embraced in said plan," and under this power the committee actually expended $1,164,172.50. * * * The committee and the Southern Company therefore had ample power to realize and pay to the creditors of the Belt Company the value of their equity in the property of the Belt Company before they transferred that property to the Southern Company.

This, it is respectfully submitted, shows a total misconception of the floating debt provision of the plan, and is mainly accountable for what we claim to be the fundamental error of the court upon this branch of the case. There was much testimony upon the subject, as appears from the report of the master—pp. 859-861. The sole purpose of the appropriation of $475,000 for the payment of floating debt was, as stated by the master (Rec. 860),

> —to make provision for the payment and discharge of such obligations as the committee might find necessary to discharge, *in order to relieve the properties to be included in the Southern mortgage from any liens claimed thereon or from any interference as a matter of business policy.*

It is true that the *joint payments* of the committee and the Southern Company—not the payments on this account made by the committee alone as stated by the court—largely exceeded the estimate of $475,000, amounting in the aggregate to $1,164,172.50, (Rec. 860). But *all* of these payments, as will be more fully

shown hereafter, were made in order to remove *liens and claims of liens* upon the reorganized properties, so that the new mortgage should be a first charge. The master, in speaking of the payments in excess of the estimate, said (Rec. 860):

> In other words, the Trust Company, presumably, received its proportionate benefit from this large expenditure in payment of what are called the floating debts, but which *in reality consist of all kinds of items, which the committee deemed necessary to take care of so as to secure absolutely the first mortgage lien on the properties transferred to the Southern Company.*

It also appears from the findings of the master (Rec. 861),

> —that at no time did the committee in making such estimate (of $475,000), contemplate or include therein the indebtedness of the Belt Company to the Trust Company.

It is apparent, therefore, that the discretion of the committee, in the payment of floating debt, was limited, and did not include general authority to discharge all unsecured debts such as that of the Trust Company, without regard to their position as actual or potential charges against the properties.

5. The court, in giving its reasons for its conclusion that the Trust Company is not estopped to maintain this action, says, page 713:

> In December, 1899, or during the early part of the year 1900, the Trust Company requested a prominent member of the reorganization committee to adjust or settle and pay its claim against the Belt Company, and he answered that it was asserted that the Belt Company did not owe the Trust Company anything, that an examination of the books of the Belt Company and the books of the Trust Company was being made and *that when that was completed he would take up the question of whether anything could be done towards an equitable settlement of the claim.*

This obviously refers to the testimony of Max Pam, an abstract of which is contained in the master's report (Rec. 863). But the master's recital of his *entire testimony* could not have created the belief, in the mind of anyone, that the committee expected to pay the debt of the Trust Company. It is true that he stated that if an accounting were had it would appear that the Trust Company was indebted to the Belt Company, and that an examination

of the Belt Company's books and the Trust Company's books was being made, and that when this was done "he would take up the question of whether anything could be done towards an amicable adjustment of the claim." *But the matter did not stop there.* His suggestion, in reference to the examination of the books and the possibility of an amicable adjustment, was *rejected,* and both parties, thereupon, declared they would *stand upon their legal rights.* This is apparent from the report of the master who quotes Mr. Pam as saying further (Rec. 865), "that as the gentlemen present indicated a desire to *litigate the matter instead of waiting until the examination was completed,* he then stated that the Belt Company *would insist upon its legal defense,* and that *thereupon he withdrew from the meeting.*"

Furthermore, the master finds (Rec. 866), that there was no evidence of authority having been given to Max Pam, or to any other person, to make any "promise or representation which would be binding on the committee, even if such promise or representation had been attempted to be made, and for a sufficient consideration."

It is apparent, therefore, that taking the master's finding *as an entirety,* there was nothing in Mr. Pam's statement that could fairly lead anyone to believe *that any other course would be pursued than to leave the parties to the pursuit of such rights and remedies as the law afforded them.*

6. The court, again referring to the master's abstract of the testimony of Mr. Pam, says, page 716:

> What is the evidence of any laches of the Trust Company in these proceedings? It presented to one of the members of the committee its claim against the Belt Company for adjustment and settlement, and was told that when the examination of the books were completed, he would take up the matter whether anything could be done towards an equitable settlement of its claim and *there the matter rested until the Trust Company was enjoined from selling its collateral in September,* 1900.

We respectfully dissent from this statement. The master's recital of the testimony of the member of the reorganization committee referred to (which is all there is on that subject in the record), will be found at page 863. He said, as before stated, that an

examination of the books was being made, but that as the gentlemen present at the conference "indicated a desire to *litigate* the matter instead of waiting until the examination was complete," he "stated that the Belt Company would insist upon its *legal defense*" and "thereupon he withdrew from the meeting." Certainly no one could be "lulled into a feeling of security" by this statement.

Nor do we by any means concede that "there the matter rested" until September, 1900. If we are to believe the testimony of the president and general counsel of the Trust Company (Rec. 862), although the master found that he "was likely mistaken" (Rec. 863), Mr. Pam promised the Trust Company that its debt from the Belt Company would be paid on June 16, 1900. But it was *not* paid on that date, and *notwithstanding its non-payment* the Trust Company on July 26, 1900, surrendered its $1,294,841 par value of stocks and bonds of five of the old companies, and received in lieu thereof $1,480,909.20 par value of the stocks and bonds of the Southern Company.

7. The court, for a third time, refers to the evidence of Mr. Pam and, as we believe, misconceives its import. It says, page 718:

> The Trust Company presented its claim against the Belt Company to one of the committee and was told before it made its exchange that the indebtedness of the Belt Company was denied but was under investigation, and that when the investigation was completed he would take up the claim and see if anything could be done about its settlement, and there the matter rested until after the exchange of stock was made. Meanwhile the Southern Company had the books of the Belt Company evidencing the state of the account between the Belt Company and the Trust Company in its possession. The Trust Company never made any representation that it had no claim against the Belt Company nor that it would not press it for payment by the committee, by the Belt Company and by the Southern Company, but it gave notice of its claim and requested its payment and neither the committee nor the Southern Company ever declared before the Trust Company exchanged its stock and bonds that they would not settle or pay it if the Belt Company really owed it.

It is unnecessary to repeat what has already been said concerning Mr. Pam's testimony. On one hand there was a declared

intention to "litigate" and on the other an insistence on "legal defenses." No one could have been misled by this situation.

8. The court, in stating its conclusion, which we believe to be erroneous, that the issue of debt or no debt between the Belt Company and the Trust Company was made up in *December, 1900*, says, page 714:

> On September 6, 1900, the Cambria Company commenced the suit here in hand against the Belt Company and against the Trust Company to enjoin the latter company from selling its collaterals and applying their proceeds to the payment of the debt of the Belt Company, a suit which is founded on the averment, which has been adjudged untrue, that the Belt Company was not indebted to the Trust Company and on other allegations so baseless that it has become clear that the Cambria Company had no cause of action against the Trust Company. On September 6, 1900, the Belt Company, the hand of the Southern Company, appeared in the Cambria suit, and on the same day the Trust Company was restrained by the court from selling its collaterals, and receivers of the property of the Belt Company were appointed in this suit. On November 5, 1900, the Trust Company answered and set up its claim against the Belt Company and the pledging of its collaterals. On December 3, 1900, the Cambria Company filed a replication to that answer. On that day *the issue of the indebtedness of the Belt Company to the Trust Company was made in this suit*, and that issue really existed then between the Trust Company and the Southern Company, for the Southern Company by its ownership of ninety-seven per cent of the Belt Company's stock controlled it and in all subsequent proceedings directed its course and is as much bound by its action as though it had been the Belt Company itself.

It is true that on December 3, 1900, the issues were made between the Cambria Company on the one hand, and the defendants in the Cambria bill, on the other. But the issues between the Belt Company and its receivers on the one hand, and the Trust Company and others on the other, were not made until April, 1902, and then in the following manner:

The receivers of the Belt Company were authorized by the court in the order of their appointment (Rec. 29), to bring suits for accounting covering past dealings, which obviously referred to this proceeding, and accordingly an ancillary bill, or cross-bill,

was filed by the receivers *alone*, the date of which does not appear in the record. But on November 20, 1901 (Rec. 889), a stipulation, dated November 12, 1901, was filed which provided (Rec. 890, 891), that an accounting should be had, that the Belt Company should be a co-complainant with the receivers, and that at the end of the accounting the successful party should have judgment. The ancillary bill of the Belt Company and its receivers was filed on November 20, 1901, (Rec. 97). The Trust Company and its receiver filed their answer on December 9, 1901 (Rec. 115). Exceptions to the answer were sustained on April 1, 1902, (Rec. 161), and the replication of the Belt Company and its receiver was filed April 9, 1902 (Rec. 160), on which date the issues were made. The Southern Company did not come into the case until February, 1905 (Rec. 164).

It is apparent, therefore, that the issues made by the appearance of the Belt Company and its receivers in the case were not made until April, 1902.

9. The court, in what we believe to be a wholly unwarranted effort to charge the Southern Company with delaying this case, says, p. 714:

> This issue was referred to the special master and it was not until May 21, 1910, after testimony had been taken for years and after a record of approximately 34,000 pages had been accumulated, that the Trust Company succeeded in obtaining an adjudication thereof, and that issue was first determined by the court below a few days later. *It will be interesting to note a few of the proceedings which resulted in this delay.*

Then follows an enumeration of incidents which are alleged by the court to have delayed this proceeding from December 3, 1900, (this should be April 9, 1902), until May 21, 1910, to which it is deemed necessary to give consideration.

(a) It is stated by the court, p. 714, as one "of the proceedings which resulted in this delay:"

> Before the Trust Company reached a decision of the master more than fifteen pleadings were filed in this case by other parties to this suit, and *the Trust Company was compelled to file six.*

It is true that the Trust Company filed answers as follows:

(1) On November 5, 1900, to the bill of the Cambria Company, (Rec. 33);

(2) On December 9, 1901, to the ancillary bill of the Belt Company and its receivers, (the answer being filed out of time by *stipulation*, Rec. 114-115);

(3) On March 7, 1905, to the intervening petition of the Southern Company (Rec. 186), (the petition and answer being filed by *stipulation*, Rec. 164-166);

(4) On May 20, 1905, to the amended intervening petition of the Southern Company (Rec. 293), the amendment being made by *stipulation* (Rec. 267), and the *time for answering having been enlarged by agreement* (Rec. 292);

(5) On June 1, 1905, to the first amended ancillary bill (Rec. 312), filed by *agreement* (Rec. 266), to meet the Trust Company's demand for a more specific statement; and

(6) On July 2, 1906, to the second amended ancillary bill of Belt Company and its receivers (Rec. 461), the amended bill and the amended answer being filed at the same time by *stipulation* dated June 30, 1906, (Rec. 467), to conform the pleadings to the proof, all evidence having been taken and the case then being ready for argument before the master.

We submit in all fairness that the court was not justified in saying that the Trust Company was "compelled" to file six answers, and assign that as a cause of delay in this case, when as a matter of fact all of its answers in this many-sided and complicated litigation (except its answer to the Cambria bill), were filed *by agreement of parties to speed the cause to a final determination*, and there is nothing to indicate that the delays were not due to its action in filing these answers and to the proofs offered by it thereon.

(b) The court assigns the Provident foreclosure action as another cause for the delay of this case, as follows, page 714:

> On October 20, 1900, the Trust Company filed a petition in the Provident Company's foreclosure suit for leave to be made a party and to plead therein, wherein it set forth its claim against the Belt Company, that the Southern Company would cause the Belt Company to waive all defenses and to consent to a foreclosure of the mortgage upon its property to the detriment of the Trust Company and the creditors of the Belt Company. On October 22, 1900, the Provident Com-

pany amended its bill and asked that the Trust Company be made a defendant, and the court so ordered. On October 22, 1900, the Provident Company amended its bill and asked that the Trust Company be made a defendant, and the court so ordered. On November 5, 1900, the Trust Company answered the Provident Company's bill and in its answer set forth the debt of the Belt Company to it, the control of the Belt Company by the Southern Company and its purpose to waive all defenses to and to consent to the foreclosure of the Belt Company's mortgage and the sale of its property for the purpose and with the effect of appropriating the equity of its unsecured creditors to itself. On September 12, 1901, and again on October 14, 1901, the Trust Company applied for leave to file its amended and supplemental answer in which it set forth the debt of the Belt Company to it, the facts regarding the reorganization agreement, the organization of the Southern Company, its exchange of its stock for the stock of the Belt Company and its purpose, by the control of the Belt Company and of its bonds and stock, to appropriate to itself the equity of the creditors of the Belt Company in its property by means of the foreclosure suit, and prayed that the bill of the Provident Company be dismissed and for such further orders and decrees as it was entitled to receive. On October 19, 1901, the court ordered the application denied on condition that the Provident Company should file a stipulation to the effect that the decree of foreclosure to be rendered in its case should not bar the right of the Trust Company to plead and insist in any future litigation that the Southern Company was legally and equitably bound by reason of the method by which it would obtain the property of the Belt Company to pay the debt of the Belt Company to the Trust Company. On October 19, 1901, the Provident Company filed such a stipulation and the court denied the Trust Company leave to file its amended answer. On October 19, 1901, the Trust Company presented to the Court in the Provident Company suit a petition for leave to prepare and file a cross-bill setting forth the facts stated in its amended answer, and praying for an adjudication of its claim against the Belt Company for the sale of its collaterals and for a provision in the decree of foreclosure that any purchaser of the Belt Company's property at the sale thereunder should take and hold it subject to the payment of the Trust Company's claim and to the payment of the claims of all the unsecured creditors of the Belt Company. On October 19, 1901, the Belt Company filed its answer whereby it admitted the averments of the Provident Company in its bill. On No-

vember 6, 1901, the court entered the decree of foreclosure and sale of the Belt Company which contained the express condition stipulated by the Provident Company that the decree should not bar the right of the Trust Company to recover of the Southern Company personally or out of the property of the Belt Company the amount of its claim against that Company.

On December 31, 1901, the Southern Company bid in the Belt property at the Provident Company's foreclosure sale and the master conveyed it to the Southern Company.

The foregoing matters refer to the *foreclosure suit* of the Provident Company against the Belt Company. The various pleadings, orders and other papers referred to by the court *are not in this record*, which is the identical record that was before the court of appeals. It is true a stipulation was made on June 30, 1906, shortly before the argument before the master (Rec. 469), providing that any party to the cause should have the right upon the hearing of this case to refer to any part of the record in the Provident case, but no part of the record in that case was taken by the Trust Company to the court of appeals, so that we do not feel at liberty to comment upon its contents.

But the court's reference to the record in the Provident case is for the avowed purpose "to note a few of the proceedings which resulted in this delay," in the determination of this case. Inasmuch as all the proceedings in the Provident case, as appears from the excerpt of the court's opinion above quoted, occurred *prior to April, 1902*, when the issues in this case between the Belt Company and its receivers and the Trust Company were made, pursuant to stipulation as above stated, it is not perceived how the progress of *this* case could by any possibility have been delayed thereby.

(c) The court, after reciting the filing of the intervenor's petition and amended intervening petition, and the answer of the Trust Company on May 25, 1905, says, p. 716:

> Then followed objections and arguments and testimony until on May 21, 1910, the master finally filed his report and in a few days thereafter the court rendered its decree.

As the evidence was not brought to the court of appeals, and therefore is not brought to this court, it is not possible to ascertain the number of the objections, nor by whom made, nor the

extent of the arguments, nor by whom made, but the master's report throws some light on the amount of evidence taken and gives some of the causes of the delay to which the court refers. He says (Rec., 579):

> There have been numerous occurrences, all more or less *unavoidable*, during the progress of this hearing, which have operated to materially *delay* the conclusion and filing of the master's report. There was an entire change of counsel for complainants and *respondents* in January, 1905, when hardly *one-fourth* of the record had been made, and thereby properly necessitating additional time for the new counsel to familiarize themselves with the pleadings and complicated state of facts presented by the evidence in the cause, and then again in 1909, there was another change in counsel for *respondent*, the Guardian Trust Company, which occasioned additional briefs and suggestions. For the past three years, the master has given a large part of his time to the examination and consideration of this lengthy record in connection with the arguments and briefs of the learned counsel for complainants and defendants and the intervenor.
>
> It is estimated that the items involved, first and last, in this accounting, will aggregate 10,000 to 12,000 and hence it will be readily seen that it has been impossible, within the compass of this report, to do more than group together the different classes of items which characterize the issues in this cause.

The taking of proofs was closed prior to June 30, 1906, (Rec. 468), and the case was argued for two weeks before the master in July, 1906, (Rec., 955-1023), and supplemental briefs filed on both sides afterwards in 1907 (Rec., 955-956), upon the liability issue made by the intervening petition of the Southern Company.

In the face of this recital by the master, and with no facts in the record to controvert it, was the court justified in placing the Southern in the attitude of having delayed the decision?

10. The court again makes what we believe to be an unwarranted charge of delay, saying, page 717:

> November 20, 1901, it joined the Belt Company and its receivers in a stipulation to expedite the trial of that issue and the entry of such a judgment, but *new pleadings*, tens of thousands of pages of testimony delayed the result. When that result seemed nearer and on February 27, 1905, the Southern Company intervened and claimed some of the Trust

Company's collaterals, and on March 7, 1905, the Trust Company answered the intervening petition and again pleaded and pressed its claim against the Southern Company. On March 17, 1905, and again on March 28, 1905, apparently despairing of reaching an adjudication in this suit in equity, it brought actions at law against the Southern Company upon its claim, but was prevented from trying them by injunctions procured and other proceedings conducted by the Southern Company until April 2, 1909, when the last injunction against its proceeding in the state court was reversed by this court.

The "new pleadings," everyone of them, as above shown, were filed *by consent*, by stipulation. The "tens of thousands of pages of testimony" are to be laid at the door of the Trust Company as well as its adversaries. There is nothing to justify charging the delay to either party rather than to the other. It is pure assumption. No one can claim that the intervention of the Southern Company delayed a final decision of the case, since only approximately *one-fourth* of the testimony had been taken at that time (Rec., 579).. The Trust Company in March, 1905, so far from "despairing of reaching an adjudication in this suit in equity" was bringing the same suit in the state court, *for an entirely different reason*. This case was argued and submitted to the master in July, 1906, which was much earlier than it could hope to secure a submission in the state court. It is to be hoped that its purpose in bringing the suits in the state court was not to duplicate the enormous expense of the litigation. Its obvious and avowed purpose was to *escape* an adjudication of the liability issue in the federal courts, as is indicated by its subsequent conduct in endeavoring to eliminate that issue from this case and to remit the decision of that question to the state courts.

11. The court says, page 717:

Twice in October, 1901, it set forth in answers to the Provident Company's suit its claim against the property of the Belt Company and against the Southern Company, and prayed the adjudication and payment thereof, to be met by a denial by the court doubtless secured by the objections of the Provident Company and by that Company's stipulation that the decree should not foreclose, bar or effect the Trust Company's claim against the Southern Company, or the property of the Belt Company which it should acquire thereunder. On October 19, 1901, it applied for leave to plead this claim on

a cross-bill in that suit and to pray for a decree that its claim should be paid out of the property of the Belt Company, to be met by like denial. In this way, the Trust Company was prevented from obtaining a hearing on the merits and an adjudication of its claim in the foreclosure suit and subjected to the objection to an original bill which it might otherwise have brought against the Southern Company that it had no judgment against the Belt Company and no execution returned unsatisfied thereon.

Again the court has recourse to the pleadings and proceedings in the Provident case which, unfortunately, are not in this record. It is not perceived, however, why the Trust Company did not have the same opportunity to file suit in the state court or elsewhere in 1901, that it had in 1905, when it finally brought the suits in the state court at Kansas City.

12. The court says, page 717:

> Meanwhile the Trust Company had pressed the issues in this suit through the hearings, they had been submitted to the master, and on May 21, 1910, he found that the Belt Company was indebted to the Trust Company in 1900, and that the amount of that debt with interest to June 22, 1910, was $639,658.86.

The inference created by this statement is that the Trust Company was pressing this action to a hearing, in the face of obstacles interposed by its adversaries. Nothing could be more unjust. It is not permitted to speak outside of the record, but we may refer to one significant fact in that connection which is of record (Rec., p. 1024), that after the master had taken over 34,000 pages of testimony, the Trust Company refused to prepare and file with him an abstract or abridgment of the testimony to aid him in reaching his conclusions. The Trust Company left the master to grope unaided through the maze of testimony and reach his conclusions as best he could. The Belt Company and its receivers on the contrary did prepare and file an abstract of the evidence covering each allegation of the bill and intervening petition (Rec. 1023).

13. The court in speaking of the efforts made by the parties in the lower court to secure an adjudication of the issues herein involved, one side insisting that the litigation be carried on in the

state court and the other insisting upon the federal court, says at page 699:

> This question (the liability of the Southern Company) has been at issue between the Trust Company and the Southern Company in this suit and in action at law in the state courts for many years. The prosecution of those actions had been *repeatedly* enjoined and delayed by orders of the court below and those orders had been *as often reversed* by this court.

The prosecution of the suits in the state court was twice temporarily enjoined by the lower court, and in each instance the order of injunction was reversed by the court of appeals (146 Fed. 337; 171 Fed. 43). Each of the parties, as frequently happens, was contending for an adjudication in the forum of its preference, and no unfavorable inference can justly be drawn therefrom. We are unable to see why an effort to prevent a duplication of the enormous expense and labor involved in this case by confining the litigation to one court was not commendable from every standpoint. The good faith of the Southern Company, in seeking to confine this litigation to the federal courts, where it originated, as ancillary to the foreclosure proceeding in which the property of the Belt Company was sold, will not suffer, it is respectfully submitted, by inquiring whether the principles and rules recently announced in March, 1915, by the same court of appeals, in *Western Union Telegraph* v. *Trust Company*, 221 Fed., 545, did not justify the application for the injunctive order which was reversed in the case reported in 146 Fed., 337.

SPECIFICATION OF ERRORS.

For specifications of error (Rec., 1058), the appellant says that the circuit court of appeals for the eighth circuit erred in this, to-wit:

1. In holding and deciding that The Kansas City Southern Railway Company was liable for and required to pay to the Guardian Trust Company the indebtedness of the Kansas City Suburban Belt Railroad Company to the Guardian Trust Company.

2. In holding and deciding that the rights and equities of the Guardian Trust Company in the properties and capital stock of the Central Improvement Company were prior and superior to the rights and equities therein of the Kansas City Southern Railway Company.

3. In holding and deciding that the Guardian Trust Company was not estopped by its participation in, and the benefits received and retained by it from, and growing out of the plan of reorganization involved herein, from maintaining that the Kansas City Southern Railway Company was or is liable for the indebtedness of the Kansas City Suburban Belt Railroad Company to the Guardian Trust Company.

4. In deciding and passing upon the issue of the alleged liability of the appellant for the indebtedness of the Belt Company, in the absence of any exception taken before the master, or in the lower court, challenging the correctness of the finding of the master that the appellant was not liable for such indebtedness.

BRIEF.

I.

The decision of the circuit court of appeals was not final and this Court has jurisdiction over this cause upon this appeal and the motion to dismiss should be denied.

It is important to bear in mind that the questions presented by this appeal for the consideration and determination of this court are *essentially federal questions* arising under the laws of the United States. They involve the validity and effect, in a collateral proceeding, of a decree of foreclosure and sale of railway property, duly entered and made effective by a circuit court of the United States.

Our contention is that the decision of the court of appeals was not final, and that this court has jurisdiction over this cause upon this appeal for each of the following reasons:

First. The original bill of the Cambria Company in this case presented a distinct ground of federal jurisdiction independent of that of diversity of citizenship.

Second. The intervening petition of the Southern Company, which was in the nature of an original bill, stated facts sufficient to confer jurisdiction upon a federal court, independent of the grounds of jurisdiction stated in the original bill.

1. *The original bill of the Cambria Company not only demanded an accounting, but also sought to establish and enforce a judgment lien, created by Act of Congress, and therefore, the jurisdiction of the circuit court was not entirely dependent upon diversity of citizenship.* If the bill of the Cambria Company stated facts sufficient to present a distinct ground of federal jurisdiction independent of that of diversity of citizenship, then the decision of the court of appeals was not final and the motion to dismiss the appeal must be overruled. (*Mayor of Vicksburg* v. *Henson*, 34 Sup. Ct. Rep. 95; *Warner* v. *Searle*, 191 U. S. 195; *St. Louis Railway Company* v. *Wabash Company*, 217 U. S. 247; *Howard* v. *United States*, 184 U. S. 676; *Union Pacific Ry. Co.* v. *Harris*, 158 U. S. 326; *Mississippi Commission* v. *Railway Company*, 203 U. S. 335; *United States Fidelity Company* v.

Bray, 225 U. S. 205). Even though the averments are "quite defective" the appeal will not be dismissed (*Warner* v. *Searle*, *supra*).

It is the *face of the bill* of the Cambria Company to which we must look for the jurisdictional averments. It is not material or important what questions arising upon the issues made by this bill were actually decided. (*Florida Central* v. *Bell*, 176 U. S. 321; *Omaha Electric Co.* v. *Omaha*, 230 U. S. 123; *Siler* v. *Louisville Railway Company*, 213 U. S. 175).

It becomes necessary, therefore, to examine the bill of the Cambria Company (Rec., 3-20), bearing in mind the Act of Congress of August 1, 1888, entitled "An act to regulate the liens of judgments and decrees of the courts of the United States" (25 Stat. L. 357) which provides that:

> Judgments and decrees rendered in a circuit or district court of the United States within any state shall be liens on the property throughout such state, in the same manner, and to the same extent, and under the same conditions, only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state; provided, that whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the State of Louisiana, before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such State shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the State.

And also the following statutes of the State of Missouri (1909):

> Section 3123. Judgments and decrees obtained in the Supreme Court, in any United States District or Circuit Court, held within this state, in the Kansas City Court of Appeals or the St. Louis Court of Appeals, shall upon the filing of a transcript thereof in the office of the clerk of any such court, be a lien on the real estate of the person against whom such judgment or decree is rendered situate in the county in which such transcript is filed.
>
> Section 3124. Judgments and decrees rendered by any court of record shall be a lien on the real estate of the

person against whom they are rendered situate in the county for which the court is held.

The bill of the Cambria Company may be summarized as follows:

(a) After the formal averment of the incorporation and citizenship of the parties it is alleged (Rec., 5), that the Cambria Company on September 6, 1900, obtained judgment in an action at law in the circuit court of the United States for the Western Division of the Western District of Missouri, against the Belt Company in the sum of $100,962.91; that execution was issued and returned wholly unsatisfied; and that the Belt Company had no property subject to be reached by legal process issued upon the judgment.

(b) It is next charged (Rec., 5), that the Trust Company organized a large number of railroad companies to construct railroads, and a large number of auxiliary companies, the latter for the purpose of holding the legal title to lands, buildings and other structures necessary to be used by the railroad companies in their operations; that the Trust Company controlled these companies by the election of its own officers and employes as their officers and employes, and used them for its own benefit, and that thereby it assumed a fiduciary relation toward them; that among the companies so organized (Rec., 6-9), were the following railroad companies, Kansas City Suburban Belt Railroad Company and its subsidiary companies, the Union Terminal Railroad Company, Kansas City, Independence Air Line; and the following auxiliary companies (Rec., 13), Missouri Elevator & Terminal Company, Central Improvement Company, Second Street Improvement Company, Fairmount Amusement Company, and Northern Townsite Company.

(c) With reference to the railway companies it is charged that the Trust Company appropriated all of their stocks and bonds and applied a portion of the proceeds thereof to the cost of construction of their properties, and refused to account for the remainder, and an accounting was demanded.

(d) With reference to the auxiliary companies it was charged that the Trust Company fraudulently invested them with

the legal title to various properties, both personal and real, which in equity belonged to the Belt Company, and the Cambria Company sought by its bill to impress its *judgment lien* upon them. It is alleged (Rec., 10), that tthe Trust Company acted:

> With the fraudulent intent and purpose of preventing the properties so taken in the names of said auxiliary companies, respectively, from being reached by the creditors of said railroad companies or either of them and particularly by the creditors of the said Belt Company; * * * that, as your orator is informed and believes, all or substantially all of the moneys invested in the purchase, improvement and acquisition of the several properties of the said auxiliary companies and each of them, was paid and supplied by the said Belt Company, and each and every one of the said auxiliary companies was a mere device or "dummy" contrived and provided by the said Trust Company as a means for taking and holding the naked *legal title* to such properties as might be vested in the said auxiliary companies, respectively, for the use and benefit of the said Belt Company, and that, as to the creditors of the said Belt Company and particularly as to your orator, *the properties and shares of stock of each and every of the said auxiliary companies in equity belong to the said Belt Company and are chargeable with the lien and payment of your orator's aforesaid judgment against the said Belt Company;* a list of real estate in the name of the auxiliary companies so far as known to complainant, is attached hereto as Exhibit 2. (Exhibit 2, Rec., 23-27, being a list of real estate situated in Kansas City, Missouri).

(e) It is next averred (Rec., 14-15), that the Trust Company fraudulently, by reason of its control and domination, caused the Belt Company to transfer and deliver to it certain promissory notes and a large amount of property of various kinds, consisting of bonds, shares of stock, steel rails and other property, all of which it is charged rightfully and in equity belonged to the Belt Company, and should be subjected to the *judgment lien* of the complainant. It is alleged (Rec., 15):

> Your orator charges that each and all of the aforesaid shares of stock, assets and other personal property so passing into the possession of the said Trust Company, constitute assets and property of the said Belt Company, *equitably and justly chargeable with the lien and payment of your orator's aforesaid judgment,* and that the said shares of stock and other property were fraudulently taken into the possession

of said Trust Company without consideration moving from the said Trust Company, and that said Trust Company has no right to such possession or title to any part of said stocks, or property.

(f) It is further charged that the Elevator Company, owning several elevators in Kansas City, Missouri, was a mere device or dummy to hold the legal title to its property for and on behalf of the Belt Company; that the Central Company (Rec., 16), was likewise a mere dummy contrived by the Trust Company to hold and carry the legal title to the real property standing in its name for the use and benefit of the Belt Company and its creditors; that the same was true of the Second Street Company, which among other things, held the legal title to certain tracts of real estate in and near Kansas City, Missouri, and used and indispensably necessary to be used by the Belt Company for depot grounds, necessary buildings, rights of way, yards, freight houses and machine shops; and,

That the said property in equity belongs to the said Belt Company and is chargeable with the debts and liabilities thereof, including the *judgment* of your orator as aforesaid.

It is also charged that the property and assets, the legal title to which is held by the Amusement Company and the Townsite Company, respectively, are essential and indispensable to the successful operation of the property of the Belt Company, and that the Amusement Company and Townsite Company are dummies of the Trust Company for the purpose of holding the legal title to said assets and property for the use and benefit of the Belt Company, as the equitable owner thereof, and,

That such assets and property so held are equitably and justly chargeable with the claims and demands of the creditors of the said Belt Company, and particularly the *judgment* so obtained by your orator as aforesaid.

(g) Then follows a prayer for the *establishment of the lien of complainant's judgment* against the Belt Company's equitable title to the various properties held for it by these dummy corporations as follows (Rec., 18):

That the property and assets, the legal title to which is held, respectively, by the said Elevator Company, Amusement Company, Central Company, Second Street Company, and

> Townsite Company be declared to be in equity the property of the said Belt Company, and chargeable with the *lien* and payment of the debts and liabilities of the said Belt Company, and, particularly, the judgment aforesaid of your orator.

Next follows a prayer for the sale and distribution of the assets and property of the Belt Company in the order of the respective liens of its creditors as follows:

> (d) That the assets and property of the said Belt Company, real, personal, or mixed, and wheresoever situated, including all rights of action, legal or equitable, be marshalled for the benefit and protection of all persons concerned therein.
>
> (e) That the rights and interests of all persons in and to the said assets of the said Belt Company, be ascertained, adjudicated and decreed.
>
> (f) That the said assets and property, and each and every part thereof, be sold and the proceeds thereof, after paying the costs and expenses of this proceeding and all allowances which may be made therein, be distributed among those found to be entitled thereto.

(h) It is beyond question that the bill asserted a *judgment lien,* created by an act of Congress, upon the equitable title of the judgment debtor to various properties both real and personal, which were held or claimed adversely by the Trust Company, and sought to impress and establish such judgment lien upon these properties and to foreclose the lien and sell the properties and to distribute the proceeds to the parties equitably entitled thereto.

It is equally beyond question that the Trust Company *understood* that this was one of the issues tendered by the bill, for it says in its answer (Rec., 49) that it,

> Denies that all or any of the said companies were mere devices or dummies contrived and provided by this defendant as a means for taking title to such property as might be vested in them for the use and benefit of the Belt Company, and denies that the properties and shares of stock of the so-called auxiliary companies in equity belong to the Belt Company *and are therefore chargeable with the lien of the complainant's said judgment as alleged in the bill of complainant.*

(i) The Cambria Company on January 22, 1914, (Rec., 1055) applied to the court of appeals for leave to amend its bill, making a specific reference to the Act of Congress of August 1,

1888, and to the Missouri Statutes, above quoted, in reference to judgment liens, and stating in express language that the suit arose under the laws of the United States, invoking the rule of *Vicksburg* v. *Henson*, 231 U. S., 259, 34 Sup. Ct. Rep., 95, which permits additional grounds of jurisdiction, existing at the time of the filing of the original bill, to be added by amendment. The court of appeals denied leave to make the amendment (Rec., 1056). The allegations of the proposed amendment are in respect of matters of which the court will take judicial notice, so that the action of the court of appeals in denying the motion is not important.

2. *Where, as in this case, the bill asserts a judgment lien created by Act of Congress and seeks to establish and enforce the lien against the equitable title to certain properties of the judgment debtor, the action arises under the laws and constitution of the United States and presents a distinct ground of federal jurisdiction independent of that of diversity of citizenship.* The lien of the judgment rendered in the federal court was a creature of the federal statute. The validity and effect of the lien as well as of the statute itself were involved in the case. The decree establishing or denying the lien claimed by the complainant would naturally turn upon the validity, construction, and effect of the statute.

Where the case made by the plaintiff is one which depends upon the proper construction of an act of Congress with the contingency of being sustained by one construction and defeated by another, it is one arising under the laws of the United States. (*Northern Pacific Railway Co.* v. *Soderberg*, 188 U. S., 526; *Ex Parte Lennon*, 156 U. S., 548).

As an illustration of the application of this rule to this case it is pertinent to inquire:

(a) Did the lien created by the Act of August 1, 1888, extend to the *equitable title* of the judgment debtor to the real properties described in the bill? (The judgment lien created by the Missouri Statutes above quoted, which statutes may or may not be a part of the federal act, extends to equitable as well as legal interests. *Williams* v. *Lobban*, 206 Mo., 399, 410; *Eneberg* v. *Carter*, 98 Mo., 647, 650; *Slatterly* v. *Jones*, 96 Mo., 216).

(b) Did the act of Congress adopt this Missouri Statute and with it its construction by the Missouri courts?

(c) Did the Act of Congress creating a judgment lien *supersede* the Missouri statute which also undertakes to create a judgment lien in favor of judgments rendered in federal courts?

Upon the determination of these questions the existence and validity of the lien of the complainant may depend.

These questions appear *on the face* of the bill of the Cambria Company, and at once *involve and require a construction of the act of Congress*, with the necessary result that by one construction of the act the right of the complainant will be sustained, and by another construction such right will be defeated.

But it has been expressly determined by this court (*Cooke* v. *Avery*, 147 U. S., 375) *that an action which seeks to establish and enforce a judgment lien created by an act of Congress is an action arising under the laws of the United States.* There the contest was over certain real property and the plaintiff alleged that he derived his title from the sale of the property under the *lien of the judgment* rendered by the Circuit Court of the United States for the Northern District of Texas, and the action was sustained as one arising under the laws and constitution of the United States, without regard to the citizenship of the parties, for the reason that the validity of the plaintiff's title depended upon the *existence of the lien* and the determination of that question involved the *construction and application of the act of Congress which created the lien.*

The act of Congress relied upon was the Act of June 1, 1872, (Sec. 916, Revised Statutes) which provided that the parties recovering a judgment in any common law action should be entitled to similar remedies by execution or otherwise, to reach the property of the judgment debtor as were then provided in like causes by the laws of the state in which such court was held. This was the statute which preceded the Act of August 1, 1888, which expressly gave a lien to the judgments of the courts of the United States.

This court said, in upholding the jurisdiction of the court:

> Plaintiff is to be regarded as the purchaser at the sale, and the *validity* of his purchase turned upon the *existence of a lien*, which he asserted and the defendants denied. The *disposition of this issue* depended upon the laws of the United States and the rules of the circuit court, and *their construction and application were directly involved.* We are of opinion

that jurisdiction as resting on the subject-matter was properly invoked.

Does not this case conclusively establish our right to an appeal? The right of the Cambria Company to relief turned upon the *existence of the judgment lien* created by act of Congress, which the Cambria Company asserted and the Trust Company denied. Did not the disposition of this issue depend upon the laws of the United States, and was not the jurisdiction of the lower court as depending upon the subject-matter properly invoked?

The same conclusion was reached by the circuit court of appeals of the fourth circuit in *First National Bank* v. *Society for Savings*, 80 Fed., 581. There a federal circuit court issued a mandamus requiring the county court to levy a tax to pay a judgment against the county. Certain inhabitants of the town filed a bill in the state court to enjoin the levy on property in the town, claiming that such property was not subject to the claim upon which the judgment was based. This injunction suit was then removed by defendants to the federal court. It was held that the latter court had jurisdiction of the injunction suit, *as it involved the enforcement of a judgment of a federal court acting under the federal laws and constitution.* The court said:

> This proceeding is in the nature of an execution. The rights of the parties to the judgment in respect of its subject-matter are fixed by its rendition. *City of Chanute* v. *Trader*, 132 U. S., 210. This being so, the proceeding in the state court involves the enforcement of a judgment of the United States circuit court, acting under the constitution and laws of the United States, and it is, therefore, *a question arising under that constitution and those laws*, and so within the jurisdiction of the federal court.

The case of *Soades* v. *Witters*, 46 Fed., 497, is also directly in point. It is there held:

> The laws of a state respecting the enforcement of judgments, adopted, pursuant to Rev. St. U. S. 916, by a rule of the federal district court for the government of judgment liens of such court, and for the guidance of the marshal in levying executions, derive their force from the United States, and not from the state; and a suit involving *the question whether or not the marshal's proceedings in levying an execution issued out of the federal court was in conformity with such rule is a question arising under the laws of the United States, and cognizable by the federal courts.*

The reason of the rule finds support in many adjudicated cases. An action on the bond of a marshal of the United States, or on the bond of a clerk, or on the official bond of a cashier of a national bank, or on the bond of a federal contractor given for the protection of persons furnishing materials and labor for the construction of public works, or on a supersedeas bond, are held to arise under the laws of the United States for the reason that the case depends upon the scope and effect of the bond and the meaning of the statute under which it was given. (*Bock* v. *Perkins*, 139 U. S., 628; *Howard* v. *United States*, 184 U. S., 676; *Walker* v. *Bank*, 56 Fed., 76; *Hill* v. *Surety Company*, 200 U. S., 197; *United States* v. *Bonding Co.*, 89 Fed., 925; *United States* v. *National Surety Co.*, 92 Fed., 549; *United States* v. *Rundle*, 100 Fed., 400; *Hardaway* v. *Surety Company*, 150 Fed., 465; *Seymour* v. *Phillips*, 7 Biss., 460).

An action against a corporation created by Congress is one arising under the laws of the United States for the reason that the corporation has no powers and can incur no obligations except as authorized or provided by its charter. (*Removal Cases*, 150 U. S., 1; *Railway Co.* v. *Cox*, 145 U. S., 593). Likewise, an action on an injunction bond given in the course of proceedings in the federal court arises under the laws of the United States for the reason that it is to be construed with reference to the liability administered in the courts of the United States on that subject. (*Tullock* v. *Mulvane*, 184 U. S., 497; *Railway Company* v. *Elliott*, 184 U. S., 530).

In the recent case of *American Surety Company* v. *Schultz*, 35 Sup. Ct. Rep., 525, it was held that a suit on a supersedeas bond, given in conformity to the Federal statute to supersede a judgment in an action for a breach of contract during the pendency of a writ of error from a Federal circuit court of appeals, is one which "arises under the constitution or laws of the United States," and that the district courts of the United States had jurisdiction of an action on such a supersedeas bond, irrespective of the citizenship of the parties. The court, after noting that the bond was given in pursuance of the laws of the United States, said:

> Conversely, when that judgment was affirmed, the same laws of the United States gave Schultz a right of action on the bond, and in the suit to enforce that right *the measure of*

his recovery depended upon the construction to be given the Federal statute. Such a suit to enforce such a right could be brought in the United States court by virtue of sec. 24 of the Judicial Code (36 Stat. at L. 1091, chap. 231, Comp. Stat. 1913, sec. 991), which declares that the district court has jurisdiction of any suit of a civil nature at common law which "arises under the constitution or laws of the United States."

That diversity of citizenship also existed in this case is not important. The controlling feature is that the complainant asserted the equitable title to certain real estate, and this equitable title depended for its *existence and validity* upon a judgment lien created by an act of Congress, and the validity and application of the judgment lien in turn depended upon the *construction of the act of Congress* creating it. These facts constituted a suit arising under the laws of the United States and gave to the circuit court an independent ground of jurisdiction in addition to that of diversity of citizenship.

3. *The intervening petition of the Southern Company was a suit arising under the laws of the United States and for that reason alone the right of appeal to this court exists, regardless of the source of jurisdiction of the Cambria bill.* The decision of the court of appeals in this case was not final for the further reason that the intervening petition of the Southern Company (which was in the nature of an original bill) asserted the equitable title to certain real and personal properties held or claimed by the Trust Company, based upon foreclosure decrees rendered in the United States circuit court for the Western district of Missouri and sales had thereunder at which the Southern Company became the purchaser. It was, therefore, a *"case arising under the laws of the United States establishing the circuit court and vesting it with jurisdiction;* and hence, it would be *within the judicial power* of the United States as defined by the constitution." (*Dupasseur* v. *Rochereau*, 21 Wall., 130; *Pittsburg Railroad Co.* v. *Long Island Trust Company*, 172 U. S., 493, 508; *Tullock* v. *Mulvane*, 184 U. S., 497).

There was involved the Constitution of the United States (Article III, Section 1) providing that the judicial power of the United States should be vested in the Supreme Court "and in such inferior courts as Congress may from time to time ordain and

establish," as well as the numerous acts of Congress defining the jurisdiction of the circuit courts of the United States and prescribing their procedure; and particularly the Act of March 3, 1893, entitled, "An Act to regulate the manner in which property shall be sold under orders and decrees of any United States courts" (27 Stat. L., 751).

The equitable title asserted by the Southern Company, as appears from the face of its petition, depended upon the *validity* of the foreclosure proceedings and the sales thereunder, and there was involved, therefore, the laws of the United States establishing the court, defining and limiting its jurisdiction of the subject-matter as well as of the parties, regulating the procedure in the course of the litigation, and prescribing with particularity the manner in which property shall be advertised and sold under the decrees of the court. The title asserted by the Southern Company would be defeated by a construction of the laws of the United States that would deny the jurisdiction of the courts passing the decrees, either over the subject-matter or of the parties, or that would invalidate the sale by reason of a failure to conduct it in accordance with the federal statute.

It was a necessary part of the case of the Southern Company that *under a proper construction of the acts of Congress* the courts passing the foreclosure decrees and conducting the sales had jurisdiction of the subject-matter and of the parties, the prescribed procedure had been followed and the sale had been made in the manner and at the place designated.

In other words, the Southern Company set up a right to recover as the result of a judicial sale made under a decree of the United States circuit court and, therefore, a federal question was presented.

This court, speaking through the present Chief Justice (*Commercial Publishing Co.* v. *Beckwith*, 188 U. S., 567), said:

> As in the complaint the plaintiff in error unquestionably set up a right to recover as the result of a judicial sale made under decrees, both of courts of the United States and of a state, Federal questions exist in the record, and the motion which has been made to dismiss is therefore denied.

In *State* v. *Frost*, 89 N. W., 915, foreclosure proceedings brought in a federal court against a railway company had ripened

into a decree. The master was unable to make a sale of the property at the up-set price named in the decree and reported that fact back to the court and asked for instructions. The court directed the receiver to take up the rails and ties for the purpose of selling them separately. The State of Wisconsin thereupon brought an original proceeding in the Supreme Court of Wisconsin to enjoin the receiver from taking up the rails and dismantling the road. Application was then made by the defendant to remove the case to the federal court upon the ground that the action arose under the laws and constitution of the United States. The right of removal was sustained, the court saying:

> It cannot be doubted that *the jurisdiction of the federal court depends wholly upon the constitution and laws of the United States;* nor that its power, after the expiration of a term, to modify a decree already entered, depends wholly upon the construction to be given to the *laws of Congress originating that court, and granting and defining its powers.*

Cooke v. *Avery*, 147 U. S., 375, and other cases cited under the preceding heading are also referred to as authority for this position.

Where an ancilliary bill upon its face presents federal questions, the right of appeal to this court from the circuit court of appeals exists, regardless of the source of jurisdiction of the main action. This has been expressly decided by this court in the recent case of *Railroad Commission of Ohio* v. *Worthington*, 225 U. S., 101. There, Worthington, who had been appointed receiver in an action depending solely upon diversity of citizenship, brought an ancillary bill to enjoin the enforcement of an order of the Railroad Commission of Ohio, invoking the Constitution of the United States, so that federal questions were provided on the face of the bill. The question arose as to whether a determination by the circuit court of appeals of the issues made by the ancillary bill was final, and this court held that it was not, and that the appeal had been properly allowed, saying:

> The argument that the jurisdiction of the circuit court of appeals is final is based upon the contention that, as Worthington, the complainant in the present case, was appointed receiver of the Wheeling & Lake Erie Railroad Company in a suit in equity in the circuit court of the United States for the northern district of Ohio, eastern division, wherein

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jurisdiction depended upon diversity of citizenship, and since the jurisdiction to entertain an appeal in an ancillary proceeding is that of the original case, therefore, under the circuit court of appeals act, the decree of the court of appeals is final. It is undoubtedly true that in cases of intervention in *foreclosure suits*, where jurisdiction depends upon diverse citizenship, jurisdiction of the intervening petition is determined by that of the original case. It is equally true that petitions in original proceedings to enforce rights and to protect the exercise of the jurisdiction of the court take their jurisdiction from that of the original case (*St. Louis, K. C. & C. R. Co.* v. *Wabash R. Co.*, 217 U. S., 247, 54 L. Ed. 752, 30 Sup. Ct. Rep. 510), and the many previous cases in this court therein cited.

An examination of the bill in this case, which was filed under the authority of the circuit court, shows that the order of the commission was attacked, not only upon the ground that its findings were alleged to be unsupported by the testimony and to have been made upon improper consideration of the facts, but also because the order affected and interfered with interstate commerce, in which the complainant was engaged and over which the Railroad Commission of Ohio had no authority, because of the commerce clause of the Federal constitution. It further was alleged that the owners of the property constituting the receivership estate would be deprived thereof without due process of law; that they would be denied the equal protection of the laws, and that their property would be taken without compensation. *It thus appears that jurisdiction was invoked, not only because the present case is ancillary to the receivership suit, which depended upon diverse citizenship, but upon grounds which involve alleged infractions of the Federal Constitution and rights secured thereby.* The case was therefore one which might have been taken to the circuit court of appeals, and the fact that it involved grounds which might have warranted a direct appeal to this court did not deprive the circuit court of appeals of jurisdiction. *American Sugar Ref. Co.* v. *New Orleans*, 181 U. S., 277, 45 L. Ed. 859, 21 Sup. Ct. Rep. 646; *Macfadden* v. *United States*, 213 U. S., 288, 53 L. Ed. 801, 29 Sup. Ct. Rep. 490.

The question, then, is: Is this one of the cases made final in the circuit court of appeals by the act creating that court? The 6th section of that act provides that the judgment of the circuit court of appeals, "shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of

the United States or citizens of different states; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases." (26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 550). In all other cases there is a right of review by this court if the matter in controversy exceeds $1,000. It is averred in the bill and admitted in the answer that the amount in dispute exceeds in value the sum of $5,000. *The case is therefore one not made final in the circuit court of appeals, and the appeal to this court was properly allowed. Spreckels Sugar Ref. Co.* v. *McClain*, 192 U. S., 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376; *McFadden* v. *United States*, 213 U. S., 288, 294, 53 L. ed. 801, 802, 29 Sup. Ct. Rep. 490; *Standard Paint Co.* v. *Trinidad Asphalt Mfg. Co.*, 220 U. S., 446, 460, 55 L. ed. 536, 543, 31 Sup. Ct. Rep. 456.

We understand the present state of the law on this subject to be as follows:

(a) Where it is sought to appeal from a decision of the court of appeals rendered upon the issues made by an intervening petition or an ancillary or dependent bill which does not itself disclose upon its face grounds of federal jurisdiction, the right of appeal is to be referred to the original bill which first invoked the jurisdiction of the lower court. If the sole ground of jurisdiction disclosed on the face of the original bill was diversity of citizenship, then no appeal lies; but if the bill disclosed a cause of action arising under the laws of the United States, whether stated separately or in connection with a ground of jurisdiction founded upon diversity of citizenship, the right of appeal from the court of appeals to this court exists.

(b) Where it is sought to appeal from a decision of the court of appeals rendered upon the issues made by an intervening petition or an ancillary or dependent bill which discloses on its face grounds of federal jurisdiction, then the right of appeal exists, regardless of the source of jurisdiction disclosed on the face of the original bill as filed in the lower court.

It is the contention of the appellant in the case that it has a right of appeal to this court: *first*, for the reason that the bill of the Cambria Company disclosed a cause of action of which the circuit court would have had jurisdiction independent of diversity of citizenship; and, *secondly*, that the intervening petition of the

Southern Company sets forth a cause of action arising under the laws of the United States, and for that reason the right of an appeal exists wholly independent of the grounds of jurisdiction contained in the bill of the Cambria Company.

II.

The writ of certiorari should issue, (if the Court holds that the right of appeal does not exist) for the reason that grave and serious questions of great public interest are involved and for the further reason that the decision of the circuit court of appeals for the eighth circuit is in certain respects in conflict with the decisions of this court and of the courts of appeal of other circuits.

The grounds upon which the Southern Company based its application for *certiorari* are here reproduced for the convenience of the court with the facts brought down to date.

1. *Grave and serious questions affecting the rights of the petitioner are involved.*

An enormous judgment in favor of the Trust Company for over $700,000 (now $800,000) is imposed upon the Southern Company for the alleged reason that the reorganization plan, under which the latter acquired the Belt property, was "fraudulent" as against *assenting* creditors, although the Trust Company had been *benefited* by the plan to the extent of $1,480,909.20 in the exchange of its old securities (a large part of which, but for the plan, would have been a total loss) for the securities of the Southern Company, which it still retains. The Trust Company is permitted to claim *under* and *against* the same instrument.

This court in the *Boyd* case, referring to a similar reorganization, said that "the transaction would be *binding between the parties,*" and was only invalid as to "*non-assenting* creditors," yet the circuit court of appeals holds that the plan was sufficiently *valid* to enable the Trust Company to reap enormous benefits from it, but that it was sufficiently *fraudulent*, as a conveyance in fraud of creditors, to permit the Trust Company, which was a *consenting* creditor, to recover of the Southern Company its debt against the Belt Company. The doctrines of equitable election, ratification or estoppel, it is said, have *no application*.

In other words, although the Trust Company, by becoming a party to the plan, *consented* to the diversion of assets to stockholders which, it is said, should have gone to creditors, yet it is permitted to *base its action* against the Southern Company on the doing of the *very thing* to which it assented.

A rule so revolutionary, and so in conflict with settled principles and with decisions of this court should not, it is respectfully submitted, be given a fixed place in our jurisprudence until it has received the approval, after mature consideration, of the highest court in the land.

2. *Effect is denied to the solemn covenant of the Trust Company that it would not hold the Southern Company for the debt of the Belt Company.*

The substance of the covenant of the Trust Company (Rec., 822), which was supported by ample consideration, is quoted *supra*.

The obvious purpose of this covenant was to put security holders to their *election*. If they accepted the benefits of the plan they thereby waived the right to hold the new company liable for any debts of the old companies. The purpose was a lawful one. No rule of public policy is violated. The Trust Company, for an exceedingly valuable consideration moving to itself, and after balancing the advantages and disadvantages, accepted the plan, determining that its interests would best be served by accepting its benefits and by waiving any claim it might have to hold the new company for the debt of the old one.

The court of appeals holds that the Trust Company may *ignore* its covenant and enforce a trust, or liability or obligation of the new company for the debts of the old company, notwithstanding its agreement that it would not do so.

3. *The decision of the circuit court of appeals leads to alarming and disastrous consequences.*

(a) An equity "of at least $475,000.00" is *created* in the property of the Belt Company where *none* existed before. The bonded indebtedness of the Belt Company was $1,000,000 (Rec., 187), which was the amount of the purchase price paid by the Southern Company at the foreclosure sale. The master found

that, at the time of the foreclosure sale in December, 1901, after the reorganization was complete, all the properties involved then being operated together in one interest and as one system, its value (Rec. 852, 853), *did not exceed the mortgage indebtedness.* Furthermore, the floating indebtedness of the Belt Company *alone* at that time was $900,000 (Rec. 838).

By what just and logical process of reasoning can it be said that the Belt Company, under these circumstances, possessed an equity which could be subjected to the payment of a judgment in the sum of $800,000 to an unsecured creditor? If the Belt Company had no equity out of which the Trust Company's claim could be satisfied, how can the Southern Company be held?

It is not, we submit, any satisfactory answer to say that $4,750,000 par value of stock of the *Southern Company* had been previously issued to old stockholders of the Belt Company. That stock, prior to the foreclosure sale of the Belt Company, represented the physical property of the Gulf Company and its allied companies, *other than the Belt Company*, and only represented the *stocks and bonds* of the Belt Company (which property was only 3 1/3 per cent of the whole reorganization), and they could not have been worth more than the Belt Company's physical property, which the master valued at $1,000,000 at the time of its foreclosure sale.

(b) What would have been the result if the rule of the *Boyd* case, providing for a "fair offer" to unsecured creditors, had been followed at the time of this reorganization, and there had been issued to the Trust Company "preferred stock on equitable terms," which we will assume to mean dollar for dollar, taking the indebtedness (if it could have been ascertained at that time) and the stock at par, which is most favorable to the Trust Company, in view of the value of the property of the Belt Company and the amount of its secured and unsecured indebtedness. The Trust Company would have received $360,000 par value (its debt without interest) of preferred stock of the Southern Company, the average market value of which, during the year 1900 was $33.75 per share, making an aggregate value of $124,000. Add all the dividends that have been paid on the preferred stock (at four per cent during the past six years only) and interest thereon, and the result to date would be approximately $225,000.

The present market value of the preferred stock is $57.50 and on that basis the value of the Trust Company's holdings with dividends and interest thereon to date would be approximately $300,000.

The effect of the decision of the court of appeals is to award the Trust Company *over* $400,000 more than it would have realized to date if it had received "preferred stock on equitable terms" as a creditor, under the ruling in the *Boyd* case, which this court has said is the measure of its equitable rights.

The difference is so enormous as to at least suggest the necessity of some further consideration of the reasoning by which the court of appeals has reached its conclusion.

If the Southern Company is to be held liable at all (which we strenuously deny) should not the court *now* prescribe equitable terms, as of the date of the reorganization, instead of enforcing a judgment for the full amount with the accumulated interest?

A judgment awarding payment in full of the Trust Company's claim and accumulated interest is, we submit, without justification, in the absence of proof as to what was the equitable interest of the Trust Company in the reorganized property and without proof of its *pro rata* share therein.

(c) The court of appeals (210 Fed., 707), reaches the conclusion that the Southern Company paid in value "at least $475,000" for the equitable interest of the stockholders of the Belt Company in its property, and that this amount is available to creditors; and it concludes, therefore, that that interest was worth more than enough to have paid the $360,000 which the Belt Company owed to the Trust Company.

But the court apparently overlooks the *conceded fact* that the reorganization committee and the Southern Company paid out $1,164,172.56 (Rec., 859-860), on account of the floating debt of the reorganized companies. There is nothing in the present record to show how much of this was on account of the indebtedness of the *Belt Company*. There is nothing to indicate that the whole of the $475,000 has not been already paid to creditors. The fact that there was a diversion to stockholders of $475,000 which belonged to creditors, furnishes no guide as to what part of that

sum belonged to this particular creditor in the absence of proof of the total debts.

4. *The rulings of the court of appeals in two respects are in conflict with rulings of circuit courts of appeal in other circuits, and also with rulings of this court.*

(a) The ruling of the court of appeals in respect to the properties of the Central Company (201 Fed. 826), is adhered to without comment in the second opinion. The properties involved were purchased with the moneys of the mortgagor companies for rights of way needed by them respectively, the naked legal title being taken in the Central Company, whose stock was held by the mortgagor companies in the proportion in which their moneys went into the properties. The equitable title to the properties was thus in the mortgagor companies. Afterwards, and while the mortgagor companies held the equitable title to the properties themselves and also the corresponding stock of the Central Company, the stock of the Central Company was pledged to the Trust Company, which was trustee in all the mortgages, as collateral for *its* indebtedness. Before this pledge of stock of the Central Company occurred, the after-acquired property clauses of the mortgages of the mortgagor companies had attached in equity to the properties, and the title thereto afterwards passed to the Southern Company as purchaser at the foreclosure sales of the properties of the mortgagor companies.

In denying the Southern Company's title to the properties of the Central Company the court of appeals is in direct conflict with the following decisions of courts of appeal of other circuits.

Guaranty Trust Company v. *Atlantic R. R. Co.*, 138 Fed., 517, Third Circuit;

New England Water Works Company v. *Farmers' Loan and Trust Company*, 136 Fed., 521, Seventh Circuit.

And the court of appeals is also in conflict with the ruling of this court in the following cases:

Wade v. *Railway Company*, 149 U. S., 327, 341;
Central Trust Company v. *Kneeland*, 138 U. S., 414;
McGourkey v. *Toledo Ry. Co.*, 146 U. S., 536, 566.

(b) The Trust Company's exceptions to the report of the master (Rec., 893), were that:

> The master, in his report should have *omitted reference to* or *recommendation concerning* the question of the liability of the Southern Company for said floating indebtedness of the Belt Company for the following reasons.

The grounds specifically assigned were that that issue was *not in the case* for various reasons, but it is nowhere stated that the issue had been decided incorrectly. The assignments of error in the court of appeals followed the foregoing exception, the *deliberate purpose* of the Trust Company in its exceptions to the master's report, and in its assignments of error in the court of appeals, being to *avoid a decision* in this proceeding upon its merits of the question of the liability of the Southern Company for the floating indebtedness of the Belt Company.

The court of appeals holds that under these circumstances it may consider and pass upon this question of liability, and it did consider and pass upon it, notwithstanding the fact that the *correctness* of the master's conclusion that the Southern Company was not liable for the floating debt of the Belt Company went unchallenged before the master and before the circuit court.

The conclusion of the court of appeals in this respect is in conflict with the following decisions of the courts of appeal of other circuits:

> *Provident Life and Trust Co.* v. *Camden Ry. Co.*, 177 Fed., 854, 859, Third Circuit;
> *City of New Orleans* v. *Fisher*, 91 Fed., 574, Fifth Circuit.

And the court of appeals is also in conflict with the following decisions of this court:

> *Burns* v. *Rosenstein*, 135 U. S., 449;
> *Coghlan* v. *South Carolina Ry. Co.*, 142 U. S., 101, 115;
> *Topliff* v. *Topliff*, 145 U. S., 156;
> *McMicken* v. *Perrin*, 18 How., 507;
> *Metsker* v. *Bonebrake*, 108 U. S., 66, 72.

The question is important and material for the reason that exceptions to the report of the master (Rec. 913) were filed by the Belt Company upon the issue of debt or no debt as between

the Trust Company and the Belt Company. These exceptions were overruled, but the Belt Company did not appeal, for the reason that the Trust Company, in its exceptions and in its appeal, did not question the correctness of the finding of the master and the decree of the lower court, to the effect that the Southern Company was *not liable* for the indebtedness of the Belt Company. It was not until after the Belt Company had *lost* its right to an appeal upon the question of the existence or amount of the indebtedness between the Belt Company and the Trust Company that the court of appeals decided that it would determine and pass upon the *correctness* of the finding of the master and decree of the lower court upon the liability issue.

5. *Grave and serious questions affecting generally the reorganization of insolvent quasi-public corporations are involved.*

In the eighth judicial circuit, where the rule of the court of appeals is controlling, there are, at the present moment, eight railway companies in the hands of receivers appointed by the Federal Court, their aggregate outstanding stock and bond issue being as follows: (Poor's Manual as to all except the fifth company):

St. Louis & San Francisco R. R. Co.	$381,765,462.31
Wabash Railroad Co.	198,481,575.89
Kansas City, Mexico & Orient Ry. Co.	49,538,000.00
Missouri, Oklahoma & Gulf Ry. Co.	17,252,463.15
Metropolitan Street Railway Company	33,684,035.44
Chicago, Rock Island & Pacific	363,334,530.00
Missouri Pacific and Iron Mountain	432,705,003.59
Missouri, Kansas & Texas	281,084,300.00
Total	$1,757,845,370.38

These properties are in process of reorganization either actually or prospectively. Their aggregate outstanding *capital stock* issue is $522,424,985.25. The enormous value thus represented by the capital stock must be *destroyed* unless stockholders participate in the reorganization of these properties. Many difficult and vital questions are left unsettled by the *Boyd* case, and their proper determination has been rendered *more difficult* by the decision of the court of appeals in this case. Rights will be sacrificed and protracted litigation will result until there can be an authoritative answer given to certain vital and fundamental questions, among which may be mentioned the following:

(a) May a security holder exchange his securities under a plan of reorganization, and having done so, may he afterwards, notwithstanding the doctrine of estoppel, election and ratification, and without making restoration, recover from the new company for the debts of the old one, for the sole reason that stockholders are given an interest in the new company?

(b) Is it competent for a security holder who accepts the plan and exchanges his old securities for new ones to enter into a valid covenant to waive the assertion of any and all other claims against the new company by reason of his dealings with the old company?

(c) If a court shall hold, in some subsequent proceeding, that the terms offered to a non-assenting creditor fell short of being "equitable," will the court prescribe and enforce terms which it finds should have been offered, or will the creditor be entitled to enforce a money judgment against the new company for the face of his claim and accumulated interest? Can the reorganization committee invoke the judgment of some court to determine what will constitute "fair terms," or must it act at its peril?

(d) If the existence of a creditor be unknown at the time, and he subsequently appears and brings suit against the new company, or if his debt is disputed at the time, but is afterwards established, will the court permit the new company to offer the creditor such equitable terms as would have constituted a "fair offer" at the time of the reorganization, or must his debt and accumulated interest be paid?

(e) May a bondholder decline to come into a reorganization in which stockholders receive any benefit, accept his distributive share of the proceeds of the foreclosure sale, credit the same upon his bond and recover the balance against the new company, realizing both principal and interest in full, thus making it impossible to induce bondholders to come into any reorganization?

(f) What rule is to govern the "issuance on equitable terms, of income bonds or preferred stock" to non-assenting creditors? Should preferred stock or income bonds at par equal the face of the creditor's debt? If not, how should the proportion or ratio of

stock or bonds to debt, as well as the relative value of securities and debt, be determined?

(g) If stockholders are assessed as a condition to participation in the plan, may creditors also be assessed in a similar manner as a condition to the issuance to them of income bonds or preferred stock? Will creditors be denied relief, as stockholders are, if they fail to pay their assessment?

(h) If in an "adversary proceeding" it is determined that the valid mortgage indebtedness of the debtor equals or exceeds the fair value of the debtor's property so that there is, in fact, no equity out of which the debt can be satisfied, will the new company, nevertheless, be required to satisfy the debt if it issues its stock in exchange for the stock of the old company?

These and other vital questions are involved, directly or indirectly, in this case, and their proper and prompt determination is of immense importance to those charged with the duty of reorganizing insolvent railway properties who, on the one hand, should not unnecessarily sacrifice the interests of stockholders, and, on the other hand, should give due consideration to the protection of the rights of creditors.

We respectfully request that this brief, as well as the briefs heretofore filed by *amici curiae*, may be considered in support of our application for *certiorari*.

III.

The plan of reorganization is binding upon the Trust Company because it actively participated in the plan and greatly benefited by it in the exchange of its own securities in the old companies for those of the Southern Company. Equity will not permit the Trust Company to retain the benefits of the plan and at the same time attack it as fraudulent. It cannot claim both under and against the plan.

The participation of the Trust Company in the reorganization of the Gulf Company and its allied companies is one of the established and conceded facts in this case, and, we respectfully submit that it constitutes the broad and controlling equity against the claim here asserted that the Southern Company is liable for the debt of the Belt Company.

As before stated, the Trust Company received $1,480,909.00 par value of the securities of the Southern Company, *under the plan of reorganization*. Of this amount $517,199.00 par value represented *stock* of the Belt Company, the Dock Company and the Gulf Company, previously owned by the Trust Company, *which would have been a total loss to the Trust Company but for the reorganization plan*. The securities received by the Trust Company in exchange for *bonds* of the old companies were undoubtedly much more valuable *by reason of the plan* (Rec., 853), than would have been the distributive shares to which the Trust Company would have been entitled under a foreclosure sale.

The Trust Company not only exchanged its own securities but it was a trustee in all the mortgages under which the Southern Company acquired title and one of the depositaries under the plan, and actively supported it in every way possible. The master sums up the situation (Rec., 869) as follows:

> The Trust Company, a depositary in the reorganization plan, co-operated with the committee and used its influence by correspondence and otherwise, to induce other bondholders and stockholders to deposit their securities with the committee. *It was well acquainted with the purpose of the reorganization scheme and with such knowledge entered into the same, depositing its own securities and exchanging them for the new Southern securities, and advising others to make like exchanges.*

It is upon this state of facts that the Trust Company, for a recovery against the Southern Company for the debt of the Belt Company, invokes the doctrine of the Boyd case, 228 U. S., 482, which holds that a reorganization plan, participated in by both stockholders and bondholders, which makes no provision for the payment of unsecured debts,

(a) Is *binding* "between the parties," and *valid* "between the parties and the public generally;"

(b) Is void in equity as against a "*non-assenting* creditor," and

(c) May "bind creditors who do not accept fair terms offered."

We contend that, tested by this rule, the Trust Company was a *consenting*, and not a *"non-assenting"* creditor, and that the reorganization plan is "binding" upon it, and that it is not in a position to make the complaint which is sought to be made here.

What are the considerations which give rise to the rule that a railroad reorganization plan participated in by both stockholders and bondholders may be "void as to *non-assenting creditors,*" and at the same time "binding *between the parties?*" The answer is found in a consideration of the nature and the legal effect of the plan. If the plan operates to transfer some portion of the property to "the subordinate interests of the old stockholders," which in equity should go to the "superior rights" of creditors, the transaction is void as to *non-assenting* creditors as a conveyance in fraud of their rights, and the property remains subject to their claims as though no conveyance had been made.

The transaction is "binding between the parties" because all who *assent* to the transfer of an interest to stockholders, which in equity belongs to creditors, are bound by their assent, and cannot complain. Stockholders cannot complain because they are the beneficiaries; and creditors who have *assented* that stockholders, and not themselves, shall be the beneficiaries have no cause for complaint.

No rule of law is more firmly established than that a transfer of property made in fraud of creditors, while void as to them, is *binding upon the parties and those in privity with them.* (14 Am. &

Eng. Enc. of Law, 273; 20 Cyc. 608; *Whittiker* v. *Whittiker*, 157 Mo., 342, 353.)

It is equally well settled that a creditor who *participates* in, or *assents* to a conveyance fraudulent as to creditors, thereby elects to affirm it, and the conveyance is *valid* as to him, and he cannot be heard to assert that the transfer was fraudulent as to him. (14 Am. & Eng. Enc. of Law, 281; 20 Cyc. 434, 435.)

In this case the reorganization plan was binding "between the parties," and the Trust Company was not only a party to the plan, but it was one of its chief beneficiaries. It was as far removed from the position of a *non-assenting creditor* as it is possible to conceive. The plan, being binding on the Trust Company, cannot be attacked by it as a fraud upon its rights.

A close analysis of the effect of the plan and the result of the Trust Company's participation in it will serve to confirm this conclusion. When the Trust Company invokes the doctrine of the Boyd case it says in substance that some part of the property of the debtor, the Belt Company, was diverted from its unsecured creditors and given to its stockholders, this being accomplished by means of the exchange of stock whereby the old stockholders of the Belt Company, holding 47,500 shares of $100.00 par value each, received an equivalent amount, face value, in common and preferred stock of the Southern Company.

Let us assume for the sake of the argument (although it is in fact denied) that, as found by the court of appeals, $475,000.00 in value of the property of the Belt Company went to its old stockholders. What is the position of the Trust Company under this assumpion? By its participation in the plan and by its signature to the agreement it *assented* that $475,000.00 should go to stockholders, including itself, which in equity should have gone to the unsecured creditors, including itself. How can it now complain that this *was* done, in the face of its consent that it *should* be done?

Moreover it not only assented to this fraudulent diversion of assets (if it was a fraud, which is not admitted), but it actually *received and retains* its share of the fruits of the unlawful transaction, in the form of stock of the Southern Company which it received in exchange for its stock of the Belt Company. It seeks

to challenge the transaction as fraudulent and in violation of its rights, and at the moment of doing so *it has the money in its pocket* which represents its share in the proceeds of the alleged fraud.

By its *participation in the plan*, the Trust Company, in substance, said to all concerned in the reorganization, including the Southern Company:

(a) We consent that $475,000.00 in value of the property of the Belt Company (using for illustration the figures of the court of appeals), which in equity should go to unsecured creditors, including ourselves, shall go to the old stockholders, also including ourselves.

(b) We consent to the fraudulent diversion of assets from ourselves and other unsecured creditors, to ourselves and other stockholders of the Belt Company, which under the plan of reorganization enriches our treasury to the extent of one and one-half million dollars par value of the stocks and bonds of the Southern Company.

By its *attitude in this litigation* the Trust Company, in strange contrast to its position as a beneficiary under the plan, says to the court and to the Southern Company, in substance:

(a) The diversion to old stockholders, including ourselves, of $475,000.00 (again using for illustration the figures of the court of appeals), which in equity belonged to the unsecured creditors, including ourselves, was a breach of trust and a conveyance in fraud of *non-assenting creditors*, such as ourselves.

(b) We have been outraged and defrauded by this diversion of trust funds, notwithstanding it was a diversion to which we assented, and by which we have profited, and we invoke the aid of a court of equity for the relief to which in good conscience we are entitled.

Can anything be conceived which more pointedly violates the broad principle of fair dealing? How can the Trust Company *approve* the plan of reorganization and the exchange of securities *sufficiently to receive and retain the benefits therefrom*, and then *disapprove* to the extent necessary to collect its debt from the

Southern Company? Shall the Trust Company be permitted to *approbate* and *reprobate* at one and the same time?

It needs only the application of familiar rules to the conceded facts in this case to demonstrate that such inconsistent and antagonistic attitudes will not be tolerated.

IV.

The application of the doctrine of "quasi-estoppel" or of estoppel by the acceptance of benefits is fatal to any right of recovery on the part of the Trust Company.

By the overwhelming weight of authority the acceptance and retention of benefits under the reorganization plan prevents the Trust Company from claiming that the plan, or anything done under it, either *at the time* of its execution or subsequently, was in fraud of its rights as a creditor. It is not material whether the rule be called "estoppel" or "quasi-estoppel" or "estoppel by acceptance of benefits" or "equitable election."

The whole doctrine is concisely stated by Prof. Bigelow, 16 Cyc., 784, as follows:

> The term "quasi-estoppel" has been applied to certain legal bars which are in some respects analogous to estoppel *in pais* and which have the same practical operation as an estoppel *in pais*, but which nevertheless differ from that form of estoppel in essential particulars. The term includes the doctrine of election, the principle which precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him, and certain forms of waiver.
>
> Where one having the right to accept or reject a transaction takes and retains *benefits* thereunder, he becomes bound by the transaction and cannot avoid its obligation or effect by taking a position inconsistent therewith. Thus it has been repeatedly held that a person by the acceptance of benefits may be *estopped* from questioning the existence, validity, and effect of a contract. So, too, under similar circumstances, one may be estopped from questioning the existence, validity, and effect of a deed, mortgage, or bond, or of proceedings under which his property has been taken for a public or quasi-public use. In order to constitute an estoppel, however, the benefit received must be direct, and must have been voluntarily re-

ceived, and with a knowledge on the part of the person receiving it of his rights.

The rule is well expressed by the Court of Appeals of New York (*Wormser* v. *Metropolitan Street Railway Company*, 184 N. Y., 83), as follows:

> Where the objection to the acts of a corporation is that they are *ultra vires*, without being either *mala prohibita* or *mala in se*, a stockholder cannot maintain an action in his own behalf based on such objection, where he himself, with knowledge of the character of the acts, *has acquired and accepted pecuniary benefits thereunder*. Whether his conduct in so doing constitutes an estoppel in the strict sense of that term, or a quasi-estoppel, as Mr. Bigelow puts it (Bigelow on Estoppel [4th Ed.], c. 19), or be denominated merely an *acquiescence* or an *election*, or the *assumption of a position inconsistent with an attack*, makes no essential difference here. The point is that the seeking and acceptance of a substantial *benefit*, which would be unavailable to the stockholders, *except as a result of the acts which he would attack as ultra vires* preclude him from assailing those acts on that ground. A litigant is not at liberty to deny the validity of a contract, which is neither prohibited by law nor evil in itself, *after he has knowingly sought and obtained pecuniary advantages, pay or compensation, under and by virtue of such contract*.

The case there under consideration involved the reorganization of a street railway company. The plaintiff brought suit to prevent the carrying out of the reorganization plan on the ground that it was *fraudulent*. It appeared that after suit was brought the plaintiff *availed himself of the plan* by subscribing to the capital stock of the new company and then sold his option or privilege to third persons for over $5,000. He made the subscription under protest, claiming it would be only to preserve his rights (90 N. Y. Supp. 716). The court, after stating the general rule above quoted, held that he had ratified the plan of reorganization and was estopped, saying:

> This doctrine applies to the present case, and is conclusive against the maintenance of this action by the plaintiff. He has sold the privilege attaching to 885 of his Metropolitan Railway Company shares to subscribe to the stock of the Metropolitan Securities Company for between $5,000 and $6,000. *His privilege would have been absolutely nonexistent, except for the plan and lease which he attacks in this suit*. He was

well aware of this, and he cannot *avail himself of the privilege* and at the same time *prosecute the suit*. The officers of a corporation who are sued by stockholders for damages due to carrying on business not authorized by its charter may defend by showing the stockholders' acquiescence in or assent to the business, express or implied. *Holmes* v. *Willard*, 125 N. Y. 75, 82, 25, N. E., 1083, 11 L. R. A., 170

As was said by the Supreme Court of Alabama in *Robinson* v. *Pebworth*, 71 Ala., 240, estoppel in a case of this character "simply means that *you shall not take the fruits of an illegal transaction and afterwards set the transaction aside as illegal.*" In holding that the plaintiff here is precluded from attacking the plan and lease in question by reason of his sale of the privileges acquired by him thereunder as a stockholder in the Metropolitan Railway Company, we do not pass upon the legality of the scheme, either to condemn or approve it; we simply decide that, even *assuming it to be as unlawful* as he alleges, *he is in no position to assail it*. This defense is available to the respondents notwithstanding the fact that the plaintiff did not sell his privileges until after the beginning of the suit. Matters which arise between the bill and plea may be pleaded in equity.

In *Post* v. *Beacon Vacuum Pump & Electrical Co.*, 84 Fed., 371, 28 C. C. A., 431, the United States circuit court of appeals in the first circuit considered the sufficiency of a bill in equity filed by stockholders of the Beacon Vacuum Pump & Electrical Company to rescind a transfer of its property to the Beacon Lamp Company; and it was held that the complainants being minority stockholders who opposed the transfer were *estopped* from maintaining a suit for rescission on the ground of *ultra vires, because they had subscribed for their proportion of the stock of the new corporation*, although under protest, and had permitted such company to conduct the business for 18 months. The court said:

It is clear that the complainants have not maintained that consistent position necessary to relieve them against an equitable estoppel. They admit that they have subscribed for their proportion of the 32,000 shares of stock in the new corporation. They do not state the date when they made the subscription. The transfer of the assets to this corporation was made in July, 1895, and the bill was not filed until the 12th day of January, 1897, so that, although at the outset they protested against the reorganization, yet their subscriptions, in the absence of any proper allegation otherwise, must be pre-

sumed to have been made at such time as justified the respondents in assuming that the lamp company was authorized, so far as the complainants were concerned, to receive the transfer of the property of the old corporation, and to commence and carry on its manufacturing business, thus involving itself in the liabilities and other complications inevitably arising therefrom. *That this raised an estoppel in equity as against a bill praying rescission is too clear to need discussion.* It is true that complainants allege that this subscription was under protest, and only to preserve their rights; but the bill does not give the court any details which would enable it to perceive that, by any possibility, the effect of the subscription, which of itself would be an accomplished fact, could be overcome by any protest or other formal reservation which might accompany it.

In *Towers* v. *African Tug Company*, (L. R. [1 Ch., 1904] 558), which was a suit by two shareholders of the defendant to compel the directors to repay to the company the amount of a dividend illegally, though honestly, declared and paid, the decision of the Court of Appeal is accurately stated in the head note as follows:

> A shareholder in a limited company who has, with full notice or knowledge of the facts, *himself received part of the proceeds of an ultra vires act* committed by the directors—such as payment of a dividend out of capital—and who still *retains the money*, cannot, either individually or as suing on behalf of the general body of shareholders, maintain an action against those directors.

Lord Justice Vaughn-Williams, in the course of his opinion, says:

> If it be the fact, as I think it is, that these plaintiffs knew of all that had been done, *received their dividends* with knowledge of all the facts, and then brought this action *with the money still in their pockets*, ought they to be allowed to bring this action, which, as I have pointed out, is to my mind, an action such as they can bring in consequence of their personal interest in the matter? I think not. I think that an action cannot be brought by an individual shareholder complaining of an act which is *ultra vires if he himself has in his pocket at the time he brings the action some of the proceeds of that very ultra vires act.* Nor in my opinion, does it alter matters that he represents himself as suing on behalf of himself and others. I think that the reason which requires us to say he ought not to bring such an action equally requires us to say that he

ought not to be the peg upon which such an action is to be hung for the benefit of others.

Lord Justice Cozens-Hardy said:

> It seems to me to follow that a shareholder, *having the money in his pocket which he knows is wrongfully there*, ought not to be allowed to complain.

In the case of *International Contracting Co.* v. *Lamont* (cited as *United States* v. *Lamont*) 155 U. S., 303, 15 Sup. Ct., 97, 39 L. Ed., 160, a contractor's bid for dredging for the government was accepted by the engineers in charge, but the matter was held up by the Secretary of War. The work was readvertised, and pending this bid the contractor commenced a mandamus suit to compel the Secretary of War to sign a contract with him under his first bid. Before this suit was disposed of, the bids under the second advertisement were opened, and it was found that the same contractor was again the lowest bidder, at a price much lower than his first bid. Being again the lowest bidder, he obtained a contract for the work, and the mandamus proceeding was dismissed. The contractor then demanded of the Secretary of War that he should sign the contract awarding him the work under the first bid, which was refused. Thereupon the contractor again commenced a mandamus to compel the execution of a contract under the first bid. The court, after holding that mandamus would not lie in such a case, proceeded as follows:

> But, even if the writ of mandamus could be so perverted as to make it serve the purposes of an ordinary suit, the relator *is in no position to avail himself of such relief*. He entered of his own accord into the second contract, and has acted under it and *has taken advantages which resulted from his action under it*, having received the compensation which was to be paid under its terms. Having done all this, he is *estopped* from denying the *validity* of the contract. *Oregonian Railway* v. *Oregon Railway*, 10 Sawy., 464, 22 Fed., 245. Nor does the fact that in making his second contract the relator protested that he had rights under the first better his position. If he had any such rights and desired to maintain them he should have abstained from putting himself in a position where he voluntarily took advantage of the second opportunity to secure the work. A party cannot avoid the legal consequences of his acts by protesting at the time he does them that he does not intend to subject himself to such consequences.

In *North Chicago St. R. Co.* v. *Chicago Union Traction Co.*, 150 Fed., 612, 626, it is said:

> It seems, also, that the rule of inconsistent positions or quasi-estoppel applies as between the North and West and Union Companies. This subject is considered by Prof Bigelow in his recent article on estoppel in 16 Cyc. 782. It seems from an examination of many of the cases cited by him that, if a person avails himself of the benefit of a transaction, he cannot be heard to deny its validity. The same rule is held in *International Contracting Co.* v. *Lamont*, 155 U. S., 303, 15 Sup. Ct., 97, 39 L. Ed., 160 (cited as *United States* v. *Lamont*), and *Wormser* v. *Metropolitan St. R. Co.*, 184 N. Y., 83, 90, 76 N. E., 1036, Id., 98 App. Div., 29, 90 N. Y. Supp., 714. See also, *Brazee* v. *Schofield*, 124 U. S., 495, 8 Sup. Ct., 604, 31 L. Ed., 484, above referred to.

In *Farmers Bank* v. *Groves*, 12 Howard 51, the bank sought to avoid an agreement upon the ground of fraud on the part of one of the parties, the court saying:

> Assuming that there was (fraud by Collier in the transaction), the bank could not *avail themselves of it* for the purpose of avoiding their part of the arrangement and at the same time *hold on* to the mortgage as a security for Collier's indebtedness. There has been no offer to *surrender* the mortgage and vacate the agreement. On the contrary, it is claimed by them as an available security, held and relied on against Collier.

In *Compton* v. *Jessup*, 167 U. S., 1, it was held:

> Persons who procure or acquiesce in a decree of foreclosure reserving the rights of a lien claimant, and who participate in the *benefits of an early sale* thus secured, cannot *object* to the enforcement of the lien in the manner pointed out by the decree.

In *U. S.* v. *Hodson*, 10 Wall. 395, the court held:

> If a bond is liable to the objection taken in this case and the parties are dissatisfied, the objection should be made when the bond is presented for execution. If executed under constraint, the constraint will destroy it. But where it is voluntarily entered into and the principal *enjoyed the benefits* which it is intended to secure and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense.

In *Daniels* v. *Tearney*, 12 Otto, 415, the estoppel was applied in respect of a stay bond executed under a void act of the legislature. It was held:

> When a bond is voluntarily entered into and the principal *enjoys the benefits* it was intended to secure, and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense.

The court, referring to a similar case, said:

> In disposing of the case the court well said, "Upon what principal of exalted equity shall a man be permitted to *receive a valuable consideration* through a statute, procured by his own consent or subsequently sanctioned by him, or from which he derived an interest and consideration, and then keep the consideration and *repudiate* the statute?
>
> Not to apply the principle of estoppel to the bond in this case would, it seems to us, involve a mockery in judicial administration and a violation of the plainest principles of reason and justice.

In *Winslow* v. *Railroad*, 208 U. S., 59, it was held:

> By *accepting* the sum awarded in condemnation proceedings as the value of that portion of their lands actually taken, the owners are *estopped* to insist that the petition was not maintainable.

The circuit court of appeals of the eighth circuit, in the case of *Loy* v. *Alston*, 172 Fed., 90, held:

> One who has *recovered damages* on the ground that he has been induced by fraud to make himself liable to pay a promissory note is *estopped* from successfully invoking the maxim, "He who comes into equity must come with clean hands" to defeat the subsequent collection of the note in equity.

The court of appeals of the ninth circuit, in the case of *Shackleton* v. *Baggaley*, 170 Fed., 57, 59, says:

> How can the appellants enforce a mechanic's lien for work and services performed under a contract and under a notice of lien which was filed *under the contract*, and at the same time allege that the *contract was void?* They deny that it is the purpose of the suit to rescind the contract. They admit that they entered into an agreement to waive a mechanic's

lien. The evident purpose of alleging that the contract is void is to obviate the effect of that agreement. The argument is that the *fraud* practiced by the appellees, no matter when it was discovered, absolves the appellants from their obligation to file no lien, but leaves the contract *intact* in other respects. The proposition cannot be sustained. If the allegations of fraud are true, the appellants were thereby defrauded in the sum of $1,250. For this they had their remedy by an action for damages. They cannot, in a suit brought in equity to foreclose a mechanic's lien under a contract and a notice of lien *affirming the contract,* allege that, by reason of *fraud* discovered, we know not when, the contract or any part of it was rendered *null and void. Long* v. *Caffrey,* 93 Pa., 526; *Brezenski* v. *Neeves,* 93 Wis., 567, 67 N. W., 1125; *Pressed Brick Co.* v. *Barr,* 76 Mo. App., 380; *Pinning* v. *Skipper,* 71 Md., 347, 18 Atl., 659.

In *United States* v. *Morse,* 218 U. S. 493, it is held:

The validity of a decree for the sale of an infant's real estate for purposes of reinvestment, and of the order appointing a trustee to make the sale, and of the bond reciting the due appointment of such trustee, executed to secure the faithful discharge by him of his duties, is not open to question by one who voluntarily became a surety upon the bond, *thereby enabling his principal to obtain the proceeds of the sale.*

In *State* v. *Bank,* 95 N. W., 1116 (90 Minn., 150), it is held:

The Germania Bank, organized under the state law, having a capital of $400,000, par value $100 per share, became insolvent, and made an assignment for the benefit of its creditors. Pending such proceedings, the bank was reorganized by the judgment of the district court under the provisions of chapter 89, p. 109, Laws 1897; the capital being reduced to $200,000. As a part of the reorganization scheme, those stockholders who paid up an assessment of $75 per share received stock to the amount paid, at par, in the reorganized bank, the other 25 per cent of stock held by them being canceled. All stock upon which the assessment was not paid was forfeited and canceled.

Held, an original depositor, who, in consideration of his claim against the insolvent bank, received, as part payment, time certificates of deposit, and a certificate of stock in the bank as reorganized, and who, without objection, permitted the bank to reopen and transact business for the period of two years, is *estopped,* against a receiver of insolvency of the re-

organized bank, from repudiating the transaction upon the ground that the same was invalid or irregular.

In *Seminole Securities Co.* v. *Southern Life Ins. Co.*, 182 Fed., 85, it is held:

> A stockholder of a corporation brought a suit in equity on behalf of himself and all other stockholders to have the affairs of the corporation wound up, alleging that fraudulent mismanagement by its officers had rendered it insolvent. Receivers were appointed who brought a suit in another state for the cancellation of a contract made by such officers on behalf of the corporation, which suit was compromised and settled with the approval of the court; the receivers being paid a considerable sum. Thereupon notice was sent to all stockholders to come in and prove their holdings, and from the proceeds of the settlement of the receivers' suit a dividend of 20 per cent was paid to all stockholders. *Held*, that stockholders, who came in pursuant to such notice, proved their claims, and received their dividends, were *estopped* to afterward maintain suits to rescind their contracts of subscription for fraud and claim as creditors of the corporation the amounts paid for the stock or *to attack the validity of the settlement in the proceeds of which they had shared.*

In *Gaddes* v. *Pawtucket Institution for Savings*, 80 Atl., 415 (33 R. I. 177), it is said, p. 420:

> Where a stranger to the title, or one having only a limited interest in a tract of land, conveys the property to another by deed or mortgage, *and the owner receives the benefit of any part of the proceeds, knowing the facts, he is estopped to deny that the deed or mortgage conveys a good title.* And likewise, if the owner, though ignorant of the facts when he receives the proceeds, *afterwards* learns the truth, *his retention of the proceeds* thereafter *estops him* from disputing the validity and effect of the conveyance. *Brewster* v. *Baker*, 16 Barb. (N. Y.), 613, 618; *Kahn* v. *Peter*, 104 Ala., 523, 16 South., 524; *Ansonia* v. *Cooper*, 66 Conn., 184, 33 Atl., 905; 16 Cyc., 787-791. See, also, *Brewer* v. *Nash*, 16 R. I. 458, 17 Atl., 857, 27 Am. St. Rep., 749; *Robinson* v. *Bailey*, 19 R. I., 464, 36 Atl., 1126; *East Greenwich Inst. for Savings* v. *Kenyon*, 20 R. I., 110, 37 Atl., 632.

In the case of *Sage* v. *Finney*, 135 S. W., 996 (156 Mo. App. 30), Finney had paid the dues on a policy of insurance on an agreement that he, Finney, should receive $1,000 of the insurance, the

total of the policy being $2,000; when the policy became payable, Finney's payments, with interest at 6%, had amounted to about $1800; Finney, in accordance with a stipulation, was paid $1,000 and brought suit for the balance of the amount which had been paid by him, claiming that an agreement, by the terms of which one who did not have an insurable interest in the life of another should receive all or any precise amount of the insurance beyond such premiums and interest as the beneficiary may have invested therein, was invalid; Finney therefore claimed that he was equitably entitled to reimbursement for the total amount advanced by him. The court held that Finney could not claim the benefits of the contract to the extent of accepting the $1,000, relying on it as the basis of his suit, and *at the same time attack the contract as invalid*. The court says:

> Though it be that an invalid contract affords no grounds for an estoppel unless it has been fully executed by the parties, it is true as well that *one may not both claim under and against the same deed*. One may not appropriate to himself rights such as the equities asserted here which accrue alone *from the contract*, and at the same time *deny* the efficacy of the undertaking with respect to the rights of an adversary. If a person predicate his cause, as does Finney here, on a right accruing to him under a contract, he is estopped from denying such portions thereof as are against his interest, and this is true, though such portion be invalid, for he must take it *cum onere* or not at all. He is estopped from assuming such *inconsistent positions*. For an application of the principle where one has accepted the benefits of an invalid contract, see *Morris* v. *Hall*, 41 Ala., 510, 536, 537. In *Robinson* v. *Pebworth*, 71 Ala., 240, 247, the doctrine is stated to be that, *though the transaction is illegal, one may not claim both under and against the same title*. So, where one accepts the benefits of an invalid mortgage, it is determined that he is estopped to thereafter assert its invalidity. *Horton* v. *Davis*, 26 N. Y., 495. The identical principle finds application too, and is illustrated, in numerous instances where it appears persons have accepted benefits under invalid judicial proceedings, for it is said they may not thus *accept the benefits* of the judgment and *dispute its validity*. One must not be inconsistent in the positions he assumes, and, if he *claims the benefits* of such invalid proceedings, he is thereafter estopped to *assert their invalidity*. *Hoffmire* v. *Holcomb*, 17 Kan., 378; *Babbitt* v. *Corby*, 13 Kan., 612; *Pursley* v. *Hays*, 17 Iowa, 310; *Lee* v. *Gardiner*, 26 Miss., 521. For applications of the general principle to one

claiming both under and against the same deed, see *Jacobs* v. *Miller*, 50 Mich., 119, 15 N. W., 42; *Swanson* v. *Tarkington*, 7 Heisk. (Tenn.) 612, 614, 615. To the same effect, see Bigelow on Estoppel, (5th Ed.) 684; Herman on Estoppel, 1040, 1039. See, also *Board Supervisors* v. *Allen*, 99 N. Y., 532, 2 N. E., 459. As above stated, Finney has already received $1,000 of the fund; for, upon the Supreme Council paying the $2,000, $1,000 thereof was awarded to him under a stipulation, and plaintiff made no claim whatever thereto. Besides accepting benefits to that extent under the contract after suit was instituted, plaintiff predicates his entire right with respect to the greater portion of the $1,000 now in court *on equities accruing out of the contract*, and, so doing, he is *estopped to assert the invalidity of the limitation* therein prescribed fixing his interest at $1,000.

V.

The doctrine of equitable election is a complete bar to a recovery by the Trust Company.

We are not invoking a technical estoppel *in pais*, but the broad equitable rule, whether called estoppel or equitable election, or whether comprehended within the maxim that "he who seeks equity must do equity," which effectively prohibits a party to litigation from claiming *under* and *against* the same instrument—a rule thus stated by this court in *Peters* v. *Bain*, 133 U. S., 670, which was a case involving a voluntary assignment alleged to be in fraud of creditors:

> The doctrine of election rests upon the principle that he who seeks equity must do it, and means, as the term is ordinarily used, that where two inconsistent or alternative rights or claims are presented to the choice of a party, by a person who manifests the clear intention that he should not enjoy both, then he must *accept* or *reject* one or the other; ***and so, in other words, that one cannot take a benefit under an instrument and then repudiate it.***

In the recent case of *Merchants National Bank* v. *Sexton*, 228 U. S., 634, this court holds that one claiming the benefit of a contract will not be permitted to *approbate* and *reprobate* at the same time. It is there held:

> Creditors of a bankrupt seeking to enforce a contract between the bankrupt and its debtor, and the lien arising there-

> from, so far as the avails of certain collateral are concerned, may not *enforce* rights given under one provision of such contract and *repudiate* another provision where the two are under the contract indissolubly associated, the one being the complement of the other.

The doctrine of equitable election has given rise to rules which are peculiarly applicable to the case at bar, and which, when applied to its peculiar facts, result in the inevitable conclusion that no recovery in favor of the Trust Company can be permitted to stand. It is thus defined in 11 Am. and Eng. Encyc. of Law (2nd Ed.), page 59:

> Election in equity is a choice which a party is compelled to make between the acceptance of a benefit under an instrument and the retention of some property, already his own, which is attempted to be disposed of in favor of a third party by virtue of the same instrument. More comprehensively election is defined as the choosing between two rights by a person who derives one of them under an instrument in which a clear intention appears that he should not enjoy both.
>
> Thus, if by one clause of a will an estate is given to A, and by another clause of the same instrument an estate of which A is the owner is given to B, A must adopt one of two courses. On the one hand, he may elect to take under the will, in which event he takes the property devised to him by the testator, and B will take the property of A of which the will attempts to dispose; on the other hand, he may elect to take against the will, that is, to retain his own property, but if he does so he must make compensation to B out of the estate which is devised to himself, to the extent of the benefit which B would have derived from A's property under the terms of the will.

Although originally applicable to deeds and wills, the doctrine of equitable election has been extended to "contracts for a valuable consideration resting in articles" and to "contracts for value completed and executed by a conveyance and assignment," as is apparent from the following quotation from *Codrington* v. *Lindsay*, 8 L. R. Ch. App., 578, where it is said:

> But I conceive the true rule for the decision of this case to be that which is so well stated by Lord *Redesdale* in *Birmingham* v. *Kirwan*: "The general rule is, that a person cannot accept and reject the same instrument, and this is the foundation of the law of election, on which courts of equity

particularly have grounded a variety of decisions in cases both of deeds and of wills, though principally in cases of wills, because deeds being generally matter of contract, the contract is not to be interpreted otherwise than as the consideration which is expressed requires." The application of this rule is illustrated as to cases of voluntary deeds by *Llewellyn* v. *Mackworth* and *Anderson* v. *Abbott;* as to cases of contracts for valuable consideration resting in articles, by *Savill* v. *Savill* and *Brown* v. *Brown;* and as to contracts for value completely executed by conveyance and assignment, by *Bigland* v. *Huddleston, Chetwynd* v. *Fleetwood, Green* v. *Green, Bacon* v. *Cosby, Mosley* v. *Ward,* and *Willoughby* v. *Middleton.* In two of those cases—*Green* v. *Green* and *Willoughby* v. *Middleton*—the husband's father was a party to an ante-nuptial settlement, and part of the consideration proceeded from him. Another, *Chetwynd* v. *Fleetwood,* was a case of settlement for value, not between husband and wife at all, nor in consideration of marriage. In all of them the party who, claiming by a title not bound by the deeds, thereby withdrew part of the consideration for which the deeds were intended to be made, was held obliged to give up, by way of compensation, what he or she was entitled to under the deeds, or *ex converso* (as in *Chetwynd* v. *Fleetwood*) was held bound, if taking the benefit of the deeds, to adopt and make good the contract forming the consideration for those benefits, as to matters by which, without such election, he would not have been bound.

The conclusion of the court is thus expressed by Lord Selborne:

I conceive it to be the true result of the principle of election and of the authorities generally, that no such person can claim any benefit from that contract, when *sui juris,* except upon the footing of adopting and ratifying it as far as it does not already bind him, and that all equitable interests which such person takes under it stand in equity as a security for his adoption and performance in those respects of the agreement between the actual parties, as it is expressed in the deed.

Lord Justice James said:

It seems to me, therefore, that the only safe rule to guide the court in dealing with marriage settlements is to consider everything that is brought or expressed to be brought into settlement by anybody from any source as one aggregate trust fund. So considering it, it seems to me very easy and very right to read all the trusts thus: Out of the aggregate prop-

> erty settled, A is to have so much and no more, B is to have so much and no more, the issue are to have such interests and no more or other. Then, if by paramount title A or B or any of the issue takes out of the aggregate something other than the share or interest expressed to be given, he or she must take that in full satisfaction of the expressed share or interest. This would seem to me to give a very simple rule to which every one of the cases can be referred (except *Campbell* v. *Ingilby*, which I more than doubt the propriety of), and which is sufficient for the solution of the problem in this case. And it is really not adding anything to say 'and no more.' And it is far safer to adopt without qualification the rule that a person cannot claim under and against the same instrument than in a particular case to divide the instrument into parts, and to find that in legal construction the one part is not made clearly dependent on the other part or parts.

The rule is thus stated in the recent case of *Pitman* v. *Ewing*, in the House of Lords (Appeal Cases 1911, page 217):

> It is the law of Scotland, as of England, that no person can accept and reject the same instrument. Where, therefore, a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions *and renouncing every right inconsistent with them.*

The doctrine of election which prevents the assertion of repugnant rights is but an extension of the law of equitable estoppel. (*Fox* v. *Windes*, 127 Mo., 502, 512; 1 Herman on Estoppel and *Res Judicata*, page 11.)

Let us assume for the purposes of the application of the doctrine of equitable election that the property of the Belt Company was, as the court of appeals held, a trust fund for distribution, first to lien creditors, secondly to unsecured creditors, and thirdly to stockholders. The operation of the plan was in substance to give to the Trust Company, *as a stockholder*, a portion of the trust estate upon condition that the Trust Company, *as a creditor*, would surrender to the stockholders that portion of the trust estate to which it, as a creditor, was entitled. If the plan of reorganization had been a will or a deed or contract under the terms of which the Trust Company, as a stockholder, would have received a benefit upon condition that it surrender to the stockholders its rights as

a creditor, then undoubtedly the doctrine of equitable election would have applied. The analogy between the two cases is complete. When the Trust Company elected to accept the benefits under the plan accruing to it as a stockholder upon the condition that it surrender to the stockholders the interest which as a creditor it would be entitled to, it thereby conclusively and forever elected to accept the benefits thus accruing to it as stockholder and it thereby also conclusively renounced its right to claim any benefits which might otherwise have accrued to it in its capacity as creditor.

The Trust Company is held in law to have *renounced* and *relinquished* every right *inconsistent* with the provisions of the reorganization plan and agreement. (2 Herman on Estoppel and *Res Judicata*, Sec. 1028, page 1156; *Fox* v. *Windes*, 127 Mo., 512; *Stone* v. *Cook*, 179 Mo., 534, 545.)

The Trust Company undoubtedly with due deliberation weighed its chances and opportunities in claiming under the plan of reorganization and accepting the benefits which it created for it at the expense of creditors, and thereby waived the assertion of its rights as a creditor independent of the plan and in antagonism to it. By the plan it was able to surrender $517,199.00 par value of stock of the old companies and to receive in lieu thereof the securities of the Southern Company which but for the plan would have been a total loss. In addition to this it received from the Southern Company nearly $1,000,000 par value of its stocks and bonds, the value of which were greatly enhanced by the plan. Doubtless it reached a wise conclusion in accepting the plan, but whether it did so or not, it then and there made its final election so that now, *with the money in its treasury* which arose from the surrender of rights to which it and other creditors were entitled, it cannot at this late day claim that the plan, either in its structure or in its execution, operated to deprive it of its rights as a creditor, or resulted in the imposition upon the Southern Company of a liability for the debts of the Belt Company.

Other illustrations of the operation of the doctrine of equitable election are given below.

In *Kavanaugh et al.* v. *Shacklett's Adm'r. et al.*, 69 S. E. 335, (111 Va., 423) it was held:

> A widow filed a bill in equity seeking sale of the property of her deceased husband and commutation of dower in place

of the dower interest given to her by the will, and upon this bill process as to all parties was sufficiently made. A cross-bill was filed as to which the decree recited that the adult defendants appeared in court by counsel and waived their right of process, and that the cross-bill was taken for confessed as to them. The record showed that those defendants, either personally or by counsel, participated in the dower proceedings from commencement to conclusion, that they signed an agreement of sale under the terms of court, consented to the widow's commutation of dower out of the proceeds, accepted for themselves their own full shares of the proceeds, and that during 10 years they had not questioned the conclusiveness of the proceedings. *Held*, that, even if counsel were not entitled, in the absence of special authority, to appear and waive process on the cross-bill, those parties were estopped by their subsequent conduct from taking advantage of any irregularities in the dower proceedings.

In *Savings Bank of Richmand* v. *Todd et al.*, 77 S. E. Rep., 446, (114 Va., 708) it was held:

Where a husband conveyed certain property for the benefit of his wife, in consideration of her release of dower in the residue of his estate, which was thereupon conveyed for the benefit of creditors, a creditor with knowledge, or means of knowledge, of the circumstances of the transaction, who participated in the sale of the husband's remaining lands free from the wife's dower, and received his share of the proceeds of the sale, making it impossible to place the wife in *statu quo*, could not thereafter maintain a bill to set aside the settlement to the wife as excessive.

The court said:

But the dismissal of the bill might also have been placed upon the equitable doctrine of election. A court of equity will not entertain a bill by a creditor to set aside a settlement on the wife as excessive where it appears that such creditor with knowledge, or means of knowledge, of the facts and circumstances attending the transaction goes into a suit to sell the lands of the husband free from the wife's contingent right of dower, and receives his just share of the proceeds of sale. His conduct has made it impossible to place the wife in *statu quo*, and he will be held to his election. *Kavanaugh* v. *Shacklett's Adm'r.*, 111 Va., 423, 427, 69 S. E., 335; *Peters* v. *Bain*, 133 U. S., 670, 695, 10 Sup. Ct., 354, 33 L. Ed., 696; 16 Cyc., 784.

VI.

The doctrine of equitable estoppel is also a complete bar to a recovery by the Trust Company.

The rule has been applied to participation by security holders in railroad reorganizations.

In *Farmers Trust Company* v. *Railway Company,* 120 Fed., 1006, the intervener was *both creditor and stockholder* in a company passing through reorganization. He exchanged his stock under the reorganization plan for the securities of the new company and then sought to hold the new company for a judgment against the old company. The court disposed of the contention briefly, and it is believed logically and concisely, by the use of the following language:

> The intervener here cannot be permitted *to blow hot and cold,* and having entered into the reorganization, he must be held to be bound by his action.

In *Matthews* v. *Murchison,* 15 Fed., 691, it was held:

> A bondholder of a former organization has no standing in chancery to dissolve the present organization of a railroad company, for which his agent had voted his bonds, it was alleged, in excess of authority, and to enforce a different plan, where it appears that he had known of what his agent was doing, but had not dissented, *and that he had accepted his share of the bonds of the new organization,* had offered to buy and sell, and had brought suit for them. *Such conduct ratified the act; or, inducing others to believe he had acquiesced in the organization, worked estoppel.*

In *Symmes* v. *Union Trust Co. of N. Y.,* 60 Fed., 830, it is stated in the syllabus:

> Stockholders who have had full knowledge of a plan of reorganization, and have given it their approval, and subscribed to its provisions in respect of part of the stock owned by them, *are estopped,* after the reorganization is complete, to maintain a suit, as owners of the stock on which they did not subscribe, to overthrow the same on the ground of fraud and conspiracy.

In *Vose* v. *Cowdrey,* 49 N. Y., 336, 343, the court said:

> He cannot be permitted to assert that the agreement of October 3, 1861, was fraudulent as to creditors and that he

is entitled to pursue the property on that ground, for he admits in his complaint that he was a party to and one of the trustees under that agreement, and that in pursuance of it he surrendered a large amount of bonds of the La Crosse & Milwaukee Railroad Company, thus entitling himself to the benefits of the agreement. *Being such party, he also necessarily assented to the issue of the new stock to the old stockholders.*

Other cases in which the same principle is recognized are given below.

In *Reagan* v. *First National Bank*, 157 Ind., 623, the facts were as follows:

Krag-Reynolds Co., while grossly insolvent, wished to make a mortgage upon its property to secure the claims of some of its creditors. The company had issued preferred stock to the amount of $50,000, of which two persons owned $25,000 each. The company was advised by its attorneys that under the laws of Indiana a corporation could not mortgage its assets without the consent of the holders of a majority of its preferred stock. A plan was adopted which contemplated the taking over, by the company, of this stock, issuing its notes therefor to the holders. One of the stockholders refused to accept a note for his stock unless the notes were secured under the contemplated mortgage. Accordingly, the company issued two notes, in the sum of $25,000 each, which were turned over to these two stockholders for their stock, and then executed the mortgage to a trustee, in which these two notes were secured upon the same basis as the claims of all other creditors which were listed therein. The facts upon which this suit was brought are very complicated, and there is no need of setting them out here. What is pertinent is the discussion of the court in its opinion of the status of all such creditors as assented to this mortgage and agreed to the preferences sought to be given them therein. The court held that the transaction was valid as between the parties to it, and that none of the creditors who agreed to it would be permitted to attack it upon the ground of fraud in giving these two stockholders preference over other creditors, instead of postponing their claim till the satisfaction of all the floating debts, as was provided by the statutes. The trustee under the mortgage was named Perkins. The court says, p. 585:

This mortgage is the source from which Perkins, as trustee, and the beneficiaries therein, claim and derive all of their rights and powers; and the directions given or stipulated in the instrument must be followed, so far as these parties are concerned, until set aside according to law, * *

It follows, therefore, that the court cannot direct Perkins, as trustee, to pay a debt of the mortgagor, or give it preference in violation of the terms and conditions of the mortgage, and the rights of the beneficiaries thereunder. As was said by the court *In re. Lewis, Supra,* 81 N. Y. 421: 'To hold the contrary would be to put the court in the place of the assignor, and assert a right to modify the terms of the assignment after it had taken effect, against the will of its maker and to the injury of those protected by it.' * * * *Where a debtor voluntarily assigns or transfers his property for security of his creditors, if the latter choose to accept the benefits of such assignment, they must abide by the provision and conditions imposed. They must accept its provisions as an entirety. They will not be permitted to accept it in part and repudiate it in part.*

In Bishop on Insolvent Debtors (Sec. 359) the author states the rule as follows: If the assignee is directed to pay certain persons upon certain specified amounts, either with priorities or proportionately, the assignee who accepts the trust, and all the creditors who come in and share under it, are bound by the provisions of the deed, and cannot dispute it. This proposition, which rests upon the doctrine of election, that he who accepts a benefit under an instrument cannot dispute the validity of its provisions, is abundantly sustained by the authorities * * * If the claims so provided for are fictitious or fraudulent, or such as for any reason ought not to be paid, that will be a ground for setting the assignment aside as fraudulent and void, but it will not furnish a ground upon which a creditor claiming under the assignment as a valid instrument can dispute the claim of another creditor provided for in the same manner in the same instrument.

Jessup v. *Hulse,* 21 N. Y. 168, was an action to set aside a conveyance of real estate upon the alleged ground of a fraudulent conveyance by one Hulse to Gott in trust for the benefit of creditors. Considering the effect of the provisions of the assignment, the court said:

The assignor, being the absolute owner of the property, and in no manner obliged to assign, may annex such

conditions and qualifications to the transfer as he pleases. If he annex an improper condition, the court must pronounce the assignment itself void. It cannot hold the transfer good, disregard the condition, because that would be to take the property from the assignor against his will. He having consented to part with his title only upon certain conditions, the transfer and the conditions must stand or fall together. *If, therefore, the court upholds the assignment, it must, of necessity, protect and enforce the terms and conditions upon which it is made. It cannot substitute its own discretion for that with which the assignor has in express terms invested the assignee.*

In *Bank* v. *Heckman*, 148 Ind., 490, 47 N. E., 953, the bank had accepted a mortgage executed to it by the Indiana Potter Company, the mortgage stipulating that it was subject to the provisions of a prior mortgage executed to Rosine Heckman and others to secure certain indebtedness. The question was as to the effect of the provisions of the prior mortgage upon this mortgage to the bank. The court held that the bank could not attack the prior mortgage as fraudulent, unless it abandoned its rights secured by the second mortgage. The court said:

> But the appellant bank was not seeking to set aside its own mortgage for fraud or anything else. It was seeking, so long as the first paragraph of its cross-complaint remained undismissed, to enforce its mortgage by foreclosing it. But that is not all it was seeking to do. It was seeking to enlarge the terms and conditions of its own mortgage contract by proving fraud against the first mortgage. *Fraud may furnish means to avoid one contract, but not to enlarge the terms of another, which would amount to the court making a new contract for the parties which they never made for themselves.* * * * It will be seen that the cases involving the question now under consideration do not rest upon the doctrine of estoppel in a strictly legal or technical sense, though some of the authorities referred to say that the second mortgagee is estopped to deny the validity of the first mortgage. But it is apparent that they all rest upon the principle that *a party seeking to enforce a contract in his favor must be bound and limited in his relief thereunder to the terms and stipulations of the contract.*

In *Jacobs* v. *Lumber Co.*, (Tex.), 15 S. W. 236, the syllabus of this case is as follows:

> Where certain persons buy property from an insolvent

> debtor, and pay him therefor, with the advice and consent of one of his creditors, the latter cannot claim, as against subsequent purchasers from the first purchasers, that the first purchase was fraudulent as to him, though the debtor intended without the knowledge of the purchasers not to use the proceeds from the sale in paying his debts.

In *Mitchell* v. *Mitchell*, 212 Pa. 62, it appeared that while indebted to his brother in the sum of $100, Mitchell made a voluntary conveyance of a piece of land to his wife, with the knowledge and consent of his creditor brother. Having recovered judgment against his brother on the claim, the latter condemned and sold the land as that of the debtor brother. Having received a deed from the sheriff to the land, he brought this suit to clear his title. The court made short work of the case:

> The principle *volenti non fit injuria* is a good defense to what would otherwise be actual fraud (*Zuver* v. *Clark*, 104 Pa. 222); and *a fortiori* it is good against merely constructive fraud. The jury have found that the plaintiff knew and assented to the conveyance by the defendant to the latter's wife. That ended the plaintiff's case.

Olliver v. *King*, 8 De G., M. & G., 110, is a leading English case upon the subject. It was decided in 1856. With the advice and concurrence of his brother, a father executed a voluntary conveyance to his sons. He was largely in debt to the brother at the time. In his will he made this brother and the sons trustees. For seven years after the death of the testator the brother acted under the will, never making any effort to impeach the deed. Upon his death, his representatives attempted to have this deed declared void as fraudulent against creditors. The court held that his representatives could not so impeach it, since he would have been estopped to do so himself. Lord Justice Knight Bruce and Lord Justice Turner delivered concurring opinions. We quote from that of Lord Turner, 114 Rev. R. 54:

> It is, however, said that James had a right to make a settlement of the property, subject to his debts. No doubt he had; and if he had made a settlement without John's concurrence, John might unquestionably have impeached it. But the question to be considered is, not whether James had a right to make the settlement, but what is the effect of John's concurrence in the settlement. Suppose John had executed the deed for the purpose of testifying his consent to the trans-

fer of the leasehold property by that deed, could he then have impeached the deed? I apprehend that he clearly could not; and if he could not, there is nothing which he has done falling short of the execution of that deed, except that there is not his pen put to the paper by which that property was transferred.

I think therefore that, as he could not have impeached the deed if he had actually executed it, neither could he have impeached it under the circumstances of concurrence on his part, which are in evidence in this case. If he could not have impeached it, of course his executors cannot. Even if he could have done so I am not satisfied that his executors could. * * * I give no opinion, however, on that point, further than to say I am not satisfied upon it.

My opinion is based upon this: I consider the true effect of this transaction to be, that John by his conduct agreed to this alienation of the assets, and must be considered to have consented to take satisfaction out of the property which remained.

In *Perisho* v. *Perisho*, 71 Ill. App. 222, it was held:

Where parties enter into an arrangement for the conveyance of real estate of one of them, for the purpose of hindering and delaying creditors, at the same time reserving a secret trust for the benefit of the grantor, according to well settled principle, the law will leave them in the position they make for themselves, and will not set the conveyance aside at the request of a creditor who was a party to the arrangement.

In *Rapalee* v. *Stewart*, 27 N. Y. 310, a creditor had entered into an agreement with the assignees in regard to the management of the assigned property, which agreement had been partly performed. The creditor later attempted to question the validity of the assignment.

The court, per Marvin, J., said:

The statute declares an assignment, made with intent to hinder, delay or defraud creditors, void, as to the persons so hindered, delayed or defrauded. Why is such an assignment void? It is because the effect of it is to delay or defeat creditors in the collection of their debts, and when made with such intent it is void. But if the creditors consent to the assignment, how can it be said that they are defrauded? One cannot predicate fraud of facts having his assent upon a full knowledge of them. It is true, in this

> case, the plaintiff was not consulted, at the time the assignment was made, but on being advised of its provisions he acquiesced in them, and entered into an agreement with other creditors, showing an assent to and ratification of the assignment; by which agreement the parties to it consented and agreed that certain other persons, one of them being the assignor debtor, should be joined with the assignees, and should convert and dispose of the property, and pay the creditors in the order of preference mentioned in the assignment. Here is not only a waiver of any right to attack the assignment for fraud, but a ratification of it by coming in and taking action, by agreement with other creditors, designed to prevent a sacrifice of the assigned property, by a disposal of it in the ordinary way by the assignees; and by the agreement authorizing further delays, compromises, etc. *It would be a fraud upon all of the other creditors to this agreement if the plaintiff should be permitted to maintain this action, and by setting aside the assignment gain a preference above them and secure the payment of his entire debt. I think that the plaintiff was concluded by his acts in reference to the assignment from attacking it on the ground of fraud as to creditors.*

In *Canton, etc.*, v. *Rolling Mill Co.*, 155 Fed., 321, the Rolling Mill Co., upon the advice and solicitation of one Sturgiss, conveyed all its assets to the Morgantown Tin Plate Co., a new corporation organized for the purpose of taking over the other. Sturgiss participated in the transaction as a stockholder in the new corporation. The Canton Roll and Machine Co., a creditor of the first corporation, brought a creditor's bill to set aside the conveyance as fraudulent and likewise to cancel the bonds issued by the new company, which sought to create liens upon the corporate assets. Later Sturgiss filed a petition in the cause, seeking to be made a party, alleging among other things, that since the commencement of the suit he had purchased the claim of the original complainant along with others, and asking that a first lien be declared for this original demand of the plaintiff on the funds arising from the sale of the property, which was in the hands of a trustee in bankruptcy. In deciding that he did not have any claim for the relief asked, the court said, p. 330:

> It seems to me clear that this controversy no longer exists between the original plaintiff in interest and the defendants; that its claim has either been paid by or assigned to petitioner George C. Sturgiss; that the allegations of the

original bill charging the transfer of the property of the Rolling Mill Company of America to the Morgantown Tin Plate Company to be fraudulent must fall and drop out of the case, for it is conceded that the organization of the Tin Plate Company and the transfer to it from the Rolling Mill Company of its property and assets was not only known and consented to by Sturgiss, but that all the papers and proceedings necessary to accomplish this result were either prepared or supervised by him as attorney for the parties interested in the two companies; and it is further admitted that he, by transfer from Humbert on the organization of the Tin Plate Company, became a stockholder of the Tin Plate Company; that he consented to be one of its original incorporators, but was not finally called upon to be such. Under such condition of affairs, it being uncontroverted that he owns the plaintiff's debt, either by assignment or payment, and that this creditor alone has made these charges of fraud, it would be a matter of supererogation to cite authorities to the effect that he is estopped from maintaining himself or having his assignee maintain them for his benefit.

In *Thompson* v. *Cohen*, 127 Mo., 215, the syllabi are as follows:

1. A deed, although in fraud of the grantor's creditors, is not a nullity; it is valid as between the parties and can be avoided only by creditors and subsequent purchasers.

2. A creditor who knowingly acquiesces in a sale and accepts benefits arising from it cannot afterwards assail it on the ground that it was made in fraud of creditors.

Judge Gantt, in the leading opinion, says, p. 227:

It has been generally held, both in England and the various states in this Union, that if a deed is made which a creditor may avoid if he sees fit, yet if he knowingly acquiesces in a sale and accepts the benefits arising from it, he cannot repudiate it.

Gutzweiler v. *Lackman*, 23 Mo., 168.

To a similar effect are:

Smith v. *Espey*, 9 N. J. Eq., 160;
Richards v. *White*, 7 Minn., 345;
Fiske v. *Carr*, 20 Me., 301.

VII.

It is respectfully submitted that no sufficient answer is given in the first opinion of the court of appeals to our contention that the Trust Company, by its conduct, is estopped to claim that the Southern Company is liable for the debt of the Belt Company.

The court of appeals, in its first opinion in this case, held that our contention that the Trust Company was estopped by its conduct to maintain its claim against the Southern Company should be denied upon the ground that "the Trust Company may well have supposed that its claim * * would be paid by the committee." The full text or what is said on this subject, 201 Fed. 823, is as follows:

> The contention of the Southern Company that the Trust Company is estopped from enforcing and collecting this claim based on the unsecured debt of the Belt Company to it, because, for the bonds and stock of the Belt Company, which it owned, it received bonds and stock of the Southern Company under the plan of reorganization, is untenable. The collection of this claim is not an avoidance; it is an enforcement and execution of the scheme of reorganization and of the trust in favor of the creditors of the Belt Company, which that scheme created. The published plan of reorganization was plenary notice under the law to the Southern Company, and to all who became interested under that plan, that purchasers of property of the companies foreclosed pursuant to it took that property in trust for the unsecured creditors of those companies. That plan expressly set apart $475,000 to be applied to the payment of the floating debts of those companies, vested in the committee of reorganization discretionary power to pay such of those floating debts as it saw fit to discharge, and that it actually expended $1,164,172.56 in paying such debts. The committee had full authority to pay this claim of the Trust Company. *The Trust Company may well have supposed that its claim, as well as the claims of other creditors of those foreclosed companies, which were paid to the amount of over a million dollars, would be paid by the committee.* The Trust Company never represented that it would not, but persistently asserted that it would enforce its demand, and the collection of it from the Southern Company is neither barred by estoppel nor inconsistent with the previous position and action of the Trust Company.

There is, we submit, absolutely nothing in the plan nor in the record which can be pointed to as justifying the assumption, indulged in by the court, that the Trust Company may well have supposed that its claim would be paid by the committee.

On the contrary, the record affirmatively shows that no such presumption can be indulged. In fact, the court of appeals, in its second opinion, abandons the position taken in its first opinion upon this subject, and places its denial of our claim of estoppel upon *an entirely independent ground,* which is presently to be considered.

(a) The claim of the Trust Company that it was represented to it that its debt from the Belt Company would be paid, was expressly made in the Trust Company's answer; and the master, in his report, expressly found *against* this claim. The allegation of the Trust Company in this respect (Rec. 200) is as follows:

> Said reorganization committee when working out said plan of reorganization expressly *represented* to this respondent that, in consideration of the debt due and owing from said Belt Company to this respondent, said committee would provide for the payment of all debts and obligations due to this respondent from all of said corporations proposed to be included in said reorganization plan, and particularly said Belt Railroad Company, and expressly *promised* this respondent that said committee would pay or cause to be paid all debts of every character due to this respondent from several corporations proposed to be consolidated, and particularly from said Belt Railroad Company; and that the said new and reorganized company would pay such debts.

The master, in his report, after a review of all the evidence upon the subject finds that there was *neither representation nor promise.* He says (Rec. 862):

> The alleged liability of the Southern Company arising on account of any *promise or agreement* by either the committee or the Southern Company to pay the Belt debt to the Trust Company is not satisfactorily supported by the proofs in the record.

The master further finds (Rec. 866), that there is no proof in the records of the committee or elsewhere of any authority having been given by the committee to Max Pam, or to any other person,

By which he or such person would be warranted in making a *promise or representation* which would be binding on the committee, even if any such promise or representation had been attempted to be made and for sufficient consideration.

The master, after an examination of the minutes of the committee (Rec. 864), reaches the following conclusion:

It will be seen that at no time did the committee, either directly or indirectly ever agree to pay in whole or in part any of the indebtedness of the Belt Company to the Trust Company.

(b) The Trust Company was not justified in *supposing* that its claim would be paid in view of the testimony of its general counsel, and later its president, T. L. Chadbourne (Rec. 862-864) who testified that one of the reorganization committee agreed to pay the claim of the Trust Company on *June* 16, 1900, and that it was not paid at that time as agreed. Notwithstanding the nonpayment of the debt on June 16, 1900, the Trust Company nevertheless, on *July* 26, 1900, exchanged its securities with full knowledge thereof.

(c) Nor had the Trust Company any reason to suppose that its debt would be paid out of the $475,000.00 which was a tentative appropriation of the proceeds of securities to be issued by the new company for the purpose of satisfying claims and liens against *all* the companies, so as to make the new mortgage a first lien on all of the properties brought into the reorganization.

The purpose and effect of the provision in respect to the proposed appropriation of $475,000.00 for paying floating debts is thus stated by the master (Rec. 854):

As heretofore stated, the reorganization agreement gave the committee plenary power to alter or modify the terms as might seem necessary or desirable, the intention being to include the Belt terminals, as heretofore stated, if sufficient of its securities were deposited with the committee, otherwise, arrangements for other terminals at Kansas City were to be made. The provision in the plan, as to using $475,000.00 for paying floating debts of the constituent companies, was, perhaps, more in the nature of a *detail* in the general plan, so as to advise the depositing security holders of the *probable disposition of the moneys*, to be realized from the securities to be issued by the new company, as there is nothing in the

plan, or in the agreement indicating the amount of the floating debts to be paid, or their nature *and certainly nothing as to the Belt indebtedness to the Trust Company*. The provision in the plan relating to certain securities, aggregating $3,000,000, and reserved in the treasury for future requirements, might properly be considered as another such detail in the plan.

And the following, (Rec. 860).

> The testimony of Shipley, Smith, Petitt, Pam, Harrity, Sielcken and Hecksher, members of the reorganization committee, and found in Vol. 57 of the record, is to the effect that the $475,000.00 appropriated, as above stated, for the payment of floating debts, was a lump sum set aside by the committee to make provision for the payment and discharge of such obligations as the committee might find necessary to discharge in order to relieve the properties to be included in the Southern mortgage, from any *liens*, claimed thereon or from any interference as a matter of business policy, and that said $475,000.00 was simply an *estimate or reservation* to cover such charges, and further, that at no time did the committee, in making such estimate contemplate or include therein the indebtedness of the Belt Company to the Trust Company; *but the contracting parties to the reorganization plan and agreement, made an express provision, intending to exclude, and excluding, the Trust Company or any other creditor of the constituent companies from enforcing against the new company to be formed, any right of action which such creditors might have had against the old companies.*

The fact that the estimate of $475,000 for the payment of liens and claims against the property, as well as the estimates contained in the plan, for the payment of car trust certificates, first mortgage coupons and receivers' certificates, were all largely exceeded, is set forth in the master's report (Rec. 859, 860) which is quoted in the statement. The purpose of all the payments made on floating debt account, as the Trust Company must have known, was to make the mortgage of the Southern Company an absolute first lien. Not only was the Trust Company's claim not of this character, but it, as a stockholder and bondholder, received, undoubtedly, the benefit of the payments made. The master says (Rec. 860):

In other words, the Trust Company, presumably, received its proportionate benefit from this large expenditure in payment of what are called the floating debts, but which in reality consists of all kinds of items, which the Committee deemed necessary to take care of, so as to secure absolutely the first mortgage lien on the properties transferred to the Southern Company.

(d) There is yet another reason why it is not possible that the Trust Company was justified in supposing that its debt would be paid from the proposed appropriation of $475,000.00 for floating debts, which applied to *all* of the companies involved in the reorganization, of which the Belt Company, measured by its relative bonded indebtedness, was but three and one-third per cent. The floating debt of the Belt Company *alone* was approximately $900,000 (R. 755). While the floating debt of the other companies, including the Gulf Company, involved in the reorganization does not appear, yet it may be assumed that it was considerable, but, whether large or small, how was the Trust Company warranted in assuming that its debt would be paid, when there was but a proposed appropriation of $475,000 to pay the floating debts of *all* the companies, and the floating debt of the Belt Company alone was $900,000?

It will not do to say that the Trust Company might well have supposed that its debt would be paid from some other source than the $475,000 provision, for the reason that all the bonds and all the stocks to be issued were accounted for under the terms of the plan, and no funds would be available for that purpose unless estimated expenditures for other purposes were correspondingly decreased.

(e) A well established rule of law forbids that the Trust Company shall be permitted to relieve itself of the effect of its act by "supposing," even if it did so, that its debt would be paid. A "supposition" entertained by it, whether or not communicated to the committee or to the Southern Company, could have no greater operation or effect than a *formal protest*, and the authorities are uniform to the effect that where a person's conduct is such as to operate an estoppel, the estoppel will be applied *regardless of the fact that he may protest and insist that it shall not have that effect*. This court says in *United States* v. *Lamont*, 155 U. S., 303:

> A party cannot avoid the legal consequences of his acts by protesting at the time he does them that he does not intend to subject himself to such consequences.

In *Wormser* v. *Metropolitan Street Railway Company*, 76 N. E., 1036, a participant in the reorganization plan subscribed to the stock of the new company, and afterwards sold his privilege, protesting "that the exercise of the privilege was without prejudice to his asserted rights with respect to the subject matter of this present suit," (90 N. Y. Supp., 716). But the court disposed of his protest with this statement, "but this cannot avail him."

So also in *Post* v. *Electrical Company*, 84 Fed., 371, the complainants alleged that their subscription to the stock of the new company was under protest and "only to preserve their rights," but this was held to be unavailing.

(f) The provision of the plan which made a tentative appropriation of $475,000 for the payment of floating debts of all the companies was not a contract for the benefit of the Trust Company, as a creditor, upon which it was entitled to maintain an action. The purpose and intention of this provision was to benefit the security holders and not to benefit the unsecured creditors of the constituent companies. That unsecured creditors may have been incidentally benefited does not change the rule or extend the contract to strangers not in privity with it. This court, in *German Alliance Insurance Company* v. *Water Company*, 226 U. S., 220, upholds the rule for which we are contending, using the following language:

> Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement to which he is not a party, he must, at least, show that it was intended for his direct benefit. For, as said by this court, speaking of the right of bondholders to sue a third party who had made an agreement with an obligor to discharge the bonds, they "may have an indirect interest in the performance of the undertakings. * * * But that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names."

The same rule is followed in the following cases:

St. Louis v. *Contracting Co.*, 202 Mo., 451;
Brattie Manufacturing Co. v. *Clark*, 208 Mo., 89;

Howsman v. *Water Company,* 119 Mo., 304;
Metropolitan Trust Company v. *Topeka Water Co.,* 132 Fed., 702;
Allen Manufacturing Co. v. *Shreveport Waterworks Co.,* 37 So., 980;
Second National Bank v. *Grand Lodge,* 98 U. S., 123;
Keller v. *Ashford,* 133 U. S., 610;
Sayward v. *Dexter,* 72 Fed., 758;
American Bank v. *Railroad Co.,* 76 Fed., 130;
Moyer v. *Railroad Co.,* 132 Ind., 88;
Freeman v. *Pennsylvania Co.,* 173 Pa. St., 274;
McIlvaine v. *Lumber Co.,* 54 S. E., 473;
Armour v. *Construction Co.,* 78 Pac., 1106.

The Trust Company must have known that as a creditor it was not entitled to maintain any action upon the floating debt provision, and, therefore, there was no legal justification for it to suppose that its debt would be paid.

VIII.

We respectfully submit that no sufficient answer is given in the second opinion of the court of appeals to our contention that the Trust Company, by its conduct, is estopped to claim that the Southern Company is liable for the debt of the Belt Company.

In the second opinion of the court of appeals it is held that the Trust Company is not estopped by its conduct, and the reason assigned is that the case is not brought within the narrow limits of a technical estoppel *in pais,* notwithstanding the fact that we do not now claim, and never have claimed, that this restricted form of estoppel is controlling in this case. It has at all times been insisted by the Southern Company that the estoppel, which is a complete bar to the assertion of the claim of the Trust Company, is that which arises from the acceptance and retention of benefits under the reorganization plan, and from the election which the Trust Company made between inconsistent positions.

Biglow on Estoppel, (6th Ed.) p. 732;
16 Cyc. p. 784.

The opinion does not disclose what views were entertained by the court of appeals upon the vital and controlling question,

further than the conclusion reached by it upon the subject of a technical estoppel *in pais* as follows, (210 Fed. 718):

> But counsel argue that the Trust Company is equitably estopped from maintaining its claim by the fact that it was one of the depositories under the reorganization agreement, that it persuaded others to sign it, and that on July 26, 1900, it exchanged its $76,972 par value of stock in the Belt Company and the stocks and bonds which it held in the Gulf Company and the other reorganized companies for $1,480,909 par value of stock of the Southern Company. Let us see: the indispensable elements of an "estoppel *in pais*" are: (1) intentional or reckless misrepresentation of a known and material fact inconsistent with the subsequent claim of him who makes the misrepresentation: (2) ignorance of the truth and absence of equal means of knowledge of it by the party who claims the estoppel; (3) action by the latter induced by the misrepresentation; and (4) injury to the latter if the truth is permitted to be proved. Biglow on Estoppel (4th Ed.) p. 679; *Illinois Trust & Sav. Bank* v. *City of Arkansas City*, 76 Fed. 271, 293, 22 C. C. A. 171, 193, 34 L. R. A. 518; *Farmers' & Merchants' Bank* v. *Farwell*, 58 Fed. 633, 638, 639, 7 C. C. A. 391, 396, 397; *New York Life Ins. Co.* v. *McMaster*, 87 Fed. 63, 66, 67, 30 C. C. A. 532, 535, 536. The estoppel here probably lacks all, and it certainly lacks at least three, of these essential elements: (1) the requisite misrepresentation of any material fact which the Trust Company knew; (2) ignorance or absence of equal means of knowledge of that fact by the Southern Company or its stockholders and bondholders, and (3) injury to them if the truth is permitted to be proved.

Then follows the reasons assigned by the court in support of its position that there was no misrepresentation by the Trust Company, that there were equal means of knowledge on the part of the Southern Company, and that no injury would result by granting to the Trust Company the equitable relief demanded by it. It is not deemed essential to follow the reasons of the court further than to point out that one conclusion of fact upon which they are based arises from a misapprehension. The court says:

> The Trust Company presented its claim against the Belt Company to one of the committee and was told before it made its exchange that the indebtedness of the Belt Company was denied, but was under investigation, and that when that in-

> vestigation was completed he would take up the claim and see if anything could be done about its settlement, *and there the matter rested until after the exchange of stock was made.* * * * * Neither the committee nor the Southern Company ever declared before the Trust Company exchanged its stock and bonds that they would not settle or pay it if the Belt Company really owed it.

It appears from the report of the master (Rec. 862) that the general counsel, and at one time president of the Trust Company, who was the witness chiefly relied upon by it, testified that Max Pam, one of the reorganization committee, promised to pay the debt of the Belt Company on June 16, 1900. The master also found (Rec. 866), that there was no proof anywhere in the record of any authority having been given by the committee to Max Pam, or any other person.

> By which he, or such person, would be warranted in making a *promise or representation* which would be binding on the committee, even if such promise or representation had been attempted to be made and for a sufficient consideration.

It was *after* the non-payment of the debt, on June 16, 1900, that the Trust Company, *on July* 26, 1900, exchanged its securities under the plan of the reorganization. It must be taken as true, therefore, not only that *no member* of the reorganization committee had authority to make a binding representation, but upon the Trust Company's own theory that a representation was made that the debt would be paid on June 16, 1900, it, with full knowledge that the payment had *not* been made, nevertheless accepted the plan and exchanged its securities under it. It is respectfully submitted, therefore, that the reasons assigned by the court of appeals were based on a misconception of the record.

Unquestionably, to constitute an estoppel, such as is insisted upon in this case, an intentional or reckless misrepresetation of a known and material fact is *not* one of the "indispensable elements;" nor is ignorance of the truth or absence of equal means or knowledge of it by the party who claims the estoppel, likewise an "indispensable element." The text books and decisions, alike, concur in their support of this statement.

In *Hector* v. *Mann*, 225 Mo., 228, coparceners were brought into court in a partition suit, by order of publication, and af-

terwards accepted their respective shares of the proceeds of the sales made in the proceeding. It is held that they were estopped from claiming that the partition sale was invalid. The important distinction betwen an estoppel *in pais* and an estoppel by acceptance and retention of benefit—which we respectfully submit was overlooked by the court of appeals—is there forcefully pointed out. The court said:

> But is argued that in order to operate as an estoppel the purchaser should have *known and relied upon* the receipt of the purchase money and changed his situation to his disadvantage because of such reliance. I cannot agree such argument is sound. There are estoppel and estoppels, and some forms of them are so defined by law-writers and jurists as to make one element in the estoppel the knowledge and reliance of one party upon the acts and conduct of the other—for instance, estoppel *in pais*, arising from misrepresentation by word, act, conduct or silence. But there are other forms of estoppel in which knowledge of the fact upon the part of the person invoking the estoppel, and reliance upon the fact and a change of situation based upon that reliance, *is not an element*. It may be that "estoppel," speaking with precision, is the wrong designation and that in attempting to classify and give names the doctrine we are about to invoke is improperly classified as "estoppel" and that it does not come under that head, but springs from election, ratification, affirmance, acquiescence, acceptance of benefits or what not. It is classed, however, by law-writers under the head of "quasi-estoppel." (Bigelow on Estoppel (5 Ed.), p. 693; 16 Cyc., p. 787 *et seq.*)
>
> Says Bigelow: Many of the cases upon this subject it will be noticed, are simply cases of ratification or acquiescence; and it is a questionable use of terms, as we have seen, to apply the word 'estoppel' to them. A few more cases will serve to enforce this observation. Thus, if heirs of age join in a deed of quitclaim with a trustee of the ancestor's real estate, to complete title made by a previous deed executed by the trustee, it is said that they will thereafter be 'estopped' from contesting the validity of that earlier deed. So if a man assent with knowledge of the facts to the appropriation by an officer of the law of moneys arising from a judicial sale, he will be estopped thereafter from objecting.
>
> The same careful writer says (p. 684), under the head of "Quasi-Estoppel," "Election," and a subhead, "Inconsistent Positions:" "Thus, a party actively affirming a transaction such as a contract or a purchase, by receiving and retaining

money upon it, is estopped thereafter to deny the force of any of its express or implied terms or conditions." He suggests there is no great objection to the use of the term "estoppel" in such cases if used as a synonym with "bar" or "preclusion" (p. 694).

Under the subheads of "Acceptance of Benefits" and "Quasi-Estoppel" (16 Cyc., *supra*), it is said: "Where one having the right to accept or reject a transaction takes and retains benefits thereunder, he becomes bound by the transaction and cannot avoid its obligation or effect by taking a position inconsistent therewith." But the custom is to include the doctrine just announced under the head of "estoppel" and so the case learning terms it. If it were to be held that one invoking the doctrine should know the fact of acceptance of the proceeds of a judicial sale and in reliance upon that acceptance, change his condition, the doctrine would have little application in the practical administration of justice. It is not the rule for purchasers at judicial sales to interest themselves in the distribution of the amount bid, in the first instance nose out the disposition of such funds and act on the strength of knowledge so obtained. It is sufficient that when their title is assailed they are able to show by way of defense that the assailant elected to affirm the transaction by accepting the fruits of the sale. A long line of cases in Missouri sustains that doctrine on grounds of elevated morals. In no case we can find, breaking on the exact point, was any stress laid upon the fact that the party invoking this particular form of estoppel need know at the outset of the act of affirmance or change his position on the strength of it in order to make it effective as a defense. In some of those cases other forms of estoppel were present and the discussion is broad enough to cover them, but in the precise form up for consideration the rule is as stated above.

The form of estoppel by the acceptance and retention of benefit, for which we are contending, as distinguished from a technical estoppel *in pais*, is illustrated in *Utermehle* v. *Norment*, 197 U. S., 40, when this court said:

> As to what is the law relating to a party taking the benefit of a provision in his favor under a will, there is really no foundation to dispute the proposition that he thereby is precluded from at the same time attacking the validity of the very instrument under which he received the benefit.

In *Hyde* v. *Baldwin*, 17 Pick. 303, 308, it was held that one who accepted the beneficial interest under a will was

thereby barred from setting up any claim which would defeat the full operation of the will. *Drake* v. *Wild,* 70 Vermont, 52, holds the same doctrine. In that case a party was held to be estopped from asserting her title to a trust fund disposed of by the will, because she had accepted the provisions of the will in her own favor. In *Branson* v. *Watkins,* 96 Georgia, 54, it was held that one who took an estate under a will was thereby estopped from at the same time denying its validity as a will, or from questioning the jurisdiction of the court admitting it to probate, or the regularity of the probate proceedings. In *Smith* v. *Smith,* 14 Gray, 532, it was held that the acceptance of a devise estops the devisee to set up a title in opposition to the will, at law as well as in equity. In *Fry* v. *Morrison,* 159 Illinois, 244, it was held that one who took a beneficial interest under a will was thereby estopped to set up any right or claim of his own, though otherwise well founded, which would bar or defeat the effort of any part of the will. And in *Madison* v. *Larmon,* 170 Illinois, 65, 82, it was again held that one who takes under a will cannot contest it as an heir at law of the devised property. So, in *Fisher* v. *Boyce,* 81 Maryland, 46, 53, the court said: "It is a maxim in a court of equity not to permit the same person to hold under and against a will. * * * It is equally appropriate to the jurisdiction and practice of courts of law. If the appellees claim under the will of their father, they must give it effect as far as they can, and they will then be estopped from denying its validity and genuineness. *Waters' Appeal,* 35 Pa. St. 523; *Thrower* v. *Wood,* 53 Georgia, 458."

In *Humes Construction Company* v. *Casualty Co.,* 32 R. I. 246, which was an action on a policy of employer's liability insurance, it was held that the Casualty Company, by taking charge of the defense of the suit brought by the employe, estopped itself to deny liability under the policy. It is pointed out that, however necessary a misrepresentation of fact may be as the basis of an estoppel *in pais,* it is not an "indispensable element" in the form of estoppel, which we contend is a complete bar to the assertion of the Trust Company's claim in this case. The court said:

> We are of the opinion, however, that, in exact legal terminology, the defendant by its conduct should be said to have estopped itself to deny liability under the policy rather than to have waived any right under the policy. Whether the action of the defendant be termed a "waiver," "estoppel," "quasi-estoppel," or "an election ripening unto an equitable estoppel," its liability is based upon the broad equitable prin-

ciple, which courts of law will recognize, that a person, with full knowledge of the facts, shall not be permitted to act in a manner inconsistent with his former position or conduct to the injury of another. This doctrine has been frequently applied in cases relating to employers' liability insurance.

The defendant's counsel has argued that the doctrine of estoppel cannot be applied in this case, because there does not appear by the allegations of the count to have been any *misrepresentation* or concealment of material facts on the part of the defendant, nor does it appear that the facts were not equally as well within the knowledge of the plaintiff as of the defendant. *These objections overlook the distinction between quasi-estoppel and estoppel by misrepresentation.* The term "quasi estoppel" has been applied to certain legal bars which are in some respects analogous to estoppel *in pais*, and which have the same practical operation as an estoppel *in pais*, but which nevertheless differ from that form of estoppel in essential particulars. The term includes the doctrine of election, the principle which precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him, and certain forms of waiver. 13 Cyc. 784.

In *Tozer* v. *Guarantee Corp.*, 94 Minn. 478, it is said:

No doubt appellant acted in good faith; but bad faith is not always necessary to estoppel, and it does not always follow that no estoppel will arise when the party to whom the representation is made has knowledge as to the truth of all the facts. Appellant comes within the rule that a person is precluded from taking, merely because his interests may change, a position inconsistent with one previously assumed by him, and to the prejudice of a third person. 1 Ency. Law, subd. 6, p. 46. We think the position of appellant in this case is analogous to that of a party who has taken advantage of an unconstitutional law to stay execution against him by putting up a bond. In such case it has been held that he would not be permitted to question its validity thereafter, notwithstanding that the law under which he was proceeding was afterwards declared unconstitutional. *Davis* v. *Wakelee*, 156 U. S., 680, 15 Sup. Ct. 555, 39 L. Ed. 578. In that case the following general statement was made: "It may be laid down as a general proposition that where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acqui-

esced in the position formerly taken by him." So, in this case, simply because it may be for its interest, appellant will not be permitted to change its position to the prejudice of the party who acquiesced in its line of conduct. By its own election appellant put the question of indemnity at rest.

In *Gaddes* v. *Pawtucket Institution*, 33 R. I. 177, it is said:

> Where a stranger to the title, or one having only a limited interest in a tract of land, conveys the property to another by deed or mortgage, and the owner receives the benefit of any part of the proceeds, knowing the facts, he is estopped to deny that the deed or mortgage conveys a good title. And likewise, if the owner, though *ignorant* of the facts when he receives the proceeds, *afterwards learns the truth*, his retention of the proceeds thereafter estops him from disputing the validity and effect of the conveyance. *Brewster* v. *Baker*, 16 Barb. (N. Y.) 613, 618; *Kahn* v. *Peter*, 104 Ala. 523, 16 South. 524; *Ansonia* v. *Cooper*, 66 Conn., 184, 33 Atl. 905; 16 Cyc., 787-791. See, also, *Brewer* v. *Nash*, 16 R. I., 458, 17 Atl., 857, 27 Am. St. Rep. 749; *Robinson* v *Bailey*, 19 R. I., 464, 36 Atl. 1126; *East Greenwich Inst. for Savings* v. *Kenyon*, 20 R. I., 110, 37 Atl. 632.

In *Field* v. *Doyon*, 64 Wis. 560, it is held if the mortgagee of personal property, with full knowledge that the same has been sold by the mortgagor for its full value, accepts the money realized from said sale and credits the amount on the mortgage debt, he is estopped from thereafter asserting any right to such property under the mortgage. The court said:

> The fact that the sale was made without his knowledge at the time does not change the relations of the parties when he admits that he was immediately informed of the sale and accepted the money received from the purchaser. He is estopped from asserting his title in either case. Bigelow on Estoppel (3rd Edition) 579, says: 'In like manner, if one *without actually inducing* another to act in a particular way assent to the thing done and seek to derive a benefit from it, he cannot, in case of disappointment, repudiate the validity of the act assented to.'

In *Grand Rapids Railway Co.* v. *Osborn*, 193 U. S. 17, it is held purchasers of a railroad not having any right to demand to be incorporated under the laws of a State, but voluntarily accepting the privileges and benefits of an incorporation law, are bound

by the provisions of existing laws regulating rates of fare and are, as well as the corporation formed, estopped from repudiating the burdens attached by the statute to the privilege of becoming an incorporation.

In *Chard* v. *Warren*, 122 N. C. 75, it is held that creditors who claim under a deed of trust and file their claims to share in the proceeds of sale cannot be heard to impeach its provisions. The court said, page 85:

> But beyond this, how can the creditor appellants who claim under this deed be heard to impeach it? They have filed their claims before the commissioners and have proved them. The security for their debts depends upon the provisions of the deed from Warren to Chard, and one who claims a right under a deed cannot be heard to impeach its provisions. *Fort* v. *Allen*, 110 N. C., 183. In Bigelow on Estoppel, 683, it is said: 'Upon a principle similar to that applied to persons taking under wills, beneficiaries under a trust are estopped by claiming under it to attack any of its provisions.'

In *Greeley* v. *Savings Bank*, 103 Mo., 212, it is held that where a creditor accepts a dividend at the hands of the receiver he will be estopped to deny the validity of his appointment. The court said, page 222:

> The exceptor having accepted the dividends made from time to time from the hands of the receiver, and having thus recognized the validity of his appointment during all that time, cannot now change front and deny the validity of that appointment. He is clearly estopped from so doing. Bigelow on Estoppel (5th Edition) 687.

In *St. Louis* v. *Davidson*, 102 Mo., 149, it appeared that the City had contracted the services of prisoners in its workhouse to a private person and that the contract was *ultra vires*, being neither authorized nor prohibited by the City charter, but that it was not illegal. It was held that the City was entitled to recover for the work actually done by the prisoners and not paid for and that the other party, after having derived benefits under the contract, was estopped from denying its validity. The court said:

> But upon a yet broader ground the defense (of *ultra vires*) set up in the answers cannot be maintained; the contract was not prohibited by law. The principal in that contract

has derived benefits under it; he cannot retain those benefits and repudiate the source from which they spring by denying the validity of the contract in which they originated. In short, *he is estopped to grasp the benefits of that contract with one eager hand, while thrusting aside its burdens with the other.*

The principle here asserted is one promotive of fair dealing which is the basis of estoppels and it is good law, as exemplified by many adjudications.

The court also quotes with approval the following from Bigelow on Estoppel, 5th Edition, 685:

Though a contract be in fact wholly invalid when executed, still (supposing it not to be prohibited by law as relating to some illegal transaction), if it be acted upon afterwards by the parties to it as valid, they will be estopped thereafter to allege its invalidity.

In *Robinson* v. *Pebworth*, 71 Ala., 240, the court said, page 247:

Estoppel in such cases is a reasonable doctrine, and simply means that *you shall not take the fruits of an illegal transaction and afterwards set aside the transaction as illegal.* In other words, that you shall not be heard to claim both *under* and *against* the same title.

We are invoking the rule—which is much broader than the rule of a technical estoppel *in pais*—that the acceptance and retention of benefits under a will, contract, plan of reorganization, or what not, operates as a complete estoppel or bar against any action or proceeding which does not recognize and give effect in its entirety to the transaction from which the benefits have been derived. Whatever name may be given to this rule, it is one firmly established in our jurisprudence. It is not dependent upon (a) the existence of a misrepresentation, (b), ignorance of the truth, or (c) action induced by the misrepresentation, or (d) injury if the truth is permitted to be proved.

The court of appeals, we respectfully submit, unduly and unwarrantedly narrowed all consideration of the broad question of estoppel to a technical estoppel *in pais*, and wholly ignored the broad principle that one may not accept and retain the benefits of a transaction and afterwards, with the fruits of the scheme still in his pockets, denounce the transaction as illegal, or *ultra vires*, or fraudulent, and base a cause of action thereupon.

IX.

The application to the facts in this case of the familiar rules that he who seeks equity must do equity, and must come into court with clean hands, is fatal to the contention of the Trust Company, even if it be assumed (as it is not) that the reorganization plan amounted to a fraudulent conveyance to stockholders of assets to which general creditors had a right to resort for the satisfaction of their claims.

It would be most repugnant to these equitable maxims, if the Trust Company were allowed to enforce its claim against the Southern Company, on the theory of the Boyd case, and yet retain in its treasury the securities which it received through the very transaction which, it is alleged, the Boyd case condemns as unlawful.

If the transaction was a fraud, the Trust Company participated in it to such an extent that it is entitled to no relief whatsoever under the plan, for the reason that it does not come into court with clean hands. It cannot make out a case of fraud in the diversion of assets from the reach of creditors of the Belt Company, without showing its own participation therein (*Harriman* v. *Northern Securities Company*, 197 U. S. 244, 295). It has no standing in a court of equity to cry fraud until it has purged itself of its own participation in the very scheme or device which it now seeks to assail. A few of the many cases which apply to the rule are cited below.

In *Randall* v. *Howard*, 2 Black, 585, the complainants and defendant had made an agreement to defeat the claims of third persons to certain lands which the complainants had mortgaged to the defendant to secure a debt, so as to cloak the ownership by means of a foreclosure sale at which the defendant should purchase and hold the nominal title. After obtaining the title, he fraudulently dispossessed the complainants and asserted the right of ownership in himself. The prayer of the bill was to restrain the defendant from disposing of the land, and to restore it, or so much of it as remained after paying the debt, to complainants.

The court, Mr. Justice Davis delivering the opinion, held that the agreement was a fraudulent one to defeat a claim set up by other parties for a portion of the mortgaged lands by covering up, through the aid of the court, the real ownership of the property, and said, p. 588:

> A fraudulent agreement was entered into to defeat, as is charged, a fraud attempted against the complainants. * * * A court of equity will not intervene to give relief to either party from the consequences of such an agreement. The maxim, *in pari delicto potior est conditio defendentis,* must prevail. It is against the policy of the law to enable either party in controversies between themselves, to enforce an agreement in fraud of the law, or which was made to injure another. Citing 1 Story's Equity, Sec. 298; *Bolt* v. *Rogers,* 3 Paige, 154; *Wilson* v. *Watts,* 9 Gill, 356.

In *Wheeler* v. *Sage,* 1 Wall., 518, an agreement was entered into between complainants and defendant to secure the title to valuable real estate of an insolvent debtor, at the expense and sacrifice of his creditors, which the defendant violated, and in conjunction with another person, secured an interest in the property to himself. The bill prayed that he be declared a trustee for the complainants, and be required to convey to them that portion of the land to which, under the agreement, they were entitled.

The court, Mr. Justice Davis delivering the opinion, said, p 529:

> Generally when a party obtains an advantage by fraud he is to be regarded as the trustee of the party defrauded and compelled to account. But if a party seeks relief in equity he must be able to show that on his part there has been honesty and fair dealing. If he has been engaged in an illegal business and been cheated equity will not help him. * * *
>
> A proceeding like this is against good conscience and good morals, and cannot receive the sanction of a court of equity. The principle is too plain to need a citation of authorities to confirm it. It is against the policy of the law to help either party in such controversies. The maxim, *in pari delicto,* etc., must prevail.

In *Dent* v. *Ferguson,* 132 U. S. 50, a person had conveyed his property to defendant for the purpose of defrauding his creditors. Subsequently the heirs of the grantor brought this bill to recover the property from the heirs of the grantee. Mr. Justice Lamar, delivering the opinion of the court, quoted both the above cases with approval, and said, p. 67:

> Such an agreement, so entirely inconsistent with the absolute conveyance of the property as executed between the parties, has all the features of a fraud upon creditors. It reserves

to the grantor the enjoyment of the rents and profits of the property conveyed, to which the creditors have a right of immediate appropriation to their debts, and involves a secret trust for the return to himself of property of which such creditors have the immediate right of sale. The law does not countenance any such transaction, but leaves both parties in the position where they have placed themselves. (*Lukins* v. *Aird*, 6 Wall, 78) * * * The prayer cannot be granted without overturning established principles of equity.

In *Bartle* v. *Coleman*, 4 Peters, 184, the syllabus is as follows:

Where parties were jointly interested in a contract with the government, and the agent for the government was secretly interested with them, and one part of their plan was to impose on its officers by false measures, the court refused to sustain a bill by one of the parties against another for an account.

Mr. Justice Baldwin, delivering the opinion of the court, says on p. 189:

The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply practiced fraud, which, when detected, deprives him of anticipated profits or subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers, by shifting the loss from the one to the other, or to equalize the benefits or burdens which may have resulted by the violation of every principle of morals and of law.

In *Schermerhorn* v. *de Chambrun*, 64 Fed., 195, the first paragraph of the syllabus reads:

C, who was engaged as agent of certain heirs of one J, in efforts to recover property formerly belonging to J, under an agreement for compensation contingent upon success, made a contract, in 1876, with defendant, a lawyer, for services. C made the agreed payments, and afterwards paid defendant other sums for further services. During the year 1876 C made contracts with sundry lawyers and other persons for services and advances, agreeing to pay them out of his share of the J property, after payment of expenses and counsel fees, making their claims liens upon such share. In August, 1880, C contracted in writing with defendant to pay him $30,000 in consideration of services rendered, the amount

to be a lien upon C's share of the J property. Defendant had rendered and continued to render important services throughout the litigation. After its close, resulting in a comparatively small recovery, C brought this suit to establish a trust for his benefit in the $30,000 which had been paid to defendant, alleging that the contract of August, 1880, was made upon a secret understanding between C and defendant that the $30,000 should be held in trust for C, in order to withdraw that amount from the liens of the contracts made in 1876, by making it appear to be paid as counsel fees. Defendant denied the existence of such trust. *Held,* that, assuming the alleged trust to be proved (as it did not appear to be), it would constitute a fraud upon C's creditors under the contracts of 1876, and a means of fraud upon others with whom he might contract, and equity would not aid C to obtain the fruits of such fraud from his co-conspirator.

To the same effect are:

Lawton v. *Estes* (Mass.), 45 N. E. 90, 57 Am. St. R. 450;

Deppen v. *German-American Title Co.* (Ky.), 70 S. W. 868;

Lemay v. *Bibeau,* 2 Minn., 291;

Scott v. *Edes,* 3 Minn., 388.

X.

The Trust Company is barred from a recovery in this action by its covenant that it would not hold the new company for the debts of any of the old ones.

The covenant is set forth in full in 210 Fed., 710, and the substance is given at page 712, as follows:

> No right is conferred, nor any trust, liability or obligation * * * is created by this agreement or the plan, or is assumed hereunder, or by or for any new company in favor of * * * any holder of any claims whatsoever against the said companies, * * * with respect to any property acquired by purchase at any foreclosure sale.

The master, in his report, finds that the Trust Company, in executing the covenant, thereby elected to accept the benefits of the reorganization rather than to take "its chances on the outside," and that in doing so it, in effect, agreed that it would not assert its

creditors' claim either against the committee or the Southern Company. He says (Rec. 861):

> The third section of the 12th paragraph of the reorganization agreement, provided that no right is conferred, nor any *trust, liability or obligation,* is created by or for a new company in favor of any claim whatever, against the companies involved, as to any matter or thing. The Trust Company executed said agreement as one of the depositaries thereunder and also accepted the benefits of its provisions when it exchanged the old securities it held against the constituent companies for the new securities of the Southern Company, and by so doing, *it has accepted and agreed to said provisions,* and cannot repudiate them, after receiving and enjoying the benefits thereof. In other words, the Trust Company might have refused to accept the benefits of the reorganization scheme and taken its chances on the outside, but it did not do so. *It has, in effect, agreed that it would not assert its creditors' claim either against the committee or the Southern Company,* for if it did so, it would thereby be asserting a claim which would be adverse to the reorganization plan and agreement, under which it had elected to take the benefits accruing to it as a depositor of its securities thereunder. It would seem, then, that under the circumstances above stated, *the Trust Company cannot now maintain an action against the Southern Company to enforce a right or trust in contravention of the terms of said agreement.*

The court, in assigning its reasons for denying the existence of any estoppel against the Trust Company, uses the following language, p. 711, of the second opinion:

> It may be that if, when the Trust Company signed the agreement, that instrument had disclosed a purpose or had by its terms required the committee, or the stockholders of the Belt Company, or their successory trustee, the new company, the Southern Company, to violate their trust and divert the equity of the creditors of the Belt Company in its property to its stockholders, the Trust Company's signature to it, its action as a depository of the bonds and stocks under it, and its exchange of its Belt Company stock for the Southern Company stock, might have wrought an estoppel against it.

All must concede that under the circumstances stated by the court the Trust Company would be estopped to maintain this action. It is pertinent to inquire *on what ground* or upon what principle the estoppel would exist in that case, for it may well be that

the same equitable principles which would apply in the case supposed would have equal application in the case under consideration. Obviously the ground or basis of estoppel in the case supposed would be:

(a) The fact that the Trust Company was a *party* to the agreement and hence the agreement was binding upon it; or

(b) The fact that the Trust Company had *accepted and retained benefits* under the agreement and was therefore estopped to question or deny its validity and binding force in all respects; or

(c) The fact that the Trust Company in accepting the new securities of the Southern Company in exchange for its old securities, thereby *consented* that the creditors' equity should be diverted from the creditors to the stockholders, and having thus consented and *participated in the distribution of the diverted equity,* was thereafter estopped from complaining that such diversion was a fraud upon the rights of the creditors.

What other ground of estoppel could there have been?

We confidently assert that all the grounds which would create an estoppel in the case supposed by the court are *equally applicable* in the case under consideration.

But the court undertakes to distinguish the supposed case from the case at bar by insisting that *the law must be read into the agreement,* and that the law created a *legal presumption* that the plan would be executed in a lawful way, which could only be done by offering or paying to the creditors of the Belt Company at least as much in value as the stockholders should receive. The court uses the following language in reaching this conclusion, p. 711:

> *But the agreement must be read in the light of the law which was necessarily a part of it.* It was to execute a plan, which it disclosed, to transfer the property of the Belt Company to a new company by means of the exchange of the stock of the new company for that of the Belt Company. The law was that as against creditors of the Belt Company such a plan could be lawfully executed in but one way, and that was by offering and, if accepted, by paying to the creditors of the Belt Company either in cash or in stock of the new company, or in some other property at least as much in value as the stockholders should receive, and, in the absence of such an offer or payment the transfer would be *fraudulent* and *voidable* as to the creditors. Unless there was in the agreement

some term or provision which required the committee or the Southern Company to violate this law and to make a transfer *fraudulent* and *voidable* as to the creditors, the *legal presumption* was that the agreement contemplated, and that the committee and the Southern Company would make, such an offer and payment to the creditors, and upon that presumption the Trust Company had the right to rely when it signed the agreement and thenceforth until it was clearly notified to the contrary. The legal presumption was that the committee and the new company, the Southern Company, which was to succeed to the trusteeship of the stockholders of the Belt Company, and all others executing the agreement would obey the law, would *refrain* from making the transfer of the property from the Belt Company *fraudulent* and *voidable*, and would make it fair, just, and valid. The Trust Company had the right to calculate the natural and probable result of its signature to the agreement and of all its acts and omissions in reliance upon this presumption. Indeed, it could reckon upon no other, for it is alike impracticable and impossible to predicate and administer the rights and remedies of men upon the theory that their associates and fellowmen will either violate the laws or disregard their duties.

It is, of course, true that the law must be read into the agreement. But this salutary rule means that *all* of the law applicable to the situation must be read into the agreement. It is not sufficient to read *one principle of law* into the agreement, as we believe the court has done, and to *exclude* others equally pertinent, and, as we think, *of paramount and controlling importance*.

The law of estoppel, or as it is sometimes called, *quasi* estoppel, the doctrine of equitable election, the rule of estoppel by acceptance and retention of benefits, *must all be read into the agreement*. They do not create mere legal presumptions subject to being defeated by some subsequent event or superior equity. They are absolute rules which fix, define and determine the rights and obligations of the parties.

If the law of estoppel had been actually written into the agreement, *as it was there in legal contemplation*, side by side with the "legal presumption" to which the court refers (assuming it to exist), then we should have had in the agreement a paragraph in substance as follows:

This reorganization is one in which stockholders are permitted to participate, and that implies a diversion of the equity

of creditors from them in favor of stockholders who possess an inferior equity. Such a plan carries the legal presumption that creditors, *who do not assent to the plan*, will be paid or settled with in some way, and if they are not paid or settled with, they retain the right to the satisfaction of their claims against the new company to the extent that the equity belonging to the creditors has been diverted from them and given to the stockholders.

But remember at all times that any unsecured creditors who *assent* to the plan, or *participate* therein, or receive any *benefits* therefrom, particularly if they be stockholders and as such *participate in the wrongful diversion of the creditors' equity*, are forever *barred and estopped* from claiming or alleging that the plan or agreement is unlawful, or that the diversion of the creditors' equity to stockholders is a breach of trust, or that the plan has operated as a fraud upon unsecured creditors.

The Trust Company signed the agreement with this warning which the law had plainly written into it. It can claim no benefit from the "legal presumption," to which the court refers, for the reason that such presumption, if it existed, had been overcome by the *paramount and controlling rules* which operated to estop the Trust Company from maintaining this action. The court says that the Trust Company had the right to rely upon this legal presumption "thenceforth until it was clearly notified to the contrary." *But it was clearly notified to the contrary the moment it signed the agreement.*

We insist that no such "legal presumption" existed, or could exist in favor of the Trust Company. There was no *obligation* to pay creditors, such as the Trust Company, who assented to the plan, and received benefits from it, and thus placed upon it the stamp of their approval. When there was no legal obligation to pay, there could be no legal presumption that payment would be made.

(a) The court of appeals proceeds upon the assumption that the plan carried the presumption that some fair offer would be made to creditors, and that the plan, therefore, was a valid and lawful plan until after the Trust Company had received its securities in July, 1900, and *then it became fraudulent and voidable only when the Trust Company's debt was not paid.* It is said that "the *fraud* and breach of trust, which made the transfer voidable as

to creditors, were not committed or disclosed until *after* the Trust Company's acts in the formation and execution of the plan had been done."

If the plan became fraudulent only after the Trust Company's debt was not paid, as the court of appeals decided, nevertheless the Trust Company's retention of the fruits of the scheme is a conclusive bar to a recovery. We do not by any means concede the correctness of either the premises or the conclusion of the court. On the contrary, we contend that both are erroneous, and we contend furthermore that the premises assumed by the court lead to an entirely different conclusion from that reached by it.

Let it be assumed that the law, which prescribes the order of distribution of the assets of insolvent corporations, be read into the plan, and that the Trust Company when it signed the agreement had a right, until notified to the contrary, to rely upon the presumption that some offer would be made to creditors, and that the plan operated as a *fraud* and breach of trust only *after* the Trust Company's acts in the formation and execution of the plan had been done. The very facts assumed, in their last analysis, present a situation, innocent in its inception, which subsequently developed into a typical case of *fraudulent conveyance.* The benefits which the Trust Company has received and still retains are subsequently, if not at the outset, the *fruits of a fraudulent transaction.* The Trust Company therefore is in the attitude of a complainant who comes into a court of equity with the tainted proceeds of a fraudulent scheme still in its treasury, which it confesses by its pleadings *ought not to be there,* and bases its claim for relief upon the same illegal transaction from which it has profited. Does not this attitude of the Trust Company—to borrow an expression from the Monon case—come within "judicial denunciation?"

In *Kahn* v. *Peter,* 104 Ala. 523, it appeared that the complainant, Kahn, and one Werborn, were liable as sureties on a defaulted bond and to defeat the collection thereof, Werborn transferred his property to a creditor in payment of a debt and in consideration of the latter's agreement to pay certain of the former's debts, including that due the complainant, which agreement was performed. Complainant subsequently paid the judg-

ment rendered on said bond and afterwards filed his bill in equity to set aside the transfer of Werborn's property, claiming the right of subrogation to the rights of a judgment creditor. It was held that having advised the transfer and retained the benefits under it, complainant could not attack it though he *did not know* at the time he advised it or when he received the benefits that the transferee's claim was fictitious. The court said:

> But it is said this doctrine should not be applied to the complainant, because when he advised the sale to Charles Werborn, and when he accepted payments of his claim from Charles Werborn according to the terms of the sale, he did not know, what he now asserts, that Charles Werborn's debt, upon consideration of which in part the sale was made, was simulated. There is nothing in this contention. In the first place, the sale was made *upon his consent and advice* as an interested party; and this advice and consent, which the evidence shows contributed materially to the consummation of the sale, should not have been given ignorantly. So that, whether cognizant or not of the now alleged fictitious character of Charles Werborn's claim against Geroge, he was at fault in advising, and thus bringing about, the sale, and he cannot now be permitted to undo what he then accomplished. His position and rights in this connection are not unlike those of the seller himself. *And, further, leaving the fact of his having advised the sale out of view, whether the sale as to Charles was fraudulent or not, and whether, it being conceded to be fraudulent, he had knowledge of the fraud when he claimed and received benefits under it, or not, he cannot, while retaining those benefits—while holding onto the money which he received from Charles in consideration of the sale—have the transaction avoided.* This would be the taking and holding *under* and claiming *against* the conveyance which all authorities denounce. And there is no pretense that he has surrendered or is willing to surrender, what he received. He is even *now*, with full knowledge of the alleged fraud, claiming both *under* and *against* the bill of sale.

In *Brewer* v. *Nash*, 16 R. I. 458, it is held:

> Where mortgagors receive the surplus proceeds of a sale made under a power, in ignorance of defects invalidating the sale, but *afterwards* acquire knowledge of such defects, and continue to *retain* the proceeds, they are estopped from denying the purchaser's title.

(b). *The plan could not become fraudulent by events subsequently transpiring.* It is conceded by the court of appeals that the plan and the proceedings under it were valid and free from fraud in July, 1900, at the time the Trust Company exchanged its securities. If valid at that time it could not become fraudulent by any subsequent acts of the committee or of the Southern Company. The subsequent action of the committee in declining to pay the Trust Company the amount of its indebtedness from the Belt Company could not have any *retroactive* effect to invalidate a transaction which was free from fraud at the time of its inception.

The rule on this subject is stated in 20 Cyc., page 413, as follows:

> A conveyance, to be fraudulent and void as against creditors, must have itself been fraudulent *when made*, and if it was not, then it cannot be rendered so by a fraudulent intent existing either before or after that time, or by the prior or subsequent conduct of the parties, or by other separate and distinct transactions, prior or subsequent, which were fraudulent.

In *Kreuger* v. *Vorhauer*, 164 Mo., 156, it is held:

> Schemes to defraud his existing and subsequent creditors, entered into by a party after making the deed of trust, cannot affect the validity of such deed.

(c) *It is confidently asserted that if the reorganization plan was ever fraudulent and voidable as to creditors, it was so at the time of its execution by the Trust Company and that the covenant is a complete bar.* It is a new doctrine that before the plan is subject to criticism, it must *affirmatively* show upon its face that creditors will *not* be paid. On the contrary, in the reorganization agreement in the Boyd case, which the majority opinion holds to be fraudulent as to "non-assenting creditors," it is said:

> The agreement contained *no provision* as to the payment of unsecured creditors.

And also:

> The invalidity of the sale flowed from the *reorganization agreement.*

The same is true of the plan in the *Monon case*, 174 U. S., 674, and in the Howard case, 7 Wall., 392.

The *covenant* in the twelfth paragraph, to which the Trust Company assented, was a distinct and unequivocal *caveat* that no claims against the old company could be enforced against the new company. How can the *covenant* and the *presumption*, in which the court of appeals indulges, co-exist in the same instrument, since the covenant *excludes* any such presumption?

No presumption could arise to contradict the plain meaning of the plan, which was that $475,000, and no more, was set aside to pay the floating debt, which meant such debt as it was necessary to pay in order to make the mortgage of the new company a first lien (Rec., 860, 861). How can this provision be said to raise a presumption that *all* the floating debt of *all* the companies was assumed by the committee or the Southern Company?

(d) *There could be no presumption that the floating debt would be paid, on which the Trust Company could rely to escape the effect of the covenant, for the Trust Company must have known that no such thing was possible.* Certainly that no such thing was contemplated by the plan. The reorganization agreement disclosed on its face the specific appropriation to be made of *all* the securities and of *all* of the funds of the new company. Its bonds and stocks were to be used (1) in exchange for old securities, (2) for future requirements of the company which included future additions, betterments, and new equipment (Rec., 820), and (3) for specific cash requirements of the company, (Rec., 820, 821). The available assets of the new company are all accounted for, the sum of $475,000 being set aside for the payment of the floating debts of *all* of the constituent companies (Rec., 820). The floating indebtedness of the Belt Company *alone*, which represented only 3⅓ per cent in value of the companies included in the reorganization, as above stated, was $900,000 (Rec., 755).

The Trust Company knew this because it knew the financial condition of the Belt Company. All of the officers and directors of the Belt Company, except one, were officers, directors, or employes of the Trust Company (Rec., 756). "The inter-relations of the Belt Company and Trust Company were exceedingly intimate" (Rec., 760), and the Trust Company kept the books of the Belt Company.

It is a violent and wholly unwarranted presumption to assume that the plan contemplated the payment of the floating debt of *all* of the companies when but $475,000 was set aside for that purpose, and the floating debt of *one* company alone was *twice* that amount, as the Trust Company must have known.

(e) *The covenant bars a recovery, whether the reorganization plan was fraudulent as to non-assenting creditors at the time the Trust Company became a party to it, or only became so afterwards when the Trust Company's debt against the Belt Company was not paid.* Whenever the plan, or action taken under the plan, became fraudulent as to creditors, the duty *immediately* devolved upon the Trust Company to *elect* whether to accept the benefits of the fraudulent scheme, or to *retain* them if they had already been received. The duty to tender back the fruits of an illegal and fraudulent transaction upon a discovery of the fraud is an imperative duty, and is an indispensable condition to the maintenance of any action based upon the fraud. The equitable rule of estoppel, or election, or ratification, becomes at once applicable. *A retention of the fruits of the fraud is a conclusive election to hold under the plan and is an insurmountable barrier to any attack upon the plan.* (*Stone* v. *Cook*, 179 Mo., 534; Vol. 11 Am. & Eng. Enc. of L. [2nd Ed.] p. 98; *Young* v. *Young*, 27 Atl. Rep., 627; *Medill* v. *Snyder*, 58 Pac. Rep., 962).

(f) *Assuming that the foreclosure and sale of the Belt property was brought about by the plan (which is not admitted) it necessarily follows that the liability of the Southern Company, if any, was created by the plan and is barred by the covenant.* It is respectfully submitted that if any liability could, under any circumstances, exist against the Southern Company, it must necessarily be a liability *created by the reorganization plan or agreement* and as such barred by the covenant since, as said in the Boyd case, "the invalidity of the sale flowed from the *agreement*." The bar of the covenant cannot be escaped by the assertion that the liability was created, not by the agreement, but by the transfer of the Belt property. The foreclosure cannot be divorced from the *agreement* if they are to be regarded as part and parcel of the same transaction. The court of appeals itself recognizes this fact when it says (210 Fed., 703):

For what purpose then was the foreclosure? Evidently to *carry out* the reorganization agreement.

(p. 703). *Was not the scheme of reorganization* the *primary cause,* the *vesting of the fee* of the Belt Property in the Southern Company by the foreclosure, the *object and effect* of that scheme, and the exchange of the stock and the foreclosure of the Belt mortgage the *means* contemplated and authorized by that scheme to attain that end? To the minds of the members of this court the record in this case leaves no alternative but to answer these questions in the affirmative.

(p. 704). By virtue of the *plan of reorganization,* the Southern Company had become such trustee (for unsecured creditors.)

(p. 704). They (the acquisition of the property of the Gulf Company and later of the Belt Company) appear to this court to constitute a single transaction instituted, conducted, and consummated *pursuant to the preconceived plan to vest the fee of the properties of the Belt Company in the Southern Company* and to bring them directly under the lien of its mortgage.

It is not consistent to say that the Southern Company's liability "was not created by that agreement, but by the Southern Company's subsequent transfer of the equity of the creditors of the Belt Company to itself, its stockholder, and trustee for its creditors, without securing and paying to them the value of that equity."

A transfer of the equity of the creditors of the Belt Company, in the opinion of the court of appeals, as appears from the foregoing excerpts, was solely in pursuance of the reorganization agreement and would not and could not have occurred *but for the agreement.* The agreement, the court says in the above quotations, was the "primary cause," the foreclosure sale the "object and effect" of the scheme, and the exchange of stock the "means" employed. Therefore, it seems plain that if, as the court of appeals decides, a liability was created on the part of the Southern Company by the exchange of stocks (which was the "transfer of the equity of creditors of the Belt Company"), such liability was *created* by the reorganization agreement, and it necessarily follows that the assertion of such liability is effectively barred by the covenant. If the agreement and the foreclosure are *not* to be regarded as part and parcel of the same transaction, but are to be separated and viewed as independent transactions, then the rule of the Boyd

case has no application, and there is no necessity to resort to the covenant.

(g) Furthermore, the court of appeals says, (210 Fed., 712), that if any equity or trust were created or conferred by or under the reorganization agreement, they were conferred, not by the just and lawful execution of the ageement, but "by an inequitable and fraudulent appropriation of the Trust Company's equity in the property to the benefit of its stockholder or stockholders." But it was the *exchange of stocks*, to which the Trust Company was a party, which created the so-called "inequitable and fraudulent appropriation of the Trust Company's equity in the property" and the exchange of stocks was brought about by the plan and was the direct result of the plan. The exchange of stocks was only a *means*, as the court of appeals itself says in the above quoted excerpt, of carrying out the reorganization plan. It could not have taken place but for the plan. If the exchange of stocks resulted in the fraudulent diversion of assets to stockholders, then the covenant obviously operated to bar the assertion or enforcement of such right.

The obvious intent of the covenant, without the necessity of resorting to any refinement of reasoning, was to make it clear to all depositing security holders that if they took the benefits of the plan they thereby waived the assertion of any and all rights, liabilities, trusts, or obligations against the new company arising out of any dealings with the old companies or any of them.

XI.

The acquisition by the Southern Company of the stocks and bonds of the Belt Company, by exchanging the former for the latter in certain specified proportions under the plan, was lawful, being expressly authorized by the Missouri statutes. The reorganization plan had spent its force when the Southern Company on April 1, 1900, came into possession of the property of the Gulf Company acquired at foreclosure sale, as well as the stocks and bonds of the Belt Company. The subsequent foreclosure of the Belt Company, (which destroyed all stockholders' interests in that company), was not brought about by the reorganization committee, or by the reorganization plan, but by the independent action of the Southern Company as the owner of a large majority of the bonds of the Belt Company, in causing the foreclosure of a mortgage securing the bonds which were then in default, and of this no creditor of the Belt Company can complain.

On April 1, 1900, the Southern Company was the owner, by purchase at foreclosure sale, and engaged in the operation of the railroad formerly owned by the Gulf Company. It was also the owner of a large majority of the stocks and bonds of the Belt Company, and it was engaged in operating the property of the Belt Company indirectly through the officers of the Belt Company, who were its nominees. The exclusive control of the Southern Company was vested by statute (Sec. 2992, R. S. 1909) in its board of directors, and, likewise, the exclusive control of the Belt Company was vested by law in its officers and directors.

It is our contention that at this time the reorganization had been accomplished and the plan had spent its force; and that the subsequent foreclosure and sale of the property of the Belt Company, which is alleged to have created a liability on the part of the Southern Company for the unsecured debts of the Belt Company, was not due to the reorganization plan, but was the result of the independent action on the part of the officers and directors of the Southern Company as the owner of the bonds of the Belt Company then in default.

It cannot be successfully maintained that there was anything unlawful or fraudulent in the acquisition by the reorganization committee, or by the Southern Company, of the stocks and bonds

of the Belt Company, either under the plan of reorganization, or otherwise. The lines of the two companies formed a continuous line by direct connection. Such acquisition was in pursuance of express statutory power given by Section 3080, R. S. Mo., 1909, which authorized the Southern Company to,

> Acquire any line of railroad within or without this state which shall form a continuous line with the road operated by such company by direct connection * * * *and may acquire and hold the obligations and stock of other companies owning or operating any such lines of road.*

If the reorganization committee, or the Southern Company, had purchased the stocks and bonds of the Belt Company by making a cash payment therefor, as they did purchase the stocks of the Union Terminal and Air Line by the payment of cash, then it must necessarily be conceded that such a purchase would have come within the express permission of the statute. But the exchange of stocks and bonds was in effect a purchase and sale within the rule of *Harriman* v. *Northern Securities Company*, 197 U. S., 244.

If the Southern Company, after becoming the owner of the property of the Gulf Company and of the stocks and bonds of the Belt Company on April 1, 1900, had continued in the operation and management of the Gulf property acquired at foreclosure sale, and had continued to own the stocks and bonds of the Belt Company, without causing any action to be instituted for the foreclosure of the mortgage securing the bonds, for a period of, say five, ten or twenty years, no one would contend that such a transaction was unlawful, irregular, or even unusual.

Pullman Company v. *Railway Company*, 115 U. S., 587;
Peterson v. *Railway Company*, 205 U. S., 364;
Atchison Company v. *Cochran*, 43 Kans., 225;
Stone v. *Railway Company*, 202 N. Y., 352.

If upon the expiration of any one of the periods supposed, the Belt Company had made default in the payment of interest upon the bonds held by the Southern Company, and the trustee in the mortgage of the Belt Company, as required by the terms of the mortgage in such contingency, had caused the property to be foreclosed and sold, no stockholders' interest being preserved to

the Southern Company, no creditor of the Belt Company could have complained, and no one would have imagined that there was any fraudulent conveyance to defeat the claims of creditors.

An apt illustration is found in *Pullman Car Company* v. *Missouri Pacific,* 115 U. S., 587. There the Missouri Pacific Railway Company issued its stock in exchange for the stock of the Iron Mountain Company, and in that way became the owner of all but 1,195 out of 220,682 shares of the capital stock of the Iron Mountain Company. The Missouri Pacific Company has continued to own the capital stock of the Iron Mountain. If the Iron Mountain should default in the payment of interest on its bonded indebtedness, would anyone claim that the Missouri Pacific, in case it should purchase the property at foreclosure sale, no stock interest in the Iron Mountain being preserved, would thereby assume the floating debt of the Iron Mountain? Certainly not. The obvious reason is, giving to the Boyd case and the Monon case the far reaching effect claimed for them, that the original acquisition by the Missouri Pacific of the capital stock of the Iron Mountain was a lawful act expressly authorized by statute; that no creditor of the Iron Mountain was injured thereby, all of his rights against its debtor and its debtor's property being precisely the same after the transaction as they were before; and that the foreclosure proceeding was the result of the default in the payment of interest upon the mortgage indebtedness, and was not the result of the plan for the exchange of capital stock.

How can it be said in the case at bar, that the creditors of the Belt Company were injured because the reorganization committee and the Southern Company acquired the stock of the Belt Company by the exchange of shares, which was brought about by the plan? *Their remedies against the Belt Company and against its property were precisely the same after the transaction as they had been before.* So far, no creditor had been injured or been affected injuriously or otherwise. How can it be said that the foreclosure of the Belt Company was the *direct result of the reorganization plan,* or that it was brought about by the plan, and *not* the result of action by the holder of the bonds of the Belt Company, *wholly independent of the plan?*

It cannot be said that the reorganization plan *required* the foreclosure of the mortgage of the Belt Company. It did not even

require that the terminals at Port Arthur and Kansas City should be brought into the reorganization; on the contrary, they might or might not be included, as appears by the following language:

> (f) Or in the event that either or both of said terminal properties are not so acquired, then (under arrangements already provided) the requisite terminal facilities at Kansas City and on the gulf will be otherwise secured—in which event, the amount of the new securities to be issued will, of course, be correspondingly reduced.

It is manifestly the fair intendment of that provision that if sufficient of the securities of the terminal properties should be deposited to "warrant the retention of that property by the new company," then the plan contemplated that the terminal properties, together with the Gulf properties, should be operated in the same interests, and thereby, in the language of the plan, *which was subject to modification in the discretion of the committee*, "all three properties will be under one corporate ownership, management and control," which might be accomplished by *stock ownership*, and was in fact accomplished by the Southern Company's ownership of the stock of the Belt Company, Canal & Dock Company, and of other allied companies. The plan did not *require* anything beyond this.

It was recited in the plan that "it is *intended* as soon as practicable, that the new company acquire the properties of the terminal companies in fee and bring them directly under the lien of the mortgage," and this expression of *intention*—which was the intention of the reorganization committee, and the Southern Company was free to accept or reject it in the exercise of its discretion—is seized upon by the court of appeals (210 Fed., 703, 704) as a justification for its conclusion that the foreclosure and sale of the property of the Belt Company was brought about by the plan of reorganization, and that it was one of the objects that the committee and the Southern Company were empowered and expected to carry into effect.

The plan was not a *contract* that this would be done by the committee or by the Southern Company. No *obligation* was imposed on the Southern Company to acquire the properties of the terminal companies in fee. It could do so, by enforcing its mortgage security, if in the exercise of its discretion it deemed that

course the wise one, and none of its security holders could object. *It could likewise have continued to hold the stocks and bonds of the Belt Company without a foreclosure, and no one could object.*

Suppose that some holder of securities of the Southern Company, who was a party to the plan of reorganization, should bring suit demanding that the Canal & Dock Company property (the stock of which, but *not* the fee, is held by the Southern Company) should be acquired in fee and brought directly under the lien of the mortgage, claiming that in the plan the "intention" was expressed that this would be done, and asking the court to require that this intention be carried into effect. No one would contend that such a suit would have the slightest hope of success. Any court, it is submitted, would say that the "intention" of the committee was not binding upon the Southern Company, and that it was for that company to decide for itself in the exercise of its discretion, in the event of a default under the mortgage, whether it would enforce the security or waive the default, and likewise in the event of a foreclosure sale whether it would or would not become the purchaser; and that the plan of reorganization was completely executed when the Southern Company became the owner of the stocks and bonds of the Belt Company and other allied companies, and also the owner and engaged in the operation of the property of the Gulf Company.

Could not the directors of the Southern Company at any time between April 1, 1900, and November, 1901, the date of the foreclosure decree, have resolved that the Southern Company, as the owner of a majority of the bonds of the Belt Company, would waive the default and that no foreclosure suit should be brought, or if one had been brought, that it should be dismissed? No one will contend that the Southern Company could have been *compelled* by process of law, to insist on the default, to proceed with the foreclosure, and to purchase the property at the foreclosure sale, or to respond in damages for a failure so to do, for the obvious reason that there was no legal duty or obligation so to do. No one can successfully contend that the Southern Company could not exercise every right that any other owner of stocks and bonds of a subsidiary company might exercise.

A complete settlement was made between the reorganization committee and the Southern Company in October 1900, and the

committee thereupon became dissolved. Its influence upon the affairs of the Southern Company could not have extended beyond that period, in the absence of some contract or obligation resting on the Southern Company, and that no such contract or obligation existed is one of the established facts in the case.

As the Southern Company was in exclusive control of the situation, after April 1st, 1900, it follows that the foreclosure and sale of the property was not brought about by the plan, but was wholly independent of it. In other words, (a) the purchase by the Southern Company at foreclosure sale of the property of the Gulf Company, and its acquisition of the stocks and bonds of the Belt Company, and (b) the foreclosure and sale of the property of the Belt Company following a default, were not one entire transaction.

The transaction may be analyzed as consisting of three separate and distinct steps or stages. There was, *first*, the exchange of the stocks and bonds under the plan by which the stockholders of the Belt Company became stockholders in the Southern Company, and when this was accomplished the plan had spent its force; *secondly*, the intervention of the Southern Company, as an independent agency, which assumed control, and excluded the reorganization committee from control; and, *thirdly*, the default in the payment of interest on the mortgage of the Belt Company, and the subsequent foreclosure of the mortgage with every stockholder's interest destroyed. It is submitted that there was nothing unlawful in these three steps, and that there was nothing in any of them of which any creditor can complain.

If six *years* had elapsed between the assumption of control by the Southern Company and the foreclosure of the mortgage of the Belt Company, no one would have said that the two transactions should be combined for the purposes of this suit. Is not the principle the same when but *six months* elapsed, instead of six years?

XII.

The mortgage indebtedness of the Belt Company was $1,000,000. It was sold at foreclosure sale for $1,000,000, which the master found was the fair market value at that time. Under these circumstances, the Trust Company, as a creditor of the Belt Company, has not been injured and has no right to complain.

(a) The findings of the master in respect to the value of the Belt property at the time of the foreclosure sale, which was more than a year after the exchange of stocks had taken place, will be found in the record (pp. 852-853). In substance, the master found that there was no *direct* testimony showing the value of the properties involved in the reorganization plan at the time of or prior to the foreclosure of the mortgage liens thereon; that there had been introduced considerable testimony tending to show that all the roads forming the Belt system were extravagantly built and were bonded largely in excess of their actual cost; that the considerations paid at the foreclosure sales were large and sufficient, being approximately the full amount of the bonded indebtedness upon the railroads foreclosed; that there was no proof in the record to show that the Belt properties sold under the mortgage foreclosure were worth anything *in excess* of what they brought at the sale, and, in the absence of such proof, the master specifically found that the amount for which they were respectively sold was their *fair market value at that time;* and that there was nothing in the record to show that the reorganization scheme in any way deprived the unsecured creditors of any rights they would otherwise have had, in case such scheme had never been consummated.

It is conceded that the mortgage indebtedness of the Belt Company was $1,000,000, and that it was sold at foreclosure sale for that amount.

There was no *direct* testimony of the value of the Belt property. No witness, qualified as an expert, gave his opinion as to the value of the property as an entirety. Such testimony would have been of little value, since railroad property is ordinarily valued (*Smythe* v. *Ames*, 169 U. S., 466, 547, Minnesota Rate Case, 230 U. S., 352), by ascertaining (a) the cost of construction, (b) the cost of reproduction, (c) the market value of outstanding stocks and bonds, and (d) the value reached by capitalizing the net earnings.

It is apparent from the record that the master had before him ample evidence upon *all* of these questions, although such evidence is not here to be reviewed. At page 852, the master says:

> There has been produced in this cause considerable testimony tending to show that *all the roads forming the Belt system were extravagantly built and were bonded in excess of the actual cost.*

Here was evidence as to the *cost of the road,* which, in view of its newness, would be approximately the cost of its reproduction.

It is apparent that the master had before him a very large amount of testimony as to the *market value of the stocks and bonds* of the Belt Company since that question was involved in the accounting feature of the case. (Rec., 694-721.)

There was also ample testimony before the master as to the financial operations of the Belt Company and its *net earnings,* if any, since one of the issues in the accounting case was whether the Trust Company did not cause the Belt Company, while insolvent, to pay dividends in 1893, 1894 and 1897. (Rec., 722.)

It is submitted, therefore, that the record affirmatively shows that there was testimony before the master as to *all* the bases for fixing the value of railroad property, and with this evidence before him, the master finds (Rec., 852), in speaking of the amount bid at the foreclosure sales of the property of the Belt Company and its allied company, that:

> The considerations paid for such properties were *large and sufficient,* being approximately the *full amount of the bonded indebtedness* upon each railroad foreclosed.

It is evident that the master's finding that the prices paid at the foreclosure sales were ample was not merely based on the amount for which the properties were sold, *but upon the testimony in the record directed to the recognized elements for valuing railroad property.*

The master finds (Rec., 853):

> 5. If respondent's contention is correct to the effect that there was a consolidation, *de facto,* by which the intervenor became liable for the Belt indebtedness, still there is no proof in the record to show that the Belt properties, sold

> under the mortgage foreclosures, were worth anything in excess of what they brought at the sale; and in the absence of such proofs, *the master finds that the amount, for which they were respectively sold, was and is their fair market value at that time.*

The master was doubtful whether the properties were worth as *much* as the amount of the bonded indebtedness. There was considerable testimony, as he states, that they were worth *less* than their bonded indebtedness. There was no testimony that they were worth *more.* In order to be on the safe side, and *giving to the Trust Company the benefit of any doubt,* he finds that the fair market value of the Belt property was the amount for which it sold at foreclosure sale, to-wit,—$1,000,000.

The master undoubtedly had in mind the rule that the stockholders should not preserve an interest in the property to which the creditors had a prior right, *and it was, therefore, his purpose to ascertain, as a question of fact, if any value of Belt property was being diverted from its unsecured creditors.*

This is apparent because he says (Rec., 853):

> It was competent for the bondholders, in furtherance of their own business interests, to use the stocks and bonds of the new company as they saw fit, *provided that it is not shown that in so doing it was a part of their scheme to give something of value to the stockholders that should have gone to the creditors.*

The master was also obviously anxious to ascertain if the reorganization plan had operated to the detriment or disadvantage of any of the unsecured creditors of the Belt Company, and his conclusion was that it had *not.* This is apparent from his finding (Rec., 853):

> It is not shown in the record that the reorganization scheme *in any way* deprived the unsecured creditors of any rights they would otherwise have had *in case such scheme had never been consummated.*

It should be constantly borne in mind that *no exceptions* were taken by the Trust Company to these findings of the master, and that such findings were based upon testimony which was not brought to the court of appeals. It is also to be borne in mind that the valuation made by the master in this "adversary proceed-

ing," as that expression is used in the Boyd case, was *at the time of the foreclosure sale of the Belt properties*, which was nearly *two years* after the foreclosure of the Gulf property and more than *one year* after the distribution of the securities of the Southern had taken place. Whatever increased value could arise from the *reorganized system*, as distinguished from the aggregate value of all the roads as separate units, had already taken place. The Trust Company had had an opportunity to litigate and had litigated in this action, the value of the Belt property at the time of the foreclosure sale, and the master's finding, to which no exception was taken, should, therefore, be taken as coming within the rule stated in the *Boyd* case, as follows:

> In saying that there was nothing for unsecured creditors, the argument assumes the very fact which the law contemplated was to be tested by *adversary proceedings*, in which it would have been to the interest of the stockholders to interpose every valid defense.

(b) If mortgaged property is sold for the amount of the mortgage, which is its *fair market value*, how can creditors be injured, and what ground is there for complaint, whether the sale be the result of a reorganization plan or not? In such a case, what difference does it make whether the former stockholders of the company, whose stock is practically valueless because the property is mortgaged to its full value, receive stock in the new company, which represents practically no value or interest in the mortgaged property for the same reason? If the Belt Company had conveyed its property to the Southern Company in consideration of the cancellation of its mortgage and without foreclosure, the result would have been the same.

The enforcement of the mortgage of the Belt Company left nothing available to general creditors. It is true that the stockholders of the Belt Company received stock of the Southern Company which had a value, but that value arose from the fact that it represented property of *other companies than the Belt Company* and the right to participate in the prospective earnings of such other companies.

Surely a reorganization cannot be said to *create* rights in favor of creditors which did not exist before, or to give value to a creditor's claim which was *valueless* before. The claim of the

Trust Company, even after the consummation of the reorganization plan and at the time of the foreclosure sale of the Belt property, was *without commercial value* for the reason that it was against a company whose assets were charged with a lien to secure an indebtedness which exactly equalled the fair market value of the property.

After the foreclosure a startling transformation has taken place since, according to the court of appeals, the claim is then worth dollar for dollar, simply because the mortgagee has foreclosed his lien, which is conceded to be a valid one, and the property has been sold for its fair market value, which is the exact amount of the mortgage indebtedness.

The purpose of the law against fraudulent conveyances is to *preserve* the rights of a creditor against the debtor's property, but the effect of the decision of the court of appeals in this case is not to preserve a right which existed, but to *create* a right where none existed before.

Where is the *equity* in the Belt property which warrants the court of appeals in imposing upon the Southern Company a judgment for $800,000? This judgment, to be valid, must represent an equity in the Belt property which the old stockholders of the Belt Company preserved for themselves, but the record demonstrates that no such equity existed.

(c) It is respectfully submitted that the court of appeals is in error when it says (210 Fed., 706):

> But the crucial issue here was not what the fair market value of the property was, nor was it how much more the mortgaged property was worth than the amount of the mortgage.

It is our contention that this, in a case based on the Boyd decision, is not only the crucial issue, but the *whole issue*. If it be once established in an adversary proceeding that the fair market value of a property, which has already become a part and parcel of a reorganized system against which stocks and bonds have already been issued, does not exceed the amount of its valid mortgage indebtedness, then no equity to which creditors are entitled to resort has been diverted to stockholders, *and it makes no difference what stocks or bonds have been previously issued by the reorganized*

system. As a stream cannot rise higher than its source, so the mere issue of securities cannot add to the *actual value* of property.

The court of appeals says (210 Fed., 706), that the real issue was:

> What was the equitable interest of the creditors in the mortgaged property of the Belt Company worth during the execution of the scheme and immediately after the foreclosure sale?

What equitable interest available to creditors could there have been, if it be conceded that the fair market value of the Belt property at the time of the foreclosure sale did not exceed the mortgage indebtedness? The court of appeals quotes from the Boyd case to the effect that:

> If the *value* of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value whether it was present or prospective, for dividends or only for purposes of control.

Concede this and yet the question reverts to "the value of the road." The issuance of stock cannot *create* value. The value of the stock depends upon the *value of the road.* The value of the road is not dependent upon the amount or par value of stock issued.

(d) We submit that the real issue is tersely and accurately stated by the Court of Appeals for the Sixth Circuit in *Wenger* v. *Railroad Company,* 114 Fed., 34, as follows:

> To the extent that the property is worth something more than the mortgages the general creditors are interested in any subsequent distribution, but beyond that their interest does not extend.
>
> The sole question is: had the railway property, as it existed at the time of foreclosure, a greater value than the mortgage indebtedness? And that such value existed is not averred.

The court in the Monon case, 103 Fed., 130, in speaking of the rights of creditors, said:

> What are their rights? Manifestly to have any surplus of value in the property or in its proceeds over and above the mortgage debts applied to the payment of their demands.

The *Boyd* case is not in conflict with this contention. In that case, there had been no "adversary proceedings" to determine the value of the property as there has been in this case. There, there was a "distinct recital" in the plan itself that the property to be purchased was agreed to be "of the full value of $345,000,000." This was an admission by the company itself and *prima facie* established the value. The strong intimation in the opinion is that if there had been an adjudication, binding upon the claimant, that the fair value of the property did not exceed its mortgage indebtedness, and that it had been sold at forced sale for the full value, there would have been no equity on which the claims of creditors could operate, and hence there could be no recovery by an unsecured creditor. In fact, the court says:

> If their (the old stockholders') stock is worthless, he (the creditor) gets nothing.

(e) But the court of appeals points to the fact that the old stockholders of the Belt Company received $1,187,500 of the preferred stock and $3,562,500 par value of the common stock of the *Southern Company* in exchange for the stock of the Belt Company, and by a process of reasoning reaches the conclusion that the *Southern Company*, therefore, paid in value at least $475,000 for the equitable interest of the stockholders of the Belt Company.

But it must be remembered that the stock of the Southern Company represented *six* companies having a total bonded indebtedness of $29,685,000, of which the Belt Company with its bonded indebtedness of $1,000,000 was three and one-third per cent. It is quite possible, and, in the light of the finding of the master as to the value of the Belt property, practically conclusive that whatever value attached to the stock of the Southern Company which was received by the Belt stockholders was derived from the five companies other than the Belt Company. At the time of the issue of this Southern stock, the Southern Company was the owner of the stocks and bonds of the Belt Company, but not of its physical property. As the value of the physical property of the Belt Company did not exceed its mortgage indebtedness, its stocks and bonds held by the Southern Company could not have exceeded that value.

It is not a question of the *par value* of the stocks and bonds.

(*Knoxville Water Company* v. *Knoxville*, 200 U. S., 22; *Smythe* v. *Ames*, 169 U. S., 466, 547; *Missouri, K & T. Railway Company* v. *Love*, 177 Fed., 403.) The market value of stocks and bonds is sometimes used as a *means* of arriving at the actual value of railroad property, but once the actual value is established, *such value is controlling*. It is submitted, therefore, that the finding of the master in respect to the value of the Belt property is conclusive against the assertion of any claim by the Trust Company in this case.

(f) Furthermore, the court of appeals (210 Fed. 707), as before stated, reaches the conclusion from a consideration of the stocks and bonds of the Southern Company issued in exchange for the stock of the Belt Company that there was an equity in the Belt property over and above its mortgage indebtedness of "at least $475,000." It is *conceded* that the reorganization committee *actually expended* $1,164,172.50 in the payment of floating debts of the companies involved in the reorganization. Nowhere in the master's report (Rec., 859-860) is it stated *what part of the floating indebtedness so paid were debts of the Belt Company*. When the committee had paid the debts of the Belt Company to an amount in excess of $475,000, then upon the court's own theory, what equity was there from which the Trust Company's claim may be satisfied?

XIII.

A resulting trust was created in favor of the railway companies paying for the properties deeded to the Central Company, and this equitable interest passed under the after-acquired property clauses of their mortgages. The Central Company acquired the properties subject to this trust, and the interest of its stockholders was likewise subject thereto. The Trust Company acquired the stock of the Central Company with a knowledge of these facts, and its equities, therefore, are subordinate to those of the Southern Company.

The findings of fact made by the master (Rec. 781-804), conclusively establish that the properties of the Central Company, which by the decree of the lower court were directed to be conveyed to the Southern Company, were purchased with moneys fur-

nished by each of the three mortgagor companies involved, as they were needed by such company for its purposes. The Central Company was merely a holding company which held the title to the properties as trustee for each of the companies furnishing the money, and was in no sense a beneficial owner. The properties were appurtenant and needful for railroad purposes and as such came under the after-acquired property clauses (Rec. 737), of the mortgages of these companies respectively. The master says (Rec., 803):

> The specific properties desired by each of the three railroad companies involved (the Gulf Company, the Belt Company, and the Air Line) *were paid for by and with the moneys of that company and for its purposes.*
>
> The theory upon which the conclusion of the master is reached, is based upon the principle that the Central Company was simply used for the purpose of *holding the titles* to the particular properties belonging to each one of these railroads, and to all intents and purposes it acted as a *trustee*, and was *not* a beneficial owner, the intention being, as already stated, to place these properties beyond the lien of the general railroad mortgage which covered after-acquired properties.
>
> The proofs show that the intervener acquired at the foreclosure sales all the interests of the Gulf, Air Line and Belt companies as to all properties legally covered and included in the mortgages foreclosed; hence it must be shown that the real estate purchases in controversy were appurtenant to the railroads, along which they are contiguous, for if they are not appurtenant and do not come within the class of cases which would otherwise bring these properties within the lien of the general railroad mortgage, then, of course, the titles to such properties did not pass by the foreclosure sales to the intervener, and they would still be in the Central Company, giving value to its stock.
>
> Under the facts, the master finds that a certain portion of said properties were and are *appurtenant and needful for railroad purposes* and are of such character as would come within the after-acquired property clause of the mortgages.
>
> The Belt Company pledged its Central Company stock to the Trust Company for the purpose of securing its large indebtedness to that company, and subject to the rights of the intervener herein the Trust Company has the undoubted right to subject such collateral to the payment of the Belt obliga-

tions to it insofar as it affects the properties which have not been purchased by the intervener at the foreclosure sales.

It is the opinion of the master and he so finds that the intervener is entitled to the judgment, order and decree of this court requiring the Central Company and its receiver to convey to said intervener those portions of said real estate hereinbefore found to be appurtenant to said railroads and included within the after-acquired property clause of their mortgages.

An implied or resulting trust arises from the circumstance of payment alone. It results in this case because the Gulf Company, the Belt Company and the Air Line paid the consideration for the properties, the legal title being taken in the name of the Central Company. (*Osborn* v. *Perkins*, 112 Fed., 127, 131; *Lauter* v. *Trust Co.*, 85 Fed., 894, 903; *Condit* v. *Maxwell*, 142 Mo., 266; *Sanford* v. *Loan Society*, 80 Fed., 54; *Wade* v. *Sewell*, 56 Fed., 129; *Ducie* v. *Ford*, 138 U. S., 587; *Albright* v. *Oyster*, 140 U. S., 493). The payments were presumably made from the proceeds of bonds, since the properties were constructed from money realized from the sale of their bonds (Rec., 737).

In *Central Trust Company* v. *Kneeland*, 138 U. S., 414, the Toledo, Delphos & Burlington Railroad Company executed a mortgage with an after-acquired property clause to the Central Company. Certain terminal properties in the city of Toledo were afterwards purchased by the mortgagor and the title taken in the name of one George W. Ballou, the consideration, however, being paid by the Railroad Company. The court held that the lien of the mortgage attached to the property thus purchased, saying:

> So far as the property standing in the name of Ballou is concerned, he was the financial agent of the mortgagor, the Toledo, Delphos & Burlington Railroad Company, and while he took the title to some properties in his own name, the purchase was with moneys of the mortgagor. Hence, while he held the legal title, the full equitable title was in the railroad company, and that property became, therefore, in equity, subject to the lien of the first mortgage.

To the same effect are *Toledo Railroad Company* v. *Hamilton*, 134 U. S. 296; *Augusta Railroad Company* v. *Kittle*, 52 Fed. 63; *Brady* v. *Johnson*, 26 Atl. Rep. 49; *McGourkey* v. *The Toledo & Ohio Central Railway Company*, 146 U. S. 536; *Contracting and*

Building Company v. *Continental Trust Company*, 108 Fed., 1; *New England Water Works Company* v. *Farmers' Loan & Trust Co.*, 136 Fed., 521.

It is conceded by the court of appeals in its opinion (201 Fed., 827), that a trust resulted in favor of the railway companies, and that the lands were appurtenant to the railroads, and that the terms of the after-acquired clauses of their mortgages, *in each of which the Trust Company was the trustee*, were broad enough to include them. The court says:

> Conceding that the property was appurtenant to the railroad and that the terms of the after-acquired clauses were broad enough to include it, how can this claim of the Southern Company be sustained?

The court then proceeds to state the well-recognized and conceded principle that the mortgagee, by virtue of an after-acquired property clause, takes the property subject to junior liens, encumbrances and equities under which the property comes to the mortgagor. Then follows a statement of the circumstances which, in the opinion of the court of appeals, operates to defeat the equity of the Southern Company, as follows:

> In the case in hand, the Central Company acquired the property here in dispute for its liability to pay its stockholders the par value of its stock and *it held the property in trust to secure the payment to its stockholders of that liability*. The mortgagees under the railroad mortgages and the Southern Company, the purchaser thereunder, knew these facts. They parted with no value on account of this property and a court of conscience may not permit them to deprive the stockholders of the Central Company, who have really paid for it, of the trust property which the Central Company holds to reimburse them unless the court first requires them to pay to the holders of the stock its actual value.

The court adds, page 828 of the opinion:

> The equity of the stockholders as against the Southern Company which took whatever it has with full notice of all the facts in this case, is the same that it would have been if the liability of the Central Company, now represented by its stock for the purchase price of the property, *had been represented by its promissory notes and a mortgage upon this land to secure them* and they had been pledged by their owners to secure their debt to the Trust Company.

(a) If the properties of the Central Company had been taken in the name of an *individual*, instead of a corporation, the consideration therefor being paid by the railway companies, no one would deny that the after-acquired property clauses of the mortgages would immediately attach to them, subject to any liens or claims for unpaid purchase money. Why does the same result not follow when the titles were taken in the name of the Central Company, the purposes of the transaction remaining the same, the only difference being that, in the one case, the legal titles are vested in an *individual*, and in the other case, in a *corporation?* What is the magic surrounding the employment of a corporation for holding the legal title which so alters the situation that after-acquired property clauses of the mortgages become inoperative?

It is submitted that the courts have never before made such a distinction. Where the properties are bought with the funds of the mortgagor for its purposes, it is universally held that the after-acquired property clauses attach immediately, *regardless of the circumstances that the legal title may be vested in an individual or in a corporation.*

The decision of the court of appeals is in *direct conflict* with the case of *Guaranty Trust Co.* v. *Atlantic, etc. R. Co.*, 138 Fed., 517, United States Circuit Court of Appeals, Third Circuit, which sustains our position to the fullest extent.

The facts are as follows: The Atlantic Company had given a mortgage upon all its property existing and to be acquired to the Guaranty Trust Company to secure an issue of 500 bonds of $1,000 each. It afterwards used a portion of the proceeds from these bonds to purchase the property of the Asbury Park & Belmar Street Railway Company from a bondholders' committee which had purchased it at foreclosure sale. *Instead of taking the property of this company in its own name, it determined to organize a new corporation to take it over.* Accordingly, the Asbury Park & Seagirt Railroad Company was organized, which took over the property, *issuing all its capital stock to the Atlantic Company*, and immediately executing a lease of all the property to the Atlantic Company for 99 years. Later, *the Atlantic Company pledged this stock to the Guaranty Trust Company* to secure a loan of $100,000. In a sale under foreclosure of the mortgage mentioned above given to the Guaranty Trust Company as trustee, it was contended

by the Trust Company, and held by the lower court, that its individual lien upon the property of the Asbury Park & Seagirt Railroad Company acquired through the pledge of the capital stock was superior to the lien of the mortgage to secure bondholders of which it was trustee. Upon this point, the lower court was *reversed* upon appeal by intervening bondholders. Gray, Circuit Judge, writing the opinion, said, p. 526:

> As shown in the opinion of the court below, all beneficial interest and ownership in the franchises and property of the Belmar Company, were purchased by and resided in the defendant company, the bare legal title being held by the Asbury Park & Seagirt Railroad Company, as trustee, for the benefit and purposes of the defendant company, which had paid the entire purchase price, and which remained the real equitable owner. The mortgage of July 1, 1896, both expressly and impliedly, covered equitable interest, in after-acquired property appurtenant to or connected with the line of railroad controlled or operated by it. As soon as this equitable interest and ownership in the Belmar property was acquired, as hereinbefore described, by the defendant company, the lien of its mortgage attached itself thereto and remained upon it, both before and after the legal title had been placed in the Asbury Park & Seagirt Company. *Toledo, Delphos, etc. Railroad* v. *Hamilton*, 134 U. S., 296; *Central Trust Co.* v. *Kneeland*, 138 U. S., 414; *Bear Lake Irrigation Co.* v. *Garland*, 164 U. S., 1, 15. To hold that this were not so, *would be to work a fraud upon the holders of these bonds*, who were notified in the bonds themselves, and the declaration is recited in the mortgage, that they were secured by a mortgage conveying to the trustee (the complainant company) "all the certain railroad and other property, real and personal, and franchises of said railroad company, whether now owned or hereafter acquired by it."

The court further says, p. 527:

> As we have seen, the court below, although holding that the real beneficial ownership of and in the franchises and property of the Belmar Company, had been acquired in the manner hereinbefore stated, as an addition to and extension of the line of the said defendant company, and that in consequence, this equitable right and ownership, as well as the legal title in the capital stock of the said Seagirt Company, came under the lien of the mortgage in suit, yet held *that the complainant company, by its holding the pledge of all of said stock, under the circumstances as disclosed in this record,*

had, in its individual capacity, a superior equity to that of the mortgage given to it and held in trust for the bondholders.

In this, we cannot agree. *We do not think that the only way by which the lien of the mortgage upon this equitable ownership of the defendant company "can be enforced is by substituting for the railroad property itself that which fully represents it, namely, the capital stock of and the lease made by the new corporation." This ignores altogether the lien of the mortgage upon the equitable ownership itself. The capital stock held by the defendant company and thus pledged, represented the bare legal title of the property, whose full and entire beneficial ownership prior to the conveyance of the legal title to the Seagirt Company, was in the defendant company, and came, as we have seen, under the lien of the mortgage.* On the transfer of the bare legal title to the Seagirt Company, this equitable interest in the property *remained subject to the lien of the mortgage*, and those who held certificates for any or all of the capital stock held subject to such lien.

In the case before us, the defendant company, as the owner of all the capital stock of the Seagirt Company, may be estopped to assert a legal or equitable right in itself, as against its pledgee of said stock. *The controversy here, however, is not, in this respect, between the defendant company and the pledgee of this stock. It is between the pledgee of this stock and the creditors of the defendant company who hold, by reason of the mortgage in suit, a lien upon the whole beneficial and equitable ownership of the defendant company in the line of railway acquired by it in the manner above described.* If the defendant company had sold a portion of this stock, surely the lien of this mortgage so held in trust for the bondholders, would not have been measurably misplaced by reason of lack of notice to the transferee of the stock, and it is difficult to understand how a pledgee of such stock can be in any different or better position than such a purchaser.

This equitable ownership, being the real and beneficial ownership, and subject to the lien of the mortgage in suit, may be sold under the foreclosure decree, and inasmuch as the Seagirt Company holds the mere naked legal title in trust for the equitable owner, it may be a question whether, as a passive trust, it will not be considered as executed, and the legal title thus pass with the equitable; or it may be a matter for consideration, as to whether any, or what, further proceedings may be necessary to perfect and protect the title of the purchaser. *However this may be, no rights were conferred by the pledge of the stock of the Seagirt Company,*

which were superior to, or could interfere with, the mortgage lien subsisting upon this plenary equitable title for the benefit of the bondholders under the mortgage.

The decision of the court of appeals is also in conflict with the case of *New England Water Works Company* v. *Farmers' Loan & Trust Company*, 136 Fed., 521, Court of Appeals, Seventh Circuit (petition for writ of *certiorari* denied, 197 U. S. 622).

The Water Works Company executed a mortgage upon its plant containing an after-acquired property clause. The title to the property which it was claimed came within the scope of this clause was taken in the name of the *Boston Company*, which executed a mortgage upon the property. It was held that the property standing in the name of the Boston Company came under the after-acquired property clause of the mortgage of the Water Works Company notwithstanding the mortgage of the Boston Company. The court held that the after-acquired property clause attached *regardless of the form which the transaction might take*, saying:

> Here, then, in a sentence is the whole case: A mortgage on a necessarily expanding water works system—looking forward as well as to the present and contemplating that the new property, as fast as created, shall be drawn under the mortgage; a requirement that new property be created, constituting, in connection with the old property removed, the mouth and throat of the whole enterprise; and, finally, the actual creation of such new property, having no function other than to act as mouth and throat for the old. Can anyone doubt, that under such circumstances the new property, *whatever may be the legal form given to it*, is equitably but after-acquired property within the meaning of the mortgage? Does not such a case, on its physical aspects alone, constitute a case of after-acquired property?

In *Farmers' Loan & Trust Company* v. *Denver Railroad Company*, 126 Fed., 46, court of appeals, eighth circuit, it was held that the after-acquired property clause of the mortgage attached to the real estate taken in the name of the Jefferson Investment Company, a corporation formed for the purpose of holding the title to the property. It may be assumed that the capital stock of the company was owned by the mortgagor or in its interest, although that circumstance was not deemed by the court to be of sufficient importance to require any statement concerning it

whatsoever. Why was it not true that the Jefferson Investment Company acquired the property held by it "for its liability to pay its stockholders the par value of its stock," and why did it not hold "the property in trust to secure the payment to its stockholders of that liability," so as to defeat the after-acquired property clause of the mortgage, as is said by the court in its opinion in this case? Why was not the situation the same as it would have been if the liability of the Jefferson Company to its stockholders "had been represented by its promissory notes and a mortgage upon this land," so as to create an equity superior to the mortgage?

The same may be said of the facts presented in *Wade* v. *Chicago Railroad Company*, 149 U. S., 327, 341. There the title to the property, which was held to be subject to the after-acquired property clause of the mortgage, was taken in the name of the *Empire Construction Company* and the court said:

> The "after-acquired clause" in the mortgage of the Chicago, Springfield & St. Louis Railroad Company under the decisions of this court covers all acquisitions made to the property *by either the construction company or others acquiring rights under it.*

The Empire Construction Company had conveyed its rights, including the real estate in question, to Cooley & Co. and that firm in turn had conveyed them to certain newly organized companies, but it was held that even these conveyances did not defeat the operation of the after-acquired property clause of the mortgage.

If the Central Company had made a conveyance of its physical property to the Trust Company, would that have defeated the lien of the after-acquired property clause of the mortgage? Certainly not, since the Trust Company would have taken the conveyance with notice of the rights of the trustee in the mortgage.

In *Central Trust Company* v. *Kneeland*, 138 U. S., 414, 424, property which was taken in the name of the *Toledo & Grand Rapids Railroad Company* passed under the after-acquired property clause of the Toledo-Delphos & Burlington Railroad Company.

In *Augusta Railroad Company* v. *Kittel*, 52 Fed., 63, it was held that the after-acquired property clause of a mortgage of a railroad company covered the equitable title to certain lands,

although the legal title was in the United States and also in the State of Florida.

The views entertained by the court of appeals in this case of the relationship between the corporation and its stockholders are most extraordinary. Broadly stated, the court holds, as we read the opinion, that a corporation holds its property in trust for its stockholders, and that this trust relation is sufficient to defeat the operation of the after-acquired property clause of a mortgage; and that the obligation of a corporation to its stockholders in respect to its property is substantially the same as it would be if the stockholders, in lieu of the stock, held the notes of the corporation secured by a mortgage on its property.

But stockholders possess no such rights. They possess a right to participate, according to the amount of their stock, in the surplus profits of the corporation, and ultimately on its dissolution in the assets remaining after payment of its debts. (Cook on Corporations, Sec. 12.)

Stockholders have no lien or claim against property of the company until all of the obligations, liens, claims, and equities against the company and its property have first been discharged in full.

In the case under consideration, the Central Company took the title to the properties *subject to the resulting trust in favor of the mortgagor companies*. The stock of the Central Company only represented a right to participate in the profits of the concern and in the distribution of its property *subject to this trust*.

What was the situation in its entirety? The Belt Company, taking it for illustration, needed certain terminal properties in Kansas City *for its own use*. It proceeded to purchase such properties indirectly through the Central Company, paying the consideration therefor and taking possession of the property and using it as though it were its own. It employed the device of placing the title to the property in the Central Company under the mistaken idea (*McGourkey* v. *Toledo Railroad Company*, 146 U. S., 536, 566), that the lien of the mortgage would not attach to it, and that the property could be sold, if need be, free from its lien.

If the title had been placed in the name of an individual instead of a corporation, no question would have arisen. But it

was thought a corporation would be more convenient. The Central Company issued capital stock to the Belt Company in an amount corresponding more or less accurately with the purchase price of each piece of property as each sale was consummated. This stock was a mere memorandum or evidence of the amount which each company from time to time had invested in the properties held by the Central Company. The Trust Company knew all about the transactions, as its officers were the officers of the Central Company, as well as of the Belt Company, and the books of the Central Company were kept in the office of the Trust Company. The railroad of the Belt Company was built with the proceeds of its bonds (Rec., 737). The bondholders were advised of this through the terms of the mortgage and they had a right to assume that as the mortgaged property grew it would come under the after-acquired property clause. We think the court of appeals is mistaken in saying (201 Fed., 827) that the mortgagee "parted with no value on account of this property," since it is reasonably certain that it was the proceeds of the bonds of the Belt Company, the Gulf Company and the Air Line, respectively, which furnished the consideration for the properties purchased for them in the name of the Central Company.

It is the particular province of a court of equity to look through a transaction to the substance of it, and to disregard the form or appearance it may take, as was done in the *McGourkey* case, *supra*, where the court said, in speaking of a complicated arrangement for the leasing of equipment to a railway company through the issue of car trust certificates:

> In fine, we are of the opinion that this transaction should be adjudged to be in law what it appears to be in fact, a purchase by the railroad of the rolling stock in question, and that the device of car trust certificates was inoperative either to vest the legal title in McGourkey *or to prevent the lien of the mortgage from attaching to it upon its delivery to the road.*
>
> *Smith* v. *Moore*, 199 Fed., 690;
> *Linn Timber Co.* v. *United States*, 196 Fed., 593.

Let us take, for illustration, the case of the Belt Company with respect to any one of the pieces of property purchased for it with its funds, the title being taken in the name of the Central

Company and the capital stock of the Central Company issued to the Belt Company in an amount corresponding to the consideration paid. Is there any question that while the *legal title* was in the name of the Central Company the *equitable title* was in the Belt Company? We think not. Did the fact that the Belt Company accepted the stock of the Central Company operate to defeat the trust? On the contrary, the position of the bondholders was *strengthened. The Belt Company then possessed every interest in the property which it is possible for it to possess in a court of equity.* It was fortified with both the equitable title to the property itself and the stock of the company representing the property. It was so understood by the parties at the time and in the correspondence, record and books of the companies it is referred to as the property of the Belt Company, which the Central Company holds in trust for it.

Under these circumstances there can be no question that *the Belt Company's interest in this property passed to the trustee under its mortgage by virtue of the after-acquired property clause.* It was appurtenant to the railroad as the master found and as the court of appeals assumes. It was presumably paid for with the proceeds of the bonds, and bondholders had a right to expect that the security of their mortgage would be augmented correspondingly.

The lien of the mortgage having attached to it, it was obviously impossible to *defeat* or *dislodge* that lien by any transfer of stock of the Belt Company or by any act of the Belt Company whatsoever. The equitable title had passed beyond its reach and was securely vested in the trustee for the bondholders. Particularly is this so where the Trust Company cannot claim to be in the attitude of a *bona fide* holder of the stock. Not only was it conversant with all the transactions as above stated, but it was a trustee in the mortgages of the Belt Company, Gulf Company and Air Line. It controlled the affairs of the Belt Company to such an extent that it was able to strip it of all of its portable property when the insolvency of the Belt Company made it apparent that its control over the Belt Company would shortly cease. Moreover, the Trust Company cannot claim that any of its money went into the purchase of these properties. The Trust Company in its answer (Rec., 143) states that the Gulf Company and the Belt

Company "are in equity the *beneficial owners* of all of the property of the Central Improvement Company." They knew this at all times and cannot be heard to say that this beneficial interest did not pass to the trustee under the mortgages. The case of *Watson* v. *Bonfils*, 116 Fed., 157, is not controlling. Had there been involved in that case an after-acquired property mortgage, the equitable title would undoubtedly have passed under it. There is not in this case any express trust which conflicts with the resulting trust arising from the payment by the mortgagor companies of the purchase price of the properties involved.

Our views are strengthened by the language of the court of appeals itself, (201 Fed., 826), where it states that the Trust Company as the holder of the stock of the Central Company acquired an equitable interest in the *property* itself, saying:

> The Trust Company had such an equitable interest in the *property* of the Central Company by virtue of the pledge to it of 1,120 out of 1,407 shares of the stock of that company issued, that the Trust Company's appeal completely challenges the decree of the court with reference to *that property*.

If the possession of the Trust Company of this stock *as pledgee* gave to it *an equitable interest in the property itself*, why did not the *ownership* of the stock by the Belt Company give to it an equitable interest in the property itself which passed under the after-acquired property clause of its mortgage? And if this equitable interest did pass to the trustee, how could it ever have been afterwards divested from the trustee and reinvested in the Trust Company?

Our position finds ample support in the following additional cases:

Pere Marquette Railroad Co. v. *Graham*, 136 Mich., 444;
Columbia Finance & Trust Co. v. *Kentucky, etc. Ry. Co.*, 60 Fed., 794;
Knevals v. *Florida, etc. R. Co.*, 66 Fed., 224;
Omaha, etc., R. Co. v. *Wabash, etc., Ry. Co.*, 108 Mo., 298;
United States Trust Co. of N. Y. v. *Wabash Ry. Co.*, 32 Fed., 480;
Brady v. *Johnson*, 75 Md., 445;
Monmouth County Electric Co. v. *McKenna*, 68 N. J. Eq., 160;

Harris v. *Youngstown Bridge Co.*, 90 Fed., 322;
Contracting & Building Co. of Kentucky v. *Continental Trust Co. of N. Y.*, 108 Fed., 1;
Toledo, etc. Ry. Co. v. *Hamilton*, 134 U. S., 296.

(b) The Trust Company was the trustee in the mortgages or deeds of trust of the Belt Company, Gulf Company and Air Line. As such trustee, it knew that these mortgages, on the faith of which bonds were sold to various investors, contained an after acquired property clause sufficiently comprehensive to impress a lien upon railroad properties purchased by or for the three railroad companies, regardless of whether the legal title was in them or in some trustee for them. It knew this fact also through its interlocking directorates and the intimate knowledge it possessed of all of the affairs of those companies. The mortgages were promises to the bondholders that properties subsequently acquired by the mortgagors, situated as the properties of the Central Company were, would come under the mortgage liens and inure to their benefit, and the Trust Company was a party to this promise. It is true that capital stock of the Central Company was issued to the three railroad companies in amounts corresponding to the moneys advanced by them respectively, but that is unimportant in a court of equity, where the substance is to be regarded and the form ignored.

The Trust Company took the stock of the Central Company together with certain stocks and bonds on March 31st, 1899 (Rec. 753). The Gulf Company became bankrupt April 1st, 1899 (Rec. 754). This collateral was given to secure an existing indebtedness by the same officers, representing both companies. It does not appear that credit was extended by the Trust Company afterward on the faith of such collateral, certainly not in excess of moneys realized by the Trust Company thereafter.

The Trust Company was acting in a *dual capacity*. It was *trustee* for the bondholders under the mortgages with after acquired property clauses which, as the master found, attached to the properties of the Central Company. It also in its *individual capacity* took, or attempted to take, the same properties to secure an indebtedness to it from the Belt Company.

The authorities hold that a trustee, under such circumstances, will not be permitted to take or receive any of the Belt Company's assets or properties and appropriate them as security for its own

indebtedness. The court of appeals for the third circuit (*Guaranty Trust Co.* v. *Atlantic Coast Electric R. Co.*, 138 Federal, 517-530), in a case involving the right of a trustee in a railroad mortgage, carrying an after acquired property clause, to hold property acquired from the mortgagor, subsequently to the mortgage, to secure its own indebtedness from the same mortgagor, says:

> A court of equity cannot countenance such a discrimination, as is sought to be made in this case by a trustee, between property of the mortgagor which it holds in trust, and property of the same mortgagor which it claims to hold in its individual capacity. To do so would be a serious relaxation of the rules which have for long and uniformly governed the administration of trusts, and measured the responsibility of trustees.

In *King* v. *Remington*, 36 Minn., 15, King and his wife made a conveyance of property intended as a mortgage, to one Remington to secure an indebtedness. The court held that Remington, having accepted his deed to certain specific property to be held by him as security for advances made and to be made to King, thereby assumed such trust relations to King and his property as to *disable* him from becoming a purchaser at execution or bankruptcy sale of any property belonging to King, even though it was not of the property included in the trust arrangement. Other cases of similar import are as follows: *Ex parte James*, 8 Ves., 337; *Ex parte Bennett*, 10 Ves., 381; *Poillon* v. *Martin*, 1 Sandf. Ch., 589; *Duncomb* v. *New York, H. & N. R. Co.*, 84 N. Y., 190; *Case* v. *Carroll*, 35 N. Y., 385; *Gardner* v. *Ogden*, 22 N. Y., 327; *Ex parte Hughes*, 6 Ves., 617; *Fulton* v. *Whitney*, 86 N. Y., 548; *Oliver* v. *Court*, 8 Price, 127.

The master held that the rule above stated would not apply in its strictness to the present case. Certain it is, however, that no favorable presumptions attend the act of the Trust Company in undertaking to acquire for itself properties which it undoubtedly knew belonged in equity to the Belt Company, Gulf Company and Air Line, respectively, and which, as such, were impressed with liens in favor of their bondholders for whom it was acting as trustee.

The court, we respectfully submit, *should not be astute to reward the Trust Company for preferring itself, in its individual capacity, to the bondholders whom it represented in a fiduciary*

character of the highest order. Particularly is this true when it stands admitted that the properties in question were bought and paid for by the mortgagor companies with their own funds, and that the Trust Company not only contributed nothing toward their acquisition, but *through the action of common officers and directors* took the stock of the Central Company to secure an antecedent indebtedness at a time when by reason of the insolvency of the Gulf Company it saw that the Gulf Company, Belt Company, Air Line and their allied enterprises were facing financial disaster.

XIV.

Even if it should be held that the Trust Company has a right of recovery (which we strenuously deny) it should be limited to such equitable terms as in the opinion of the court should have been offered it at the time of the reorganization.

At the time of the reorganization there was a disputed claim as to the indebtedness of the Belt Company to the Trust Company. There was involved a very long accounting between the two companies covering a period of years. The Trust Company had controlled the Belt Company and its allied terminal companies during these years, and it was thought that its charges had been excessive, and that on a true accounting it would appear that instead of the Belt Company being indebted to the Trust Company the contrary was the fact. *Both* parties regarded such accounting as necessary. It appears from the stipulation dated November 12th, 1901, (Rec. 890), that prior to that time the receivers of the Belt Company had filed a crossbill against the Trust Company demanding an accounting, and it was agreed in the stipulation that *an accounting should be had* upon an amended crossbill or ancillary bill, and that the accounting should be expedited, and that when it was concluded, a judgment should be entered in favor of the Trust Company if it should be successful, or in favor of the Belt Company if that company should be successful.

The Trust Company in the stipulation was represented by Judge Francis M. Black, formerly Judge of the Supreme Court of Missouri and one of the ablest lawyers of our State. The ancillary bill was filed according to the stipulation and the Trust Company answered setting up various defenses, including the stat-

ute of limitations. The proceeding thus begun did not reach a termination until June 25th, 1910, and then *for the first time* the state of accounts between the Belt Company and the Trust Company was judicially determined.

At the time of the reorganization it was not possible to have offered to the Trust Company equitable terms in income bonds or preferred stock *since no one knew whether the Trust Company was in fact a creditor or not.* Its debt was honestly disputed, and neither the parties nor any court, in advance of an adjudication, could have prescribed fair or equitable terms.

Under these circumstances, should the Southern Company be *penalized* for failing to do what was obviously an impossibility? The Southern Company should not be penalized for its failure to make to the Trust Company a fair offer either at the time of the reorganization or at the time that its debt was first established in June, 1910. The same court which, for the first time adjudicated the state of accounts between the two companies, also adjudicated that there was no equity in the Belt property available to creditors, and hence there was no obligation to offer terms; in fact, the doctrine that an interest to stockholders can be preserved by the issuance to creditors on equitable terms of income bonds or preferred stock was first announced in the *Boyd* case in April, 1913.

It is respectfully submitted, therefore, in view of the circumstances, that if the Southern Company, in any possible view of the case, should be held liable in this action, it ought not in equity to be required to pay to the Trust Company the full amount of its debt with the accumulated interest. Should not the court under such circumstances prescribe such equitable terms as should have been offered at the time of the reorganization if the Trust Company's debt had been then liquidated? Does it not appeal to the conscience of the Chancellor to adjust the Trust Company's claim, in the event that its claim is deemed valid, to the position which it would occupy now, if such equitable terms had been offered then? As stated in our application for *certiorari* if the Trust Company had been given par in the preferred stock of the Southern Company at the time of the reorganization, it would have received $360,000 par value, the average price of which during the year 1900 was $33.75, aggregating $121,500. If you add to this

sum the dividends that would have been paid on the stock, together with interest at 6% on the dividends from time of payment to date (May, 1915), the aggregate amount would be approximately $280,000. Or if you take the present market value of the stock at 59, together with the dividends paid and interest on dividends at 6% to date, the amount would be approximately $370,000. The judgment sought to be enforced against the Southern Company is over $800,000, or $430,000 more than the Trust Company would have realized if the rule of equitable terms in the *Boyd* case had been anticipated, and could have been carried out at the time of the reorganization.

The Southern Company has done nothing to forfeit its right to equitable consideration. The Belt Company and its receiver not only had the legal right to have the account between the two companies sifted by the process of an accounting to ascertain if the Trust Company had abused its power in imposing unrighteous debts and obligations upon the Belt Company, but it was considered a duty so to do, and the court appointing the receiver approved. The situation was such that Judge Black believed there should be an accounting, and he stipulated to that effect. Not until October 22nd, 1912, was there any judicial determination that the Southern Company was in any way liable for the debt of the Belt Company, nor until December 2nd, 1913, was that decision reaffirmed by the court of appeals.

We think it would be a most unjust result if the Trust Company should be permitted to retain the enormous benefits which it received under the reorganization plan, and at the same time hold the Southern Company liable for its debt against the Belt Company. And the harshness and, as we think, the injustice of such a result would be greatly intensified if this court should hold, as did the court of appeals, that the doctrine of offering equitable terms to creditors, announced in the *Boyd* case, should be disregarded, and the Trust Company should be permitted to recover a personal judgment in an amount exceeding by at least $430,000 what such equitable terms would have amounted to.

XV.

There was no exception to the master's report in the court below challenging the correctness of his finding that the Southern Company was not liable for the floating indebtedness of the Belt Company. The decision of the court of appeals that such finding can be reviewed in an appellate court in the absence of exceptions is erroneous.

The Trust Company excepted to the *report* of the master (Rec., 893), for the reason that,

> The master has in his report stated as follows: "That the Southern Company is not in any way liable for the floating indebtedness of the Belt Company;" whereas, the master in his report should have *omitted reference to or recommendation concerning* the question of the liability of the Southern Company for said floating indebtedness of the Belt Company for the following reasons:

The grounds specifically assigned were that that issue was not properly in the case for various reasons, but it was nowhere stated that the issue had been decided *incorrectly*.

The assignment of error in the court of appeals (201 Fed., 817) was that the court erred in *including* in said decree the finding that the Southern Company did not assume or agree to pay or become liable for the indebtedness owing by the Belt Company to the Trust Company.

It is not a case where the Trust Company "intended to present the question of the liability," but it is a case where the Trust Company intended *not* to present that question for decision. Its whole attitude was the strongest evidence of a desire to *escape* a determination of that question, and it framed its exceptions to the master's report and its assignments of error for that specific purpose.

The Trust Company itself, in its return to a rule to show cause, etc. (Rec. 970), said:

> That by reason of the former decision of this court, and by reason of the state of the pleadings and record in the cause from which this appeal is taken, *the question of the personal liability of The Kansas City Southern Railway Company for the debt of the Belt Company is not in issue and cannot be determined upon this appeal.*

It was the deliberate purpose of the Trust Company to avoid any exceptions to the master's report which would challenge the *correctness* of the master's findings on the liability issue or which would *permit* or *require* a decision by the court of appeals.

It cannot be plausibly claimed that the exceptions filed in the court below by the Trust Company met the well established rule requiring definiteness and certainty so as to challenge the *correctness* of the ruling of the master on the liability issue. Aside from the fact that they were not *intended* to do so, they utterly failed to apprise the opposite party that it was called upon to meet this issue, nor did they advise either the master or the court that the Trust Company sought to controvert the master's finding in that regard. In *Sheffield Railway Company* v. *Gordon*, 151 U. S. 285, 290, this court points out that this degree of definiteness and certainty is required:

> Proper practice in equity requires that exceptions to the report of a master should point out specifically the errors upon which the party relies, not only that the *opposite party* may be apprised of what he has to meet but that the *master* may know in what particular his report is objectionable and may have an opportunity of correcting his errors or reconsidering his opinions.

To the same effect are:

> *Columbus Railroad Company Appeals*, 109 Fed., 177, 219;
>
> *Sanford* v. *Embry*, 151 Fed., 977, 982;
>
> Vol. II, Street on Federal Equity Practice, Sec. 1486;
>
> Vol. II, Foster's Federal Practice, Sec. 315.

(a) Under this state of the record it was not a question of the assignment of errors, or specification of errors, or the power of the court to notice a plain error. *There would be nothing here to review even if the appellant at the time of taking its appeal had specifically assigned as error the ruling of the court upon the liability issue.*

Assignments of error are directed to the action of the *lower court* and are not directed to the action of the master in his findings of fact or conclusions of law, which are not excepted to.

It is true, as this court says in its opinion (201 Fed., p. 818), that an appeal in a suit in equity involves a trial *de novo* in the

appellate court and entitles the appellant to a just decree, and it is also true, as the court says on the same page, that this court may consider a plain error not assigned when a failure to do so would result in a great injustice.

But a hearing in an appellate court in an equity case is a trial *de novo* of the *case before the court*, as it was presented to that court, and as that court passed upon it, but not of the case *before the master*, and the power of this court to notice a plain error means that it may consider and correct an error of the *lower court*, but not an error which may have been committed by the *master*. The power of the court to notice a plain error merely *supplies the omission of an assignment of error.*

What is before the lower court upon the coming in of the master's report in an equity case? The answer is plain, that the master's report is to be taken as correct by the court, as assented to by the parties, except in so far as matters of law and fact are properly excepted to by the parties.

In *Metsker* v. *Bonebrake*, 108 U. S., 66, 72, this court says, in speaking of the functions and duties of the lower court under these circumstances.

> The findings of the master are *prima facie* correct. Only such matters of *law* and of *fact* as are *brought before the court by exceptions* are to be considered, and the burden of sustaining the exceptions is on the objecting party.

If the only matters before the lower court are those portions of the master's report to which exceptions are filed, as this court says, and the court accepts and incorporates in its decree the unchallenged portions of the master's report, how can the lower court be convicted of error for so doing?

The Trust Company had its election to except to the correctness of the master's *conclusions* on the liability issue, and it concluded that it would not challenge that portion of the report, contenting itself with saying that that issue was not properly in the case. We contend that the conduct of the Trust Company in omitting to except to the report of the master precludes it from raising that question upon appeal, *and this would be true even if it had assigned this question as error in the most formal and solemn manner in taking its appeal.*

The decision of the court of appeals is in conflict with the

case of *Burns* v. *Rosenstein*, 135 U. S. 449. There it was duly assigned as error that the court below erred in acting upon the master's *interpretation* of certain articles of the partnership contract as a valid part of his report; in construing the partnership contract as requiring losses of capital to be borne by the partners in the same proportion in which the contract provided for the distribution of net profits, etc. It is to be noted here that the error complained of was *duly assigned*, which would at least have as great an effect as if the court on its own motion should undertake to notice a plain error. It was held, however, that these questions could not be raised by the appellant, for the reason that no exception had been taken to the report of the master in the court below, and the lower court could not be convicted of an error in basing the decree upon those portions of the master's report to which no exception had been taken. The court said:

> These questions are not open to appellants in this court. The decree below followed the report of the special master. And that report was based, in part, upon statements drawn from the books of the parties by the accountants selected by them respectively. Those statements contained the undisputed and disputed items in separate columns. The defendants did not file with the master or in court any exceptions to the report. If the statements by the accountants, or the report of the special master, were based upon any particular interpretation of the articles of partnership that was prejudicial to the defendants, it was their right to file exceptions to the report. The master was directed to report all issues of fact made by the pleadings, and take an account of the dealings and transactions between the parties, and all claims for damages arising out of said transactions. He could not intelligently discharge that duty without adopting some theory as to the scope and effect of the partnership agreement. If he went beyond the order of reference, or if the account taken by him involved a misconception of the provisions of that agreement, the defendants should have brought those matters to the attention of the court by exceptions to the report. *Having failed to do this they cannot in this court for the first time object that the master proceeded upon erroneous views as to the contract between the parties.* (Equity Rule 83; *Brockett* v. *Brockett*, 3 How. 692; *McMicken* v. *Perrin*, 18 How. 504, 506; *Story* v. *Livingston*, 13 Pet. 359, 366; *Medsker* v. *Bonebrake*, 108 U. S. 66, 71).

It is to be noted that the case just cited was an appeal in a suit in equity, and that it involved a trial *de novo* in the appellate court, which, as the court of appeals well says, entitles the appellant to a just decree, and that this court, instead of being called upon to notice a plain error, had before it a proper assignment of error made at the time the appeal was taken as required by law.

In *Coghlan* v. *South Carolina Railroad Co.*, 142 U. S., 101, 115, with which we think the decision of the court of appeals is in conflict, error was *duly assigned* that the lower court did not include interest for three periods of six months each. The court refused to consider the question, saying:

> Having failed to except to the report upon the ground that it did not include them, we do not think that the appellant should be now heard to urge this as an objection to the final decree.

The decision of the court of appeals is also in conflict with the case of *Topliff* v. *Topliff*, 145 U. S., 156. There an assignment of error properly raised the question of the inadequacy of damages awarded, but as no exceptions upon this ground were made in the court below to the master's report, this court declined to consider the question, saying, page 173:

> Proper practice requires that objections to a master's report shall be taken in that court, that any errors discovered therein may be rectified by the court itself or by a reference to the master for a correction of his report without putting the parties to the delay and expense of an appeal to this court. *It would be manifestly unjust if this court after having affirmed the action of the court below in every other particular, should take up an error in a master's report which was not called to its attention and reverse the case upon that ground, when if exception had been duly taken the error could have been at once corrected.* There is nothing in this case to indicate that this point was ever made before the master, nor is it noticed in the eight exceptions taken to this first report, which was set aside upon other grounds, or as already observed in the exceptions to his final report.

The decision of the court of appeals is also in conflict with two following decisions of courts of appeal of other circuits.

In *Provident Life & Trust Company* v. *Camden Railway Company*, circuit court of appeals, third circuit, 177 Fed., 854, 859,

the assignment of error properly made alleged that the principal sums evidenced by the bonds in question were not due and payable. It was held that although the error in the court of appeals was *properly assigned* (which would be at least equivalent to the action of the court in noticing a plain error), yet inasmuch as the particular complaint had not been presented to the lower court by the way of exceptions to the report of the master, the appellant could not be heard upon appeal. The court said:

> This was one of the matters specifically referred to the master to ascertain. The language of the order of reference in that respect has already been given. It will be recalled that he was "to ascertain and report what is now due and payable to the complainant, trustee, for principal and interest upon the two mortgages made to it by the defendant." Killion, although not entitled to be present and heard in view of the interlocutory decree standing against him, nevertheless attended before the master, was heard by him, and later was permitted to, and did, file exceptions to his report; but he did not except to the master's explicit finding that the principal and interest of the bonds were due. *Having failed to raise the question below, although given the opportunity, he ought not to be permitted to raise it for the first time on appeal*, and this irrespective of the fact of the decree *pro confesso* standing against him.

In *The City of New Orleans* v. *Fisher*, 91 Fed., 574, circuit court of appeals, fifth circuit, it is held that questions concerning the correctness of the master's findings, which were not raised by proper exceptions to his report, could not be made the ground of assignments of error on the appeal. The court said, page 581, after setting out the *assignment of error*:

> The grounds stated in this assignment form no part of the exceptions filed to the master's report and it can hardly be said that the judge below erred in this respect when his attention does not appear to have been called to it.

In *New Orleans* v. *Fisher*, 180 U. S., 185, being the opinion of this court in the same case reported in 91 Fed., 574, it is said:

> Fourteen errors were assigned in the circuit court of appeals, which were considered and disposed of *seriatim*. Many of these alleged errors raised questions *not within the exceptions to the master's report*, and in any view we think the case may be determined without minutely retraversing the ground.

The court further says:

> The facts are not in controversy, and the questions raised or attempted to be raised are questions of law.

In *McMicken* v. *Perrin*, 18 How., 507, the court said:

> This court will *not* review a master's report upon objections taken here for the first time.

In Volume II, Street on Federal Equity Practice, Sec. 1476, it is said:

> As exceptions furnish an appropriate procedure for reviewing the master's report, so they supply the only means whereby defects of the kind now under consideration can be reached. Findings of the master on questions of fact are always binding where no exceptions are taken, or where they are improperly taken. Only such matters of *law* and of fact as are brought before the court by exceptions will be reviewed and the burden of sustaining the exceptions is on the objecting party.

Perhaps the best statement of the rule is contained in 17 Enc. Pl. & Prac., 1047, as follows:

> Upon the coming in of the master's report it will be received as true when no exception is taken thereto, and, if some exceptions are filed, the portions of the report not excepted to will be taken as correct, not only as regards the *principles* but as relates to the evidence upon which they are based. And of course exceptions to the report which are not presented upon the coming in of the report cannot be made on appeal.

In *Third National Bank* v. *National Bank*, 86 Fed., 852-858, court of appeals, fifth circuit, the court said:

> There is nothing to indicate that the point was made before the master or before the circuit court in its consideration of the exceptions to the master's report. It is not mentioned in the assignments of error and therefore the suggestion comes to us in a manner which does not warrant us in entertaining it or allowing it, however sound it may be and prevalent it might have been if it had been duly made.

In *Brockett* v. *Brockett*, 3 How., 691, the court says:

> And to some of the items allowed by the master, objections are made before this court. But it does not appear that these objections were brought before the lower court by ex-

ceptions to the master's report. The seventy-third chancery rule is decisive on this subject. It provides that "the parties shall have one month from the time of filing the master's report, to file exceptions thereto, and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule day after the month is expired." No exceptions having been filed in the circuit court to the report of the master, none can be heard in this court.

In *Hudgins* v. *Kemp*, 20 How., 45, the court said:

> It is also insisted, that the court below erred in decreeing the rents and profits of the lands in controversy against the defendant, Robert Hudgins, for the reasons that it is not shown that he was in the possession and enjoyment of the same; and also, that the court erred in decreeing these rents and profits from the filing of the petition in bankruptcy, instead of from the decree declaring J. L. Hudgins a bankrupt.
>
> The short answer to each of these objections is, that no such exceptions were taken to the report of the master, and are, therefore, not properly before us. That was the time and place to have presented these questions, and the omission precludes any question here on the matter.

To the same effect see *Story* v. *Livingston*, 13 Peters, 359; *Mason Lumber Co.* v. *Buchtel*, 101 U. S., 633; *The Vanderbilt* v. *McKibbon*, 6 Wallace, 225.

The case under consideration furnishes an apt illustration of the necessity of the rule requiring exceptions to the findings of the master upon matters of *law* as well as upon matters of fact. The master's report comprised some five hundred pages, and contained a digest of thousands of pages of testimony and a consideration and determination of a multitude of legal propositions involved in this most complex and confusing litigation. Is the trial court expected to grope through this bewildering maze with a search warrant to find errors of which one or the other of the contending parties may complain? Should not the party dissatisfied with any particular finding of fact or conclusion of law be called upon to point it out to the court, and should not the court be justified in assuming that such portions of the report as are not excepted to are acquiesced in by the contending parties. If one of the parties undertakes to file exceptions and to point out to the lower court his specific objections to the report and the court passes upon the exceptions filed, assuming, as he has a right

to assume, that other portions of the report are acquiesced in, should not the parties upon appeal be confined to their exceptions thus taken in the lower court? If a party *purposely* and *intentionally* omits to except to a conclusion or finding of the master, should the lower court be required to grope through the master's report in order to pass upon the finding or conclusion against the *implied protest* of the interested party, and should an appellate court be at liberty to reverse the lower court if it fails so to do?

We do not believe that the case of *Sheffield Railway Company* v. *Gordon*, 151 U. S., 285, 293, was intended to modify the rule of the foregoing decisions of this court. There exceptions to the master's report had been filed.. The court stated that there were *two difficulties in the way of considering the case upon these exceptions, first*, because the exceptions were too broad, and, *secondly*, because the master did not send up the entire evidence with his report, so that it was impossible to impeach his conclusions. It is true the court says:

> It is true that if the report of the master is clearly erroneous in any particular, it is within the descretion of the court to correct the error, but we see no reason for exercising such discretion in this case.

The court had been speaking of the proper proceeding before the *master* and before the *lower court*, and it is quite probable that in the quotation above referred to the Court is speaking of the rule which should control the *lower court*, and not a rule which would be applicable in an appellate court. Particularly would this appear so in view of the fact that there is no reference to the line of authorities above referred to, holding in no uncertain terms, that no issue in a case heard before a master is presented in an appellate court, in the absence of an exception to the report pointing out the particular matter complained of, so that the master, the lower court and opposing counsel may be advised in what particular the report is objectionable.

(b) The court of appeals determined however, that an exception to the correctness of the master's conclusion on the liability issue was unnecessary, and that the court therefore was at liberty to consider that question *in the absence of any exception*. It says:

> Moreover the conclusion here challenged was a mere

> deduction from the facts disclosed in the master's report, and where it appears on the face of the report that the master has drawn an erroneous conclusion from the facts he found, *the absence of an exception does not disable the court from correcting the error and entering a just and final decree.*

It is submitted that the rule stated by the court is in conflict with the settled rules of this court, and it is believed, furthermore, that the authorities cited by the court of appeals do not sustain its conclusion.

The cases cited refer for their authority to 2 *Daniel's Ch. Plead. & Pr. p.* 1310, where the author says:

> Where the master by his report states all the facts correctly, but is mistaken as to the legal consequences of those facts, it is not necessary for the party dissatisfied with the master's finding, to except to the report, as the question decided by the master may be opened *upon further directions* without exceptions.

The author refers as authority for this statement to *Thomas* v. *Claxton,* 6 Ves. 226, and *Branger* v. *Chevalier,* 9 Cal. 353.

In the first of these cases it is held that the court to which the master makes his report may, *prior to final decree,* inquire whether, upon the entire report, the master's conclusion is right. This is no more than saying that the lower court, with the master's report before it, may, in the exercise of its discretion, take such action upon the report and render such decree as right and justice may require. This is far from a ruling that matters in the master's report, which have passed unchallenged in the lower court, may be reviewed on appeal.

In *Branger* v. *Chevalier,* the questions sought to be reviewed upon appeal had been appropriately challenged in the lower court. It is there said:

> But when the alleged error consists in the final conclusions of law or fact drawn from the testimony, and the evidence is certified to the court by the referee, the proper course is to move to set aside the report and for a new trial. This was done in this case.

Under these circumstances it was held that the appellant had the right "to raise the question as to errors apparent upon the face of the report itself."

The rule that the court to which the master's report is addressed reserves full control over it, as well as over all other proceedings in the case prior to final decree, is recognized in *Celluloid Manufacturing Company* v. *Manufacturing Company*, 40 Fed. 477, referred to by the court, where it is said:

> Where the master by his report states the facts correctly but errs as to the legal conclusion, the party against whom he errs is not required to except to the report but may bring the question to the attention of the court upon further directions; or if the report is made pursuant to an interlocutory decree, when the cause comes on to be disposed of by a final decree (2. *Daniel's Ch. Pr.* 149). *The cause remains under the control of the court until disposed of by a final decree* and until then it can revise the interlocutory decree or any proceeding in the cause; and it is its duty to correct any error of the master affecting the merits, as well as any error of its own, properly brought to its knowledge.

These cases come within the rule that the filing of exceptions to the report of the master may be permitted after the expiration of the regular time for filing, in case of accident, mistake or surprise (16 *Cyc.* 451).

This is not a case, however, where the lower court, of its own motion, or at the instance of any party to the cause, undertook to review the conclusions of law, upon the liability issue made by the master. Nor is it a case where the court enlarged the time for the filing of exceptions by the Trust Company. It is a case where the Trust Company *deliberately omitted* to file any exceptions which would question the correctness of the master's conclusion upon the liability issue, and *studiously avoided* taking any step whatsoever which would invite or permit the court to review the master's conclusions. There were no "further directions" of the lower court which had the effect to "open" the liability question.

The case of *Burke* v. *Davis*, 81 Fed. 907 (court of appeals, seventh circuit) is also referred to. There the case "was referred to a master" but it does not appear that the master was empowered to state his conclusions of *law* as well as his findings of fact. The court followed the rule stated in 2 *Daniel's Ch. Pr. p.* 1310, and *Hays* v. *Hammond*, 162 Ill. 133, saying:

> In the absence of exceptions to the report, there can be

> no inquiry into the correctness of the master's findings of fact; but whether the proper decree was entered upon the report is nevertheless open to consideration. The master's mistaken apprehension of the legal consequences of the facts reported as Daniel states it, "may be opened upon further directions, without exceptions."

The master only reported the facts. He apparently was not commissioned to find the law, as well as the facts. How, then, could exception have been taken to his conclusion of law? There is no reference whatever to the controlling case of *Medsker* v. *Bonebrake*, 108 U. S., 66, or to the many cases decided in the national courts which are cited in this brief. It is significant that the case of *Burke* v. *Davis* has never been cited or referred to by any court since its decision in 1907.

However, the same court of appeals for the seventh circuit, in a later case (*Sanders* v. *Village of Riverside*, 118 Fed. 720), sustains our contention to the fullest extent. The complainant, Sanders, filed his bill against the Village to quiet title to certain real estate. The Village filed a cross bill setting up its title and possession, praying that its title be quieted. By agreement it was ordered by the court that the cause and cross-cause be referred to a master to report to the court his conclusions of fact and of law. The master found that Sanders was the owner and entitled to a decree quieting his title. The Village filed no exceptions to this portion of the report. The court held that as the reference was of the law and of the fact, by consent of the parties, the master's report was conclusive as to all issues of fact or of law, not specifically excepted to in the lower court, saying:

> The parties agreed to a submission of the whole cause to a master to find the facts and the law. The finding came into this court conclusive upon both parties, except insofar as they should file exceptions. The Village filed no exceptions to the finding that Mr. Sanders was the owner of and entitled to a decree quieting his title to the alley parts. The correctness of that conclusion, therefore, is not now in controversy; citing *Kimberly* v. *Arms*, 129 U. S. 512; *Davis* v. *Schwartz*, 55 U. S. 631; *American Telegraph Co.* v. *Western Union Telegraph Company*, 69 Fed. 666; *Farrar* v. *Bernheim*, 75 Fed. 136; *Bosworth* v. *Hook*, 77 Fed. 686.

In *Walker* v. *Kinnare*, 76 Fed. 101, the same court of appeals holds that an order of reference "to take proof of the is-

sues joined in said petition, answer, and replication, and to report the same to this court, with his conclusions thereon as to the amount of damages, if any, which the claimant is entitled to recover under the issues," refers the whole case to the master, and not merely the question of damages; and that the findings of the master upon such a reference, by consent of the parties, are to be treated as presumptively correct. The court, after stating that the master under the order, was required to report his conclusions of law, as well as his conclusions of fact, upon the merits of the case, said:

> The findings by the master upon a reference by consent of the parties are to be treated as presumptively correct, and the burden is cast upon the excepting parties to show error in them. The report is not to be disregarded upon any light ground; but as Mr. Justice Field observes in *Kimberly* v. *Arms*, 129 U. S. 512, 9 Sup. Ct., 355, the findings of the master, like those of an independent tribunal, "are to be taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise."

In a later case in the court of appeals of the same circuit (*Home Land & Cattle Company* v. *M'Namara*, 111 Fed., 822), the rule for which we are contending is clearly recognized. It is there held:

> Where a cause has by consent been referred to a master to make findings on all of the issues, both of fact and law, a party may file exceptions to the master's conclusions of law after the report has been filed in court, under equity rule 83, notwithstanding his failure to file any exceptions before the master.

The court said:

> It is said, however, that the appellants failed to avail themselves of the right to question the ruling of the court below by their omission to take proper exception to the findings of the master in chancery. The case of *Kimberly* v. *Arms*, 129 U. S., 512, 524; 9 Sup. Ct., 355; 32 L. Ed., 674, is cited in support of the doctrine that, where parties have consented to a reference to a master to hear and decide all the issues of the case, and report his findings, both of fact and of law, "his determinations are not subject to be set aside

or disregarded at the mere discretion of the court." It is true that the court in that case remarked that such findings, "like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence or in the application of the law, but not otherwise." It is not necessary, however, in the case at bar, to determine what would have been the effect of a failure to take exception to the findings of the master upon a question of fact, or his omission to make material findings of fact. It is sufficient to point to the fact that the exception to the construction given by the court to the ninth clause of the contract was taken in apt time within the rule indicated in *Kimberly* v. *Arms*. After the report of the master was filed, the appellants filed in the circuit court proper and specific exception to the master's *conclusions of law* upon the very ground which is involved in the foregoing discussion, and upon the contention that the only damages which the appellees could be allowed were to be computed upon the difference between the market value of the cattle at the time of the delivery and the price which was agreed to be paid.

There is a diversity of views in the State courts upon the necessity of the filing of exceptions to the conclusions of law in reports of masters and referees, which is due in many instances to controlling statutes relating to statutory reference, and due also to the merging of equitable and legal forms. In general, however, (except in Illinois, West Virginia and Mississippi, which appear to follow the text of 2 Daniel's Ch. Plead. & Pr. 1310, without consideration of the reason on which it is based) the rule may be stated as follows:

Where there is no controlling statute, and the general rules of equity practice obtain, it is held that *exceptions to the master's conclusions of law must be filed before the lower court in order that there may be a review of the question in an appellate court.* Thus, in *Hendrix* v. *Holden*, 36 S. E. (S. C.), 1010, it is said:

> The very object of exceptions is to point out the exact errors of law and fact made in the report of a master or a decree of a circuit judge. All the issues of law and fact were committed to the decision of J. W. Hollerman as master. When his report was made, it was binding on all the parties unless excepted to, and such exceptions are required to set out in what particulars there was error committed by the

master. Unless exceptions are taken, the circuit judge must make the findings of fact and conclusions of law of the master the basis of his judgment or decree. It is not in the power of the circuit judge to disregard the machinery provided by law for the conduct of business in our courts. When parties litigant confide the trial of all issues of law and fact to the master, they are entitled to have the report of such master on all such issues confirmed by the judgment of the circuit court unless excepted to; and in the event of exceptions, the circuit judge is limited to those exceptions, and he cannot of his own motion, go outside of these exceptions. This is not to be viewed as a hardship to the circuit judge, no more than the requirements of our constitution that the Supreme Court of the state shall not pass upon facts in a law case. Inasmuch as the master passed directly upon the validity of the administratorship of William Holden, and held that he was such administrator, and there were no exceptions to such findings of fact and conclusions of law by the master, it is not an open question, so far as the parties to this action are concerned, whether such findings of the master are conclusive. And it is just as imperative on the circuit judge.

Other cases of a similar import are as follows:

Young v. *Young*, 63 S. E. Rep., 748 (Va.);
Thompson v. *Mason*, 42 Atl. Rep., 314 (Me.);
Ivarson v. *Mulvey*, 60 N. E. Rep., 477 (Mass.);
Battery Park Bank v. *S. W. Carolina Bank*, 50 S. E. Rep., 848 (N. C.);
Rodgers v. *Rodgers*, 47 S. W. Rep., 701 (Tenn.);
National Exchange Bank v. *Preston*, 33 S. E. Rep., 546 (Va.);
Jackson v. *Pleasanton*, 43 S. E. Rep., 573 (Va.);
Lockhaven Trust Company v. *Trust Company*, 81 Pac. Rep., 804 (Colo.);
Handley v. *McKee*, 70 S. E. Rep., 94 (Ga.);
Taylor v. *Savings Bank*, 61 L. R. A., 900 (Ky.);
Momsen v. *Atkins*, 81 N. W. Rep., 647 (Wis.);
Bender v. *Matney*, 122 Mo., 254;
Tyler v. *Willis*, 33 Barb., 333;
Amboy v. *Byerly*, 13 Mich., 439, 444;
Iron Works v. *Lumber Co.*, 106 Pac., 1124 (Wash.);
Camp v. *Mayor*, 47 Ga., 414.

Even where the statute provides for the filing of exceptions to the report of a master or referee, without specifying that the exceptions shall be to findings of fact or conclusions of law, it is held that only such matters of *law* as well as of fact are open for review in an appellate court as are properly excepted to in the lower court. Thus 2012 R. S. Mo., 1909, is as follows:

> All exceptions to the report of referees shall be in writing and filed within four days in term after the report is filed and shall be argued without delay.

Under this statute it is said by the Supreme Court of Missouri, *State ex rel Wayne County* v. *Woods,* 136 S. W. Rep., 337 (1911):

> In reference cases the referee is required to make and report his rulings both on the evidence and the law, and the errors he makes are called to the attention of the trial court by specific exceptions to be filed within four days. The errors of the trial court are called to the attention of this court through his ruling upon these exceptions.

The statute in some cases expressly requires findings of fact and conclusions of law to be separately stated, and that all portions of the report not excepted to shall stand as the finding and judgment of the court. In *Bounder* v. *Hinckley,* 60 Ia., 185, it is said:

> The question presented here is whether in a case where a report of a referee has been confirmed and judgment rendered accordingly, the appellant can be allowed to present for our consideration questions which do not appear by proper exceptions to have been specifically presented to the consideration of the court below. The appellant in the case at bar insists that he can. He insists that all questions which can be raised in respect to the correctness of the report must be deemed to have been presented in a general way to the court below, when it was asked to confirm the report and that such general presentation is sufficient. But it will be seen at once that if his position is correct, it becomes the duty of the court, in every case referred and reported upon, to examine the entire record with the same care as if the case had not been referred. We do not think that such has been the practice, and if we should sustain the rule contended for, it appears to us that we should impose upon the courts a great burden of which they have deemed themselves relieved, and should go far toward destroying all value of a reference.

Section 2821 of the code provides that "the report of the referee on the whole issue must state the facts found and the conclusions of law separately, and shall stand as the finding of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court. The report may be excepted to and reviewed in like manner." While the foregoing provision may not be as clear in all respects as might be desired, it is certain that it contemplates that where a report is to be reviewed, exceptions should be taken to it as the foundation of the review. The following cases, though containing no ruling upon the precise point before us, indicate to some extent what has been deemed the correct practice; *Roberts* v. *Cass*, 27 Iowa, 225; *Edwards & Beardsley* v. *Cottrell*, 43 Iowa, 194, and *Washington County* v. *Jones*, 45 Iowa, 260. It appears to us, therefore, that where the appellant desires to assail the report, he should file exceptions to the same in the trial court. The appellant in this case having failed to do so, errors assigned upon the report present, we think, nothing for our review.

XVI.

The reference to the master of all the issues of fact and of law involved in this appeal was made by consent of parties. The failure of the Trust Company to except to the Master's finding on the liability issue prevents it from raising that question upon appeal.

All the issues involved in this appeal arise upon the intervening petition of the Southern Company and the Trust Company's answer to it.

The original intervening petition of the Southern Company was filed in February, 1905, by consent, evidenced by stipulation of parties (Rec. 164, 165). There is nothing in the record to indicate that the issues made on this intervening petition were referred to the master. The amended intervening petition of the Southern Company was filed on May 1, 1905 (Rec. 269), by stipulation (Rec. 267), which, after providing for the filing of the amended intervening petition, proceeds as follows:

> And the Guardian Trust Company *consents* that the issues so made shall be referred to Shannon C. Douglas, Special Master.

The order of the court made on May 1, 1905, in accordance with the stipulation, *and O. K'd by counsel for the Trust Company*, is as follows (Rec. 268):

> In accordance with the *stipulation of the parties herein filed* it is ordered that the intervenor, The Kansas City Southern Railway Company, have leave to file its amended intervening petition and that *the issues made therein* stand referred to Hon. Shannon C. Douglas to take the testimony and report his *findings of fact and conclusions of law* therein with all convenient speed; that the defendants to said amended petition shall have fifteen days from this date within which to file answer. (Signed) SMITH MCPHERSON, *Judge.*
>
> O. K.
>
> J. C. ROSENBERGER,
> H. S. MCCARTNEY,
> *For Guardian Trust Co.*

The issues of fact and law arising under the intervening petition, which are the only issues for determination by this court, were thus referred to the master *by consent of parties.* The parties assented not only to the reference to Hon. Shannon C. Douglas, as special master, but also consented that he should hear and determine the *entire case*, and make his "findings of fact and conclusions of law" upon *all* the issues.

While it may not be of controlling importance it is worthy of note that the issue of debt or no debt, between the Belt Company and the Trust Company, was also referred to the same master by consent, as will appear from the following references to the record:

On April 7, 1905, the amended and supplemental bill of the Belt Company and its receivers was filed by leave of court and the order permitting it to be filed, *which was O. K'd by counsel for the Trust Company* (Rec. 266), provides that when filed,

> the same shall stand referred to Hon. Shannon C. Douglas, special master, with authority to settle the issues and complete the taking of testimony and make *his findings of fact and conclusions of law thereon* with all convenient speed.

After the testimony was closed both parties filed amended pleadings to conform to the proof and it was agreed by stipulation (Rec. 468) that these should "stand referred without further order to Hon. Shannon C. Douglas."

After the filing of the Cambria bill on September 6, 1900, and before the issues were made, the court appointed Shannon C. Douglas, Special Master (Rec. 94), "before whom any testimony herein may be taken," limited to the application of complainant for a temporary injunction. This order does not appear to have been made by consent, but it did not cover, or purport to cover the issues of debt, or no debt between the Belt Company and the Trust Company. That issue was not made until the filing of the bill of the Belt Company and its receivers (Rec. 97). The record does not disclose any order of reference made upon the filing of this bill. It may be noted, however, that this bill was filed by stipulation (Rec. 890), and that the Trust Company's answer to it was filed out of time by stipulation (Rec. 114).

In this connection we desire to correct a statement in the first opinion of the court of appeals in this case (201 Fed. 825), where it is said:

> As before stated the main issues, *and the issues involved on this appeal*, had been referred to the master by the court upon its own motion.

This is wholly erroneous. There is not in the record any order referring to the master the "issues involved on this appeal," except the consent order above quoted.

The court continues:

> The stipulation that the new issue made by the amended intervening petition should be referred to the master was a stipulation with reference to that issue, that issue was decided by the master in favor of the Trust Company, and is not before us for review.

This is equally erroneous. The "issues so made" (Rec. 267), that is, *by the amended intervening petition*, are by consent referred to the master. The record discloses no previous order referring the original intervening petition to the master, and the court's assumption that only the new matter brought in by the amendment was referred by consent is not only inconsistent with the plain meaning of the stipulation (Rec. 267), but is utterly refuted by the order made by the court, *O. K'd by counsel for the Trust Company* (Rec. 268), quoted above, which after referring to the amended intervening petition provides that the "issues made there-

in" that is, by the amended intervening petition, stand referred to the master, to state his "findings of fact and conclusions of law."

The presumption is that the reference was by consent, since the court would have had no authority to refer the entire case to the master *except by consent.* (Vol. 2, Street's Federal Equity Practice, Sec. 1406).

In *Kimberly* v. *Arms,* 129 U. S. 524, it is said:

> It is not within the general province of a master to pass upon *all* the issues in an equity case, *nor is it competent for the court to refer the entire decision of a case to him without the consent of the parties.*

The master did, in fact, pass upon all the issues in the case, both of fact and of law; and none of the parties objected that he was not authorized so to do by the order of his appointment, and none made that the ground of an exception. If the order of reference of the entire case was not by consent of parties the court should have stricken out the report as unauthorized. (*Walker* v. *Kinnare,* 76 Fed., 106; *Garinger* v. *Palmer,* 126 Fed., 906, 911).

The reference to the master having been by consent of parties, the legal consequences which flow therefrom are well established and may be briefly stated with a reference to the decisions of this and other courts.

A reference by *consent* to a special master of a cause in equity to report his findings of fact, *and also his conclusions of law,* is in the nature of a submission to arbitration, and his determination of those questions, may not be "set aside and disregarded at the mere discretion of the court." They are presumptively correct, and can only be set aside "when there has been manifest error in the consideration given to the evidence or in the application of the law, but not otherwise." The rule that only such matters of fact or of law as are duly excepted to will be considered by the lower court, or upon appeal, is applied in all its strictness.

In *Kimberly* v. *Arms,* 129 U. S., 512, 524, it is said:

> It is not within the general province of a master to pass upon all the issues in an equity case, nor is it competent for the court to refer the entire decision of a case to him without the consent of the parties. It cannot, of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve

that duty upon any of its officers. But when the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, and report his findings, both of fact and of law, and such reference is entered as a rule of the court, the master is clothed with very different powers from those which he exercises upon ordinary references, without such consent; and his determinations are not subject to be set aside and disregarded at the mere discretion of the court. A reference by consent of parties of an entire case for the determination of all its issues, though not strictly a submission of the controversy to arbitration—a proceeding which is governed by special rules—is a submission of the controversy to a tribunal of the parties' own selection, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law. Its findings, like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise.

The language of the court in *Moline Plow Company* v. *Carson*, 72 Fed., 387-388, is especially applicable to the case under consideration:

> The special master, upon whose report the decree in this suit is based, was appointed by consent of the parties, not to hear and report the evidence, but to report the facts and the law in this case. The parties to this suit selected him and made him a special tribunal to hear and decide this suit. His report has been confirmed by the court below, and it carries with it similar presumptions to those which accompany the special verdict of a jury or the special findings of a court in an action at law, or its decree in a suit in equity. The settled rule of the national courts is this: The findings of fact and conclusions of law contained in the confirmed report of a special master appointed by consent of the parties to the suit to report the facts and the law are conclusive, unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence.

The order of reference in the case under consideration was to "Hon. Shannon C. Douglass" without further designation. Under similar circumstances, the United States circuit court of appeals for the fourth circuit in *Westall* v. *Avery*, 171 Fed., 626, held

that the person named was thereby constituted the arbitrator, and that his findings were conclusive upon all parties, unless they should be set aside for fraud, misconduct, or other well settled legal reasons. There the reference was by consent made by the parties in open court, as follows:

> Said case and all other issues arising upon the pleadings be, and the same are now hereby referred to A. Burwell, Esq., who will take and state the evidence and his conclusions of law and fact thereon to the next term of this court for further action of the court.

The court said:

> It will be perceived that this reference was not to Burwell as either a referee or master of the court, nor did the order constitute him a special master *pro haec vice*. The whole case was referred to him as a private individual and gave him power to "conclude" as to both the law and the facts involved. He was to report his conclusion to the court, it is true, "for further action of the court." What further action by the court was contemplated? Was it any other or further than that usual in cases of arbitration where the award is provided to be entered up as the judgment of the court *unless it should be properly assailed and set aside, for fraud, misconduct, or other well settled legal reasons?* We think not. On the contrary, it was, at least, fully within the scope of the ruling in *Kimberly* v. *Arms*, 129 U. S., 512, 9 Sup. Ct. 355, 32 L. Ed. 764, where, by consent, a special master was constituted to "hear the evidence and decide all issues between the parties and make his report to this court, which report shall be subject to like exceptions as other reports of masters." In that case, notwithstanding the last provision subjecting the special master's report to "exceptions as other reports of masters," it was held: "It is not within the general province of a master to pass upon all the issues in an equity case, and the court cannot refer to him the entire decision of a case without the consent of the parties; but when the parties consent to a reference of a case to a master to hear and decide all the issues therein, and such reference is entered as a rule of the court, his findings cannot be disregarded at the mere discretion of the court, but are to be taken as presumptively correct —subject, however, to be reviewed under the reservation contained in the order of the court for manifest error."

The court of appeals for the fifth circuit, (*Farrar* v. *Bernheim*, 75 Fed., 136) says:

It is, moreover, true, as insisted by the appellee, that, under the written consent to refer all questions of law and fact to the determination of a particular standing master the finding of that officer is usually conclusive. Such a consent, entered as an order of the court, is a submission of the controversy to a special tribunal selected by the parties, to be governed by the ordinary rules applicable to the administration of justice in tribunals established by law; and its determinations are not subject to be set aside and disregarded at the mere discretion of the court. *Kimberly* v. *Arms*, 129 U. S., 512, 9 Sup. Ct. 355. Such findings may be avoided, however, *on exceptions* showing that the report is unsupported, or essentially defective, *but not otherwise.*

The court of appeals for the sixth circuit (*Sanford* v. *Embry*, 151 Fed., 977), holds:

> Where a reference was by consent of the parties, and directed the master to report his conclusions of fact and law to the court, the findings of the master will be treated as *prima facie* correct, *and only such matters of law and fact as were brought before the court by exceptions will be reviewed.*

The court of appeals for the seventh circuit, (*Sanders* v. *Village of Riverside*, 118 Fed., 720), holds:

> Where in accordance with a written stipulation of the parties, the whole case is submitted to a master to find both the law and facts, his findings are conclusive on both parties *except so far as they are excepted to.*

To the same effect are:

Dowagiac Mfg. Co. v. *Plow Co.*, 183 Fed., 317;
Brown v. *Lanyon Zinc Co.*, 179 Fed., 311;
Davis v. *Schwartz*, 155 U. S., 631, 637;
Furrer v. *Ferris*, 145 U. S., 132, 134;
Spring Garden Insurance Co. v. *Amusement Syndicate Co.*, 178 Fed., 519, 531.

XVII.

The ruling of the court of appeals, that an exception to the master's report was unnecessary, works a great hardship in this case, and in effect deprives the appellant of its day in court on the question whether there was in fact any debt owing by the Belt Company to the Trust Company.

The Belt Company and its receivers filed their exceptions to the report of the master upon the issue of debt or no debt between the Belt Company and the Trust Company. The Southern Company and the Cambria Company also filed their exceptions (Rec., 913).

These exceptions were overruled by the lower court and the question of taking an appeal was then presented. The Trust Company's exceptions had only asserted that the master erred in *including* in his report any "reference to or recommendation concerning" the liability issue. The purpose of its appeal, as disclosed by its assignments of error, as well as by its exceptions to the master's report, was to *eliminate* from the decree any reference to or recommendation concerning the liability issue. It carefully avoided taking any step in the lower court, or in the court of appeals, which in any way invited or permitted a decision upon the *correctness* of the master's conclusion that the Southern Company was not liable for the debt of the Belt Company. Its deliberate purpose was to *prevent* a decision of that question in this case so that it might be determined in the State court in the actions there pending. And so the matter stood *until long after the right of appeal by its adversaries had been lost by lapse of time.*

In these circumstances the Belt Company and its receivers, as well as the Southern Company and the Cambria Company, believing that the liability issue was properly in the case—and the subsequent decision of the court of appeals confirmed this view—that being the only question raised by the appeal, (except the ownership of the property of the Central Company, and the taxation of costs), confidently believed that the decree of the lower court on the liability issue would be affirmed, as in fact it would have been if the court of appeals had not permitted the Trust Company, *in ef-*

fect, to file exceptions to the master's report more than a year after the report had been filed, and, *in effect,* to retake its appeal after the time for an appeal had long since passed by.

The adversaries of the Trust Company, in view of these circumstances, took no appeal upon the question of the existence or amount of indebtedness between the Trust Company and the Belt Company, or upon the other issues where the decision of the lower court was adverse to them. It was *long after the time for an appeal from the decree,* which was rendered on June 25, 1910, *had elapsed* that the court of appeals, in October, 1912, not only held that the liability issue *could be* considered by it, notwithstanding the state of the record, and notwithstanding the solemn protest of the Trust Company that the liability issue was not in the case and could not be decided (Rec., 970), but also proceeded to decide that issue adversely to the Southern Company, *thus virtually reversing the lower court for overruling an exception that was never filed,* and permitting the Trust Company, in effect, to *refile* its exceptions and to *retake* its appeal, while no such right could be enjoyed by its adversaries.

With our right of appeal lost through a reliance upon the protest of the Trust Company that it sought not to challenge the *correctness* of the master's finding, but only to insist that that issue should be *eliminated* from the case, as well as through a belief that the Trust Company in the court of appeals would be confined to the appeal taken by it in the lower court, in accordance with established principles, we are now confronted with the statement, several times repeated in the second opinion of the court of appeals, that the bill of the Cambria Company (which by stipulation was heard on the same evidence and contained substantially the same allegations as the bill of the Belt Company) was "baseless" and "untrue" and an "unwarranted suit."

This serves to emphasize our insistence that we have been deprived of our day in court, for not only were we deprived of the right of appeal by a reversal of the ordinary course of appellate procedure, but the case of the Cambria Company and of the Belt Company are condemned as baseless, unwarranted and un-

true by an appellate court that has not had before it any one of the "tens of thousands of pages of testimony," (to use the court's own language), on which the case was heard below.

We respectfully submit that the decree of the court of appeals should be reversed and that the decree of the circuit court should be affirmed.

SAMUEL UNTERMYER,
SAMUEL W. MOORE,
Solicitors for Appellant and Petitioner.

October, 1915.

No. 341.

Office Supreme Court, U. S.
FILED
APR 25 1914
JAMES D. MAHER
CLERK

Supreme Court of the United States

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

against

GUARDIAN TRUST COMPANY,
Respondent.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

against

CENTRAL IMPROVEMENT COMPANY,
Respondent.

Reply Brief of The Kansas City Southern Railway Company in Support of its Petition for Certiorari.

SAMUEL UNTERMYER,
SAMUEL W. MOORE,
Solicitors for Petitioner.

B. H. TYRREL, PRINTER, 206-8 FULTON STREET, NEW YORK.

Supreme Court of the United States.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

against

GUARDIAN TRUST COMPANY,
Respondent.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
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against

CENTRAL IMPROVEMENT COMPANY,
Respondent.

REPLY BRIEF OF THE KANSAS CITY SOUTHERN RAILWAY COMPANY IN SUPPORT OF ITS PETITION FOR CERTIORARI.

I.

The Trust Company in its brief has wholly evaded the controlling issue of estoppel, tendered by the Petitioner's Brief.

The *main ground* of our application for certiorari is that the Trust Company is estopped by

its participation in the reorganization, which is the fundamental ground of distinction between this case and the Boyd case.

The Court of Appeals held that there was no estoppel *in pais,* because the four essential elements were absent. *We never claimed that there was an estoppel in pais.* We strenuously claimed at all times that there was an estoppel by election and by acceptance of benefits, *and this claim was not answered or even noticed by the Court of Appeals.*

It was to be expected that the Trust Company, in its answer to our application, would at least *attempt,* in some way, to meet this controlling issue, since it is the main ground of our application, and a large number of well considered authorities are cited in our brief which have, we believe, a direct and decisive application to the situation.

But counsel for the Trust Company apparently have not thought it advisable to meet the issue squarely. Certainly they have presented no argument and cited no authority in opposition to our contention that, if the reorganization was fraudulent in law as the Court of Appeals held that it was, the Trust Company, by its participation therein and the acceptance and retention of benefits thereunder, is estopped to maintain its action.

Counsel content themselves with the following extraordinary assertion which finds no support in the record and is in fact in direct conflict with the entire theory of the decision:

> "The plan is conceded to be honest and fair upon its face, and the Trust Company is held to be entitled to the relief of one de-

frauded because in the execution of the plan its debt was not paid."

What is meant by this ambiguous statement?

Does it mean that the charge of fraud in fact or in law in the plan and its execution is withdrawn? If so, the opinion of the Court of Appeals is robbed of its support and its judgment must fall to the ground.

Does it mean that the plan and its execution diverted to stockholders assets which should have gone to creditors, so as to constitute a fraud in law? If so, the plan and the transfer of the Belt property, in the language of this Court in the Boyd case, were "proper and binding as between the parties" and the Trust Company cannot complain.

Does it mean that the plan was valid on its face, but that it became a fraudulent device when the Trust Company's debt was not paid? If so, the retention of the fruits of the transaction, after it became fraudulent, or after the fraud was discovered, is equally as conclusive as though the fraud existed and was known in the beginning.

But no amount of evasive argument can obscure the real and controlling issues:

(a) The decision of the Court of Appeals was distinctly based upon the assumption that the plan and the transfer of the Belt property was a fraud in law, either at the beginning or afterwards. In both opinions the transaction is variously denominated as "fraudulent in law", "fraudulent and voidable as to creditors", "a fraudulent appropriation of the Trust Company's equity to the benefit of the stockholder or stockholders", "illegal and fraudulent as to creditors", "fraudu-

lent and voidable as to them (creditors)", "a transfer fraudulent as to creditors," "the fraud and breach of trust which made the transfer voidable as to creditors", etc.

The decisions upon which both opinions are based are the *Monon* case (174 U. S., 674), the *Howard* case (74 U. S., 392), the *Paul* case (93 Fed., 878), the *Boyd* case (177 Fed., 804; 228 U. S., 482), the *Lueäecke* case (140 Ia., 223), and the *Hurd* case (60 N. E., 327).

These are all cases in which the sole ground of recovery was that the reorganization was a fraud upon unsecured creditors. Counsel impliedly admit that this is so, when they say, at page 8, referring to the decision of the Court of Appeals in this case:

> "The decision consists merely in the application of the well established doctrine that any scheme or device whereby the interests of the stockholders are preserved at the expense of the creditors comes within judicial denunciation."

The sole foundation on which the judgment of the Court of Appeals rests is the doctrine of a fraudulent conveyance or diversion to stockholders of assets which in equity belong to creditors.

(b) To the action thus based upon the theory of a fraudulent conveyance, we answer that the Trust Company *participated* in the transaction, became a *party* to it, received and still *retains*, large benefits from it, and that, therefore, it is *estopped* to complain.

In answer to this proposition counsel are content to point to the opinion of the Court of Appeals, with the ambiguous and unsatisfactory sug-

gestion that the Trust Company is "entitled to the relief of one defrauded, because in the execution of the plan its debt was not paid."

We insist that the Trust Company has not met the issue or even attempted to do so.

II.

The floating debt provision in the plan of reorganization was not a factor in the determination of this case.

The brief of the Trust Company contains certain statements of fact which we cannot permit to pass unchallenged.

Counsel in their brief give prominence to the following statement:

> "The plan contained the provision that one of the objects to be attained by its execution was the payment of the floating debt. It is by ignoring and suppressing this fact that any semblance of plausibility is given to the petitioner's argument."

If it is sought by this statement to create the impression that the judgment of the Court of Appeals was *based* upon the floating debt provision, or that that provision was a *controlling factor, it is misleading and without foundation in fact.* There is nothing in the record from which the Trust Co. is justified in asserting or suggesting that the Southern Company assumed or undertook

the payment of the entire floating debt of the insolvent companies that were the subject matter of the plan. The statement in the plan had reference only to a tentative appropriation of $475,000 toward that purpose, as plainly appears from the subsequent provisions of the plan.

By the express provision of the plan referred to (Rec., 944, 951) there was an estimate or tentative appropriation of $475,000 for the payment of the floating debt of *all* the Companies involved in the reorganization. The floating debt of the Belt Company *alone* was $990,000 (Rec., 873), as the Trust Company well knew. The Southern Company and the Reorganization Committee actually paid $1,164,172.56 (Rec., 999) of the floating debt of all the companies, for the purpose of discharging underlying liens and making the new mortgage a first lien upon all the properties (Rec., 999, 1000).

The Trust Company contended in the Circuit Court and also in the Court of Appeals that the floating debt provision was a contract for the benefit of creditors, and that, therefore, it could recover directly upon the contract. The Master (Rec., 1001) found against this claim and the lower Court agreed with him. The Court of Appeals likewise refused to sustain this contention of the Trust Company. In its first opinion, in answer to our claim that the Trust Company by its exchange of securities was estopped to maintain its action, the Court of Appeals said (Rec., 1177), referring to the floating debt provision of the plan: "The Trust Company may well have *supposed* that its claim would be paid by the Committee." But this position was abandoned in the second opinion, and, as the opinion itself shows, no significance

whatever was attached to the floating debt provision. Much less was it held that a right of recovery could be based thereon.

The decision of the Court of Appeals is placed solely upon the ground that the plan was "fraudulent in law" either in its inception, or afterwards in its execution, as a fraudulent conveyance to stockholders of property which should have gone to creditors. The floating debt provision was not a factor in the determination of the case. This was necessarily so under the decisions of this and other courts. The floating debt provision was obviously either decisive of the case, or without any significance whatsoever. The Court adopted the latter alternative.

III.

There is no basis whatever for the extraordinary statement that the entire floating debt of the constituent companies has been paid, except the debt of the Trust Company.

Counsel make the amazing assertion on page 3 of their brief that: "The floating debt of all the constituent companies was paid by the Reorganization Committee or by the Southern Railway, with the exception of the Trust Company's debt."

We deeply regret to be compelled to say that there is not a syllable of testimony in the entire record to support this statement, or from which any such inference can be drawn or which furnishes any excuse for the statement.

The same statement is repeated on page 6 of the brief, as the alleged reason why "equitable terms," as of the date of reorganization, should not be the measure of the Trust Company's rights, if it is entitled to recover at all.

We are at a loss to understand why counsel should make and repeat such statements, unless the purpose was to create the misleading impression in the minds of the Court that the Trust Company has been a victim of discrimination or hostility, and that it has been singled out for unfair treatment.

Most emphatically this is not the case. There has been no discrimination and no favoritism, of any kind, whatsoever.

IV.

The Trust Company misconceives the effect of the covenant which it executed to the effect that it would not hold the new company for the debts of the old company.

It is argued that the adoption of our construction of the covenant would lead to a "preposterous conclusion," as it would require the Trust Company to "renounce and waive" a just claim against the Belt Company as a condition to becoming a party to the reorganization.

No such result follows. The plan did not require the Trust Company to "waive or renounce" its claim against the Belt Company. It provided that no *new right* for the enforcement of this

claim should be *created* against the new company which was to be organized.

The covenant said, in substance, to the Trust Company:

> Accept or reject the plan at your election. If you come in you will be accorded rights in the new company in exchange for your old stocks and bonds, which you would not receive but for the plan. You may retain your claim as a creditor of the Belt Company, but no new right of action will be *created* for its payment by the new company.

All stockholders and bondholders were given the same election. There was nothing unjust or "absurd" in the covenant, and there is no reason why effect should not be given to its obvious terms.

V.

The amount of the assessment paid by the stockholders of the Gulf Company is not competent evidence to overthrow the Master's finding as to the value of the Belt property.

That there was no equity in the Belt property and that the Trust Company has not been prejudiced, is argued in our brief in support of our application (pp. 28-35).

It is now asserted that the Circuit Court of Appeals found "convincing evidence" that the value of the Belt property received by its stockholders

far exceeded the amount of the Trust Company's debt.

The Court of Appeals reaches the conclusion that the $4,750,000 par value of Southern stock, which was issued in exchange for an equal amount, par value, of Belt stock, was of the value, at least, of $10 per share, making an aggregate of $475,000, and the Court argues that, therefore, the stockholders of the Belt Company received that much in value which should have gone to creditors, notwithstanding the finding of the Master (Rec. 990, 991), that the fair value of the Belt property was $1,000,000, which was the exact amount of the mortgage debt, and the exact amount for which it was sold at foreclosure sale, leaving nothing for either creditors or stockholders. It will be recalled in this connection that the evidence was not before the Court and that there was no exception to this finding by the master.

The Court of Appeals deduces this value of $10 per share of stock of the Southern Company from the fact that that was the amount of the *assessment* made by the plan on the stockholders of the Gulf Company.

But this assessment was a *condition of participation* in the plan by the stockholders of the Gulf Company. They had the option to lose all they had invested in their stock, or to pay the assessment. It was far from being a *sale* of Southern stock, much less a sale which could be looked to as a criterion of the *value* of the stock.

VI.

The debt of the Trust Company is not conceded to be a just obligation of the Belt Company. It certainly has never been conceded to be an obligation of the Southern Company as is implied in the brief of the Trust Company.

It is stated at page 9, that the debt of the Trust Company "is now conceded to be a just one." This is not correct.

As stated in our original brief, exceptions were filed to the finding of the Master on the question of debt as between the Trust Company and the Belt Company. At the same time the Trust Company filed exceptions to the *inclusion* in the Master's report of *any* finding on the liability of the Southern Company for this debt. All exceptions were overruled, and the Trust Company appealed, for the purpose of *eliminating* any finding from the decree on the liability issue, *not* for the purpose of reviewing the finding on the merits of the issue. Having a decree in our favor on the liability issue, and the appeal not questioning the *correctness* of that part of the decree, no appeal was taken on the accounting feature between the Belt Company and the Trust Company, for the obvious reason that, *under such circumstances*, the question of debt or no debt was of little consequence. In the Court of Appeals the Trust Company said in one of the papers filed in that Court (Rec., 1146):

> *"The question of the personal liability of The Kansas City Southern Railway Company for the debt of the Belt Company is*

not an issue and cannot be determined on this appeal."

Notwithstanding this declaration, the Court of Appeals decided that the liability issue *was* in the case, and proceeded to decide it adversely to us, *after the time for an appeal on the issue of debt or no debt had expired.*

We were thus prevented from taking an appeal, and the finding and judgment as between the Belt Company and the Trust Company have thus become final, but it is not fair to say that it is conceded that the debt is a just one.

VII.

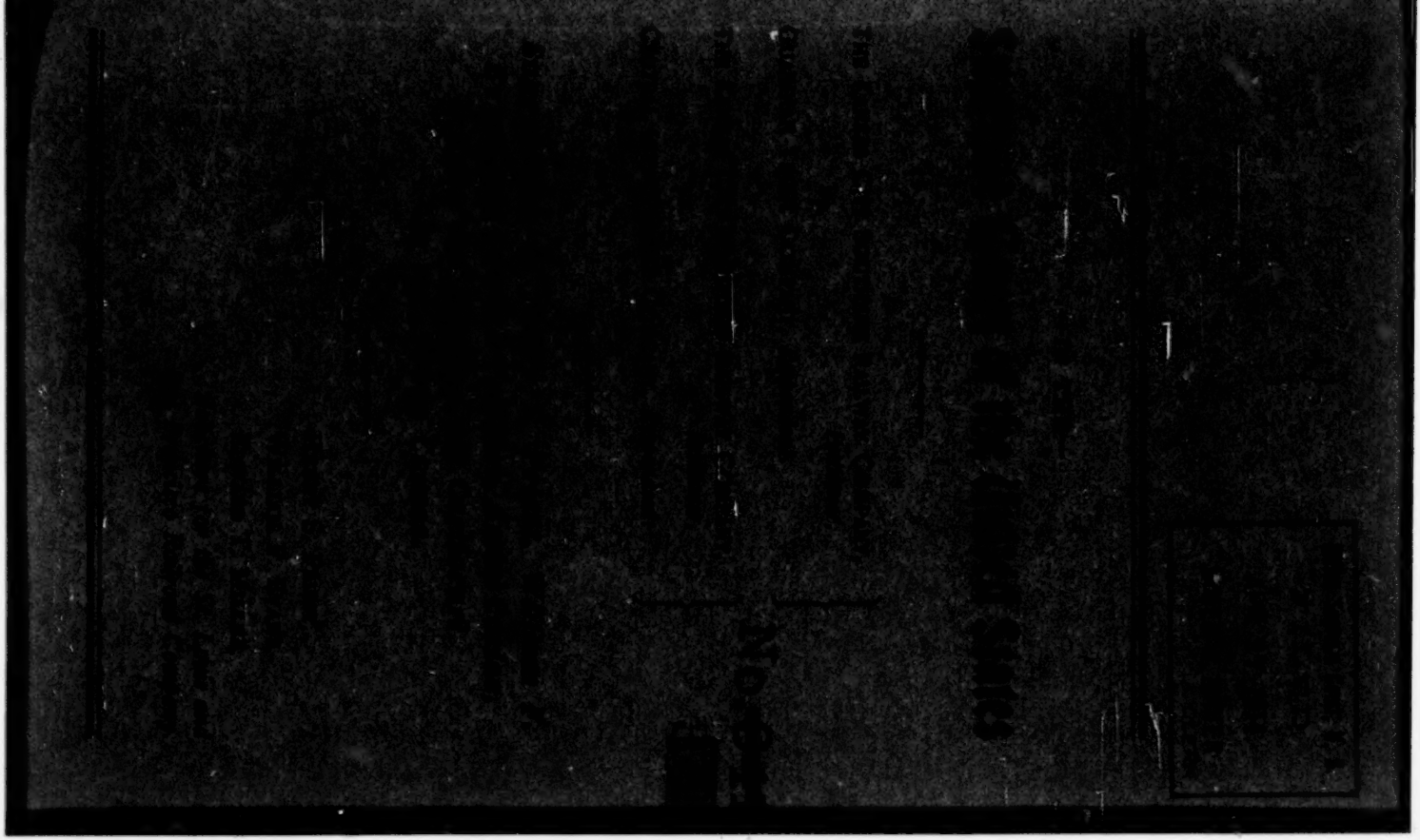
The assertion that the Southern Company has had its day in this Court is devoid of merit.

This claim is based upon the fact that one of the counsel for the Southern Company filed a brief as *amicus curiae* in the *Boyd* case, raising the question whether, if Boyd had any remedy, it was not by action against the stockholders who, it was alleged, had received something of value which should have gone to creditors.

Neither that question, nor any of the questions argued and decided in the Boyd case, are raised in our application for certiorari.

Respectfully submitted,

SAMUEL UNTERMYER,
SAMUEL W. MOORE,
Solicitors for Petitioner.



—IN THE—

Supreme Court of the United States

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Petitioner*,
vs.
GUARDIAN TRUST COMPANY, *Respondent*.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Petitioner*,
vs.
CENTRAL IMPROVEMENT COMPANY, *Respondent*.

Suggestions of Henry S. Priest, William F. Evans and Edward T. Miller, Amici Curiae, Upon the Petition for Certiorari in the Above Causes.

The undersigned practitioners in this Court, Henry S. Priest, William F. Evans and Edward T. Miller, of the City of St. Louis, Missouri, present these suggestions, *amici curiae*, and thereupon they respectfully say:

1. The St. Louis and San Francisco Railroad Company is now in the hands of receivers appointed in a cause instituted on creditors' bill on May 27, 1913, in the District Court of the United States for the Eastern Division of the Eastern District of Missouri.

2. The lines of certain affiliated companies of said St. Louis and San Francisco Railroad Company, forming in part the system of railroads known as the "Frisco Lines," are also in the hands of

receivers, the names of said companies and the respective courts in which such receiverships are pending, being as follows:

New Orleans, Texas and Mexico Railroad Company, in the United States District Court for the Eastern District of Louisiana;

The Brownwood North and South Railway Company, in the United States District Court for the Northern District of Texas;

Fort Worth and Rio Grande Railway Company, in the United States District Court for the Northern District of Texas;

St. Louis, San Francisco and Texas Railway Company, in the United States District Court for the Northern District of Texas;

The Beaumont, Sour Lake and Western Railway Company, in the United States District Court for the Southern District of Texas;

The Orange and Northwestern Railroad Company, in the United States District Court for the Southern District of Texas;

The St. Louis, Brownsville and Mexico Railway Company, in the United States District Court for the Southern District of Texas; and

Chicago and Eastern Illinois Railroad Company, in the United States District Court for the Eastern Division of the Northern District of Illinois.

3. The bonded indebtedness of said St. Louis and San Francisco Railroad Company and of its affiliated companies amounts to many millions of dollars and the outstanding unsecured indebtedness of said companies likewise amounts to many millions of dollars. This secured and unsecured indebtedness is held by numerous parties in various parts of the United States and in foreign countries.

4. Various committees representing bondholders, stockholders and unsecured creditors of said St. Louis and San Francisco Railroad Company and of its affiliated companies have been formed, and for some time have been acting under the advice of their respective counsel for the purpose of protecting the various interests represented by them in the proposed reorganization of said railroad companies.

The names of said committees, the interests by them represented, and their counsel, are as follows:

(a) A committee, consisting of Speyer and Company, representing the holders of St. Louis and San Francisco Railroad Company's General Lien 15-20 year 5 per cent. Gold Bonds, to which committee Messrs. Cravath and Henderson and Messrs. Strong and Cadwalader, of New York City, are counsel.

(b) A committee, of which Henry E. Cooper is chairman, representing the holders of St. Louis and San Francisco Railroad Company's $2,600,000 two-year 6 per cent. Secured Gold Notes due September 1, 1914, to which committee Messrs. Murray, Prentice and Howland, of New York City, are counsel.

(c) A committee, of which Frederick Strauss is chairman, representing the holders of St. Louis and San Francisco Railroad Company's 4 per cent. Refunding Mortgage Gold Bonds, to which committee Messrs. Joline, Larkin and Rathbone, of New York City, are counsel.

(d) A committee, of which Willard V. King is chairman, representing holders of St. Louis and San Francisco Railroad Company's New Orleans, Texas and Mexico Division First Mortgage Gold Bonds, to which committee Messrs. Carter, Ledyard and Milburn, of New York City, are counsel.

(e) A committee, of which E. S. Page is chairman, representing holders of Ozark and Cherokee Central Railway

Company's First Mortgage 5 per cent. Gold Bonds, to which committee Messrs. Roberts, Montgomery and McKeehan, of Philadelphia, are counsel.

(f) A committee, of which E. V. R. Thayer is chairman, representing holders of Kansas City, Fort Scott and Memphis Railroad Company's Consolidated 6 per cent. Bonds; The Kansas City, Fort Scott and Memphis Railway Company's Refunding 4 per cent. Bonds; Kansas City, Memphis and Birmingham Railroad Company's Income 5 per cent. Bonds; Kansas City, Memphis and Birmingham Railroad Company's General 4 per cent. Bonds; Kansas City and Memphis Railway and Bridge Company's First 5 per cent. Bonds; Kansas and Missouri Railroad Company's First 5 per cent. Bonds; Current River Railroad Company's First 5 per cent. Bonds; and Trust Certificates for Guaranteed 4 per cent. Preferred Stock of The Kansas City, Fort Scott and Memphis Railway Company, to which committee Messrs. Storey, Thorndike, Palmer and Dodge are counsel.

(g) A committee, of which John W. Patten is chairman, representing holders of New Orleans, Mobile and Chicago Railroad Company's First and Refunding Mortgage 5 per cent. Gold Bonds, to which committee Messrs. Beekman, Menken and Griscom, of New York City, are counsel.

(h) A committee, of which Alvin W. Krech is chairman, representing holders of St. Louis and San Francisco Railroad Company's Trust Certificates for preferred and common stock of Chicago and Eastern Illinois Railroad Company, to which committee Messrs. Murray, Prentice and Howland, of New York City, are counsel.

5. It is essential that the various railroads hereinbefore referred to now in the hands of receivers, be reorganized and placed upon a sound financial basis, and it is important that there be no doubt as to the legality of any such reorganizaton. The opinion of the Circuit Court of Appeals for the Eighth Circuit, in the Guar-

dian Trust Company case, has given to the case of *Northern Pacific Railway Company* v. *Boyd*, 228 U. S., 482, a construction which, in our opinion, the Boyd case does not authorize, and which materially enlarges and extends the force and effect of the judgment of this Court in the latter case. The questions involved in the Boyd case and in the Guardian Trust Company case are questions entering as vital factors in the proposed reorganization plans of the various committees herein referred to.

6. In order that much litigation affecting the legality of the proposed reorganizations may be avoided, and that the misunderstanding existing respecting the scope and effect of the ruling of this Court in the Boyd case be removed, and believing it to be the great interest of the public at large and for the protection of those purchasing railroad securities, we respectfully suggest that this Court should take jurisdiction of the Guardian Trust Company case in order that the questions involved therein may be definitely settled.

Respectively submitted:

HENRY S. PRIEST,
WILLIAM F. EVANS,
EDWARD T. MILLER,
Solicitors for the St. Louis and San Francisco Railroad Company.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.* GUARDIAN TRUST COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 85. Argued December 13, 14, 15, 1915.—Decided February 21, 1916.

A reorganization scheme adopted upon the foreclosure of a mortgage of a railroad company and a purchase thereunder which provides substantially for the stockholders of the company, but which makes inadequate provision for its unsecured creditors, cannot be sustained; and in this case, *held*, that the purchaser was chargeable with such unsecured debts. *Northern Pacific Ry.* v. *Boyd*, 228 U. S. 482.

One owning both stock and floating debt of a company whose property is under foreclosure and who assents to a scheme of reorganization which does not on its face show that it unduly provides for the stockholders and does not adequately provide for the unsecured creditors is not precluded from subsequently claiming that for such reason the property is still chargeable after the sale with his unsecured debt.

On the facts of this case, *held*, that the party attacking a reorganization scheme as not adequately protecting unsecured creditors while providing for stockholders was not barred by laches.

Even though reorganization schemes must be framed so as to induce parties interested to come in and furnish fresh money, and courts should avoid artificial scruples in considering such arrangements, substantial justice must be done and well settled rules of equity must not be transgressed.

210 Fed. Rep. 696, affirmed.

THE facts, which involve the validity of a scheme of reorganization adopted upon the foreclosure of a railroad company and a purchase of the same which provided for the stockholders but left its unsecured creditors inadequately provided for, are stated in the opinion.

Mr. S. W. Moore and *Mr. Samuel Untermyer* for appellants:

The plan of reorganization is binding upon the Trust Company because it actively participated in the plan and greatly benefited by it in the exchange of its own securities in the old companies for those of the Southern Company. Equity will not permit the Trust Company to retain the benefits of the plan and at the same time attack it as fraudulent. It cannot claim both under and against the plan.

The application of the doctrine of "quasi-estoppel" or of estoppel by the acceptance of benefits is fatal to any right of recovery on the part of the Trust Company. *Compton* v. *Jessup*, 167 U. S. 1; *Daniels* v. *Tearney*, 12 Otto, 415; *Farmers' Bank* v. *Groves*, 12 Howard, 51; *Gaddes* v. *Pawtucket Institution*, 80 Atl. Rep. 415; *Inter. Contracting Co.* v. *Lamont*, 155 U. S. 303; *Loy* v. *Alston*, 172 Fed. Rep. 90; *North Chicago R. R.* v. *Chicago Traction Co.*, 150 Fed. Rep. 612, 626; *Post* v. *Beacon Co.*, 84 Fed. Rep. 371; *Sage* v. *Finney*, 135 S. W. Rep. 996; *Seminole Securities Co.* v. *Southern Ins. Co.*, 182 Fed. Rep. 85; *State* v. *Bank*, 95 N. W. Rep. 1116; *Shackleton* v. *Baggaley*, 170 Fed. Rep. 57, 59; *Towers* v. *African Tug Co.*, L. R. 1 Ch. 1904, 558; *United States* v. *Hodson*, 10 Wall. 395; *United States* v. *Morse*, 218 U. S. 493; *Winslow* v. *Railroad*, 208 U. S. 59; *Wormser* v. *Metropolitan St. Ry.*, 76 N. E. Rep. 1036.

The doctrine of equitable election is a complete bar to a recovery by the Trust Company. *Codrington* v. *Lindsay*, 8 I. R. Ch. App. 578, 587; *Merchants' Bank* v. *Sexton*, 228 U. S. 634.

The doctrine of equitable estoppel is also a complete bar to a recovery by the Trust Company. *Bank* v. *Heckman*, 148 Indiana, 490; *Canton Co.* v. *Rolling Mill*, 155 Fed. Rep. 321; *Farmers' Trust Co.* v. *Railway Co.*, 120 Fed. Rep. 1006; *Fiske* v. *Carr*, 20 Maine, 301; *Gutzweiler* v. *Lackman*, 23 Missouri, 168; *Jacobs* v. *Lumber Co.*, 15 S. W. Rep. 236; *Jessup* v. *Hulse*, 21 N. Y. 168; *Kahn* v. *Peter*, 16 So. Rep. 524; *Matthews* v. *Murchison*, 15 Fed. Rep. 691; *Mitchell* v. *Mitchell*, 61 Atl. Rep. 570; *Olliver* v. *King*, 8 De G., M. & G. 110; *Perisho* v. *Perisho*, 71 Ill. App. 222; *Rapalee* v. *Stewart*, 27 N. Y. 310; *Reagan* v. *First National Bank*, 61 N. E. Rep. 575; *Richards* v. *White*, 7 Minnesota, 345; *Smith* v. *Espy*, 9 N. J. Eq. 160; *Symmes* v. *Union Trust Co.*, 60 Fed. Rep. 830; *Thompson* v. *Cohen*, 127 Missouri, 215; *Vose* v. *Cowdrey*, 49 N. Y. 336.

Under the rule of the *Boyd Case*, 228 U. S. 482, the Trust Company is not entitled to recover.

The Trust Company is barred from a recovery in this action by its covenant that it would not hold the new company for the debts of any of the old ones. *C., R. I. & P. Ry.* v. *Howard*, 7 Wall. 392; *L. N. A. & C. Ry.* v. *Louisville Trust Co.*, 174 U. S. 674; *Medill* v. *Snyder*, 58 Pac. Rep. 962; *Nor. Pac. Ry.* v. *Boyd*, 228 U. S. 482; *Stone* v. *Cook*, 179 Missouri, 534; *Young* v. *Young*, 27 Atl. Rep. 627.

The mortgage indebtedness of the Belt Company was $1,000,000. It was sold at foreclosure sale for $1,000,000, which the master found was the fair market value at that time. Under these circumstances, the Trust Company, as a creditor of the Belt Company, has not been injured and has no right to complain.

A resulting trust was created in favor of the Railway Companies paying for the properties deeded to the Central Company, and this equitable interest passed under the after-acquired property clauses of their mortgages. The

Central Company acquired the properties subject to this trust, and the interest of its stockholders was likewise subject thereto. The Trust Company acquired the stock of the Central Company with a knowledge of these facts, and its equities, therefore, are subordinate to those of the Southern Company. *Albright* v. *Oyster*, 140 U. S. 493; *Augusta Rd. Co.* v. *Kittel*, 52 Fed. Rep. 63; *Bear Lake Irrigation Co.* v. *Garland*, 164 U. S. 1, 15; *Central Trust Co.* v. *Kneeland*, 138 U. S. 414; *Condit* v. *Maxwell*, 142 Missouri, 266; *Ducie* v. *Ford*, 138 U. S. 587; *Farmers' Trust Co.* v. *Denver R. R.*, 126 Fed. Rep. 46; *Guaranty Trust Co.* v. *Atlantic &c. R. R.*, 138 Fed. Rep. 517; *Lauter* v. *Trust Co.*, 85 Fed. Rep. 894–903; *McGourkey* v. *Toledo R. Co.*, 146 U. S. 536; *New England Water Works* v. *Farmers' Loan & Trust Co.*, 136 Fed. Rep. 521; *Osborn* v. *Perkins*, 122 Fed. Rep. 127, 131; *Sanford* v. *Loan Society*, 80 Fed. Rep. 54; *Toledo, Delphos &c. R. R.* v. *Hamilton*, 134 U. S. 296; *Wade* v. *Chicago R. R.*, 149 U. S. 327; *Wade* v. *Sewell*, 56 Fed. Rep. 129; *Watson* v. *Bonfils*, 116 Fed. Rep. 157.

Even if it should be held that the Trust Company has a right of recovery, it should be limited to such equitable terms as in the opinion of the court should have been offered at the time of the reorganization.

There was no exception to the Master's report in the court below challenging the correctness of his finding that the Southern Company was not liable for the floating indebtedness of the Belt Company. The decision of the Court of Appeals that such finding can be reviewed in an appellate court in the absence of exceptions is in conflict with the decisions of the courts of appeal of other circuits and with the rulings of this court. *Brockett* v. *Brockett*, 3 How. 692; *Burns* v. *Rosenstein*, 135 U. S. 449; *New Orleans* v. *Fisher*, 91 Fed. Rep. 574; *Columbus R. R. Appeals*, 109 Fed. Rep. 117, 219; *Coghlan* v. *South Car. R. Co.*, 142 U. S. 101, 115; *McMicken* v. *Perrin*, 18 How.

504, 587; *Medsker* v. *Bonebrake*, 108 U. S. 66, 72; *Provident Trust Co.* v. *Camden Ry.*, 177 Fed. Rep. 854, 859; *Sanford* v. *Embry*, 151 Fed. Rep. 977, 982; *Sheffield Ry.* v. *Gordon*, 151 U. S. 285, 290; *Story* v. *Livingston*, 13 Pet. 359, 366; 17 Enc. Pl. & Prac. 1047; 2 Foster's Federal Practice, § 315; *Topliff* v. *Topliff*, 145 U. S. 156; 2 Street on Fed. Eq. Prac., §§ 1476, 1486.

The action of the Court of Appeals is final so that an application for certiorari at this time is not premature. *Beasley* v. *Tex. & Pac. Ry. Co.*, 191 U. S. 492; *Denver* v. *N. Y. Trust Co.*, 229 U. S. 132; *Harriman* v. *Nor. Securities Co.*, 197 U. S. 244; *Merrill* v. *National Bank*, 172 U. S. 131.

Mr. Frederick W. Lehmann and *Mr. George H. English, Jr*, with whom *Mr. Edward P. Gates* and *Mr. Walter C. Clephane* were on the brief, for appellee:

The property of the Belt Company was a trust fund to which the creditors were entitled in priority to the stockholders. *Central Imp. Co.* v. *Cambria Co.*, 201 Fed. Rep. 811; *Same* v. *Same*, 210 Fed. Rep. 696; *North. Pac. Ry.* v. *Boyd*, 228 U. S. 482.

The amount bid at the foreclosure sale of the Belt property was no evidence of its value. *Investment Registry* v. *C. & M. E. R. Co.*, 212 Fed. Rep. 504; *North Pac. Ry.* v. *Boyd*, 228 U. S. 482; § 8, Art. 12, Const. Missouri; § 962, Rev. Stat. Missouri, 1899; *Shickle* v. *Watts*, 94 Missouri, 410; *Moffit* v. *Hereford*, 132 Missouri, 513; *Louisville Trust Co.* v. *Louisville Ry.*, 174 U. S. 674.

The plan of reorganization provided for the payment of the debts of the old companies.

The estimate as to the floating debt was not intended as a limitation upon the amount to be paid under the plan.

The provision for the payment of debts made by the plan was not limited by the interests of the bondholders.

There was no exclusion of creditors who were also bondholders and stockholders.

All the creditors save the Trust Company were paid and the Trust Company was paid in part.

The Trust Company was entitled to enforce the provisions of the plan as a contract made for its benefit. *Second National Bank* v. *Grand Lodge*, 98 U. S. 123; *Johns* v. *Wilson*, 180 U. S. 440; § 1729, Rev. Stat. Missouri, 1909; *Meyer* v. *Lowell*, 44 Missouri, 328; *Beattie Mfg. Co.* v. *Clark*, 208 Ibid. 89.

There was no covenant by the Trust Company that it would not hold the new company for any of the debts of the old. *Webster* v. *Ins. Co.*, 53 Oh. St. 558; *Hobbs* v. *McLean*, 117 U. S. 567; *United States* v. *Cent. Pac. Ry.*, 118 U. S. 235; *Noonan* v. *Bradley*, 9 Wall. 394.

The Trust Company was not barred as a creditor by participating in the plan as bondholder and stockholder.

The Southern Company was liable as being a consolidation of the old companies. See § 1059, Rev. Stat. of Missouri, 1899; *Leavenworth County* v. *Railroad*, 134 U. S. 688; *State ex rel.* v. *Lesueur*, 145 Missouri, 594; *Wells* v. *Electric Co.*, 108 Mo. App. 607; *Barrie* v. *United Railways*, 138 Mo. App. 557; *Johnson* v. *United Railways*, 247 Missouri, 326; *C. S. F. & C. Ry.* v. *Ashling*, 160 Illinois, 373; *Shadford* v. *Detroit Ry.*, 130 Michigan, 300.

The "Equitable Terms of Recovery" now suggested by the Southern Company are very inequitable.

The lands of the Central Improvement Company did not pass under the after acquired property clause of the Belt mortgage. *Humphreys* v. *McKissock*, 140 U. S. 304; *Pardee* v. *Aldridge*, 189 U. S. 429; *Smith* v. *McCullough*, 104 U. S. 25; *Railroad* v. *Coffin*, 50 Connecticut, 150; *Densmore* v. *Railroad*, 12 Wisconsin, 649.

Even though the exception to the Master's report did not formally and directly challenge the correctness of his finding, which was one of law, that the Southern Company

was not liable for indebtedness of the Belt Company, none the less in the circumstances of the case it was competent and proper for the court to consider and determine the question upon its merits. *Guardian Trust Co.* v. *Kansas City Southern Ry.*, 201 Fed. Rep. 811; *Central Imp. Co.* v. *Cambria Co.*, 210 Fed. Rep. 696; *Sheffield Ry.* v. *Gordon*, 151 U. S. 285; 17 Enc. Pl. and Prac. 1048; 2 Daniel Chanc. Pl. and Prac. 1314; *Himley* v. *Rose*, 5 Cranch, 313; *Burke* v. *Davis*, 81 Fed. Rep. 907; *Celluloid Mfg. Co.* v. *Cellulite Mfg. Co.*, 40 Fed. Rep. 476; *Gordon* v. *Lewis*, 2 Sumner, 143; *Brooks* v. *Robinson*, 54 Mississippi, 272; *Haymond* v. *Murphy*, 65 W. Va. 616; *Webster* v. *Cadwallader*, 133 Kentucky, 500; *Lehman* v. *Powe*, 95 Mississippi, 446; *Von Phalen* v. *Winterbotham*, 203 Illinois, 202.

There is no reason of law, policy or morals for preferring stockholders to general creditors in the reorganization of railroad properties.

Mr. Harry S. Mecartney, with whom *Mr. Newell H. Clapp* was on the brief for intervening stockholders.

Mr. Justice Holmes delivered the opinion of the court.

This is an appeal from a decree in which the Circuit Court of Appeals decided that the Guardian Trust Company as an unsecured creditor of the Kansas City Suburban Belt Railroad Company was entitled to charge the appellant for the Belt Company's debt, because the reorganization scheme, adopted upon a foreclosure of a mortgage of the Belt Company's property and a purchase by the appellant, left the unsecured creditors inadequately provided for while it made a considerable provision for the stockholders in the Belt Road. *Guardian Trust* v. *Cambria Steel*, 201 Fed. Rep. 811; 120 C. C. A. 121. 210 Fed. Rep. 696; 127 C. C. A. 184. See *Nor. Pac. Ry.* v. *Boyd*, 228 U. S. 482.

The facts are less complicated than the proceedings that

have grown out of them. The Kansas City, Pittsburg and Gulf Railroad extended from Kansas City to Port Arthur on the Gulf of Mexico. It used terminals at Kansas City belonging to the Belt Company above mentioned, and companies in its control, and at Port Arthur belonging to a Dock Company. All three were mortgaged and after a default on the bonds of the Gulf Company in 1899 a plan was made to bring the road and terminals into one hand. The Gulf Company's mortgage was to be foreclosed and a new company formed which was to exchange its own securities for the stock and bonds of the Gulf, Dock and Belt Companies, making a new mortgage to raise the necessary funds. The Gulf Company's mortgage was foreclosed, the appellant Company was formed, issued its new securities, and in March and April, 1900, became the owner of the Gulf road and of most of the stocks and bonds of the old companies including the Belt Company. In September, 1900, a suit was begun to foreclose the Belt mortgage, and on December 31, 1901, it was sold for the amount of its mortgage to the appellant. The Court of Appeals thought it plain that the foreclosure was part of the original plan; and as it also thought that the mortgaged property was worth enough above the mortgage to pay the unsecured creditors, it held that the stockholders when receiving pay for their stock were receiving it in substance as the proceeds of a transaction that removed all property of the Belt Company from its unsecured creditors' reach. The appellant was the principal holder of the Belt Company stock, as well as the purchaser of its property with notice of the outstanding debts, and therefore was decreed to pay the Trust Company's claim.

The proceedings began with a creditors' bill by the Cambria Steel Company against the Belt Company and the Guardian Trust Company to prevent the latter from selling securities held by it for an alleged debt of the Belt Company, the bill de ying the debt. The Court of

Appeals thought that this suit was really a suit of the appellant. The Cambria Steel Company has disappeared and the proceedings have been carried on by the Belt Company, the instrument of the appellant, and later by the appellant, intervening in the suit, and all charging that the Trust Company was indebted to the Belt. The Trust Company, on the other hand, asserted its rights and prayed judgment for its debt in its answer to the Belt, although it failed to insert a similar prayer in its answer to appellant. The ground of the appellant's intervention was that the Belt mortgage covered after-acquired property, so that it was entitled to the securities in the Trust Company's hands unless the Trust Company could make good its claim. On the other hand the decree foreclosing the Belt mortgage expressly left open the right of the Trust Company to contend that the appellant was bound to pay the Belt Company's unsecured debts.

The appellant attacks the conclusion of the Circuit Court of Appeals upon several grounds. In the first place it contends that the Trust Company is bound by the plan because it was a party to it, exchanged its own Belt Company stock in pursuance of it, was a depositary under it and used all its influence to induce other stockholders and bondholders to come in. It asserts that the plans contained an express covenant not to hold the new company liable for the debts of the old one. It also asserts that the property was not worth more than the mortgage. We will consider these and some subordinate matters in turn.

The plan presented elaborate estimates of the funds required. One item was "For present stock [of the Kansas City Suburban Belt Railroad Company] one-quarter of a share of new preferred stock and three-quarters of a share of new common stock of the company as reorganized for each share of the present stock of those who may deposit thereunder." The Trust Company exchanged its stock and it is said that by its retention of this benefit

it has precluded itself from claiming its debt. But the plan also stated at the outset as one of the results to be attained, "The payment of the floating debt and the existing Car Trust obligations," and at a later point it allowed for payment of floating debts, $475,000, to come from proceeds of the sale of first mortgage bonds and preferred stock and payment of $10 per share by participating stockholders. It is true that the estimate turned out to be much too small, but the plan did not on its face give notice of an intent to prefer the Belt stockholders to its creditors, and therefore the Trust Company by assenting to it and exchanging stock under it lost no rights. What has happened is that, owing perhaps to unexpected difficulties, the plan has not been carried out. The appellant has no ground for complaining that the Trust Company has not tendered back its stock, which it took before the foreclosure of the Belt Road was begun.

But it is said that the Trust Company covenanted not to assert its claim because the agreement provided that 'no right is conferred, nor any trust, liability or obligation (except . . .) is created by this agreement or the plan, or is assumed hereunder, or by or for any new company in favor of any bondholder or any other creditor or any holder of any claims whatsoever against the said companies, . . . with respect to any property acquired by purchase at any foreclosure sale.' It appears to us that argument cannot make plainer the meaning of these words. They exclude an obligation arising from the instrument but neither purport to nor could exclude rights of creditors founded on the facts to which we have referred. Those rights were untouched and none the less that this particular creditor became a party to the agreement because of its other interests that were concerned. We may remark in this connection that we are equally unable to find in the plan a contract in favor of the Trust Company as an unsecured creditor. The plan sets out a

general scheme that it was hoped would be worked out, but its nature, the words quoted, and the authority given to the committee for carrying out the plan to modify it and to use their discretion all are inconsistent with the notion of a promise that all unsecured debts should be paid.

As the claim of the Trust Company was put by the Court of Appeals upon the equitable right of creditors to be preferred to stockholders against the property of a debtor corporation, it is essential to inquire whether the appellant received any such property, that is whether it got by the foreclosure more than enough to satisfy the mortgage, which was a paramount lien. The Master found, as he expressed it, in the absence of proof to the contrary, that the amount for which the property was sold, $1,000,000, the amount of the mortgage, was its fair market value. Although the evidence was not reported the Circuit Court of Appeals was of opinion that it sufficiently appeared that there was a valuable equity. The argument for the appellant assumes that the different conclusion was reached while leaving the Master's finding to stand. But the decision rather lays that finding on one side upon considerations that may be summed up in a few words. The allowance made for the Belt Company's bonds shows that they were regarded as well secured. The stockholders of the Gulf Company in their exchange paid ten dollars a share for stock of the appellant received by them. Therefore it must be assumed that the stock of the appellant was worth at least that amount. Therefore the $4,750,000 of that stock given for the Belt Company's stock was worth at least $475,000, and probably more. But the value of this stock depended on the value of the Belt Company's property above the mortgage. It appears to us that while perhaps not justifying definite figures, the reasoning warrants the belief that there was an equity for which the appellant must account.

The appellant urges that the foreclosure sale is to be

treated as a distinct transaction—that after it had become the owner of the greater part of the bonds and stock of the Belt Company it was free to do as it pleased. If it had simply kept the stock it would have incurred no liability to creditors of the Belt Company and an independent foreclosure would put it in no worse place. But the ownership of the Belt Road by the new company was contemplated from the first and although no fraud on creditors was suggested or intended in the plan, still the Court of Appeals was justified in regarding the whole proceeding as one from the start to the close and in throwing on the appellant the responsibility of so carrying it out as to avoid inequitable results.

It is said that the Trust Company is barred by laches: that the appellant took possession on January 1, 1902, and that the Trust Company did not assert its claim until 1905 in this cause; that it knew and was intimately connected with every step of the reorganization and was silent at a time when its conduct would influence others, as the successful assertion of its claim would have depressed the market value of the appellant's stock and bonds. But the Trust Company set up its claim in this suit in answer to the Cambria bill on November 5, 1900. The very ground of the bill was to prevent the Trust Company from selling securities to satisfy the claim as it had given notice that it intended to. The company tried to become a party to the Belt foreclosure and did succeed in saving its rights from prejudice. When later the Belt Company and the appellants came into this suit it set up its claim again. Without going into further detail we are of opinion that the Trust Company is not barred.

Some technical objections may be left pretty much upon the decision below. 210 Fed. Rep. 699. It is objected that the liability of the appellant is not open because the exception to the Master's conclusion against it was put upon other grounds than the merits, but we

see no reason to doubt that the Court of Appeals was right in thinking that justice would be done by adopting the course that it did. So it is said that the appellant was induced by the form of the exceptions to forego reopening the Master's finding that the Belt Company was indebted to the Trust Company. But it is not to be believed that the appellant has given up anything that it thought worth insisting upon. 210 Fed. Rep. 700. So as to the absence of a specific prayer for relief in the Trust Company's answer to the appellant's intervention in its own name. In short while it is true that reorganization plans often would fail if the old stockholders could not be induced to come in and to contribute some fresh money, and that the necessity of such arrangements should lead Courts to avoid artificial scruples, still we are not prepared to say that the Court of Appeals was wrong in finding that there had been a transgression of the well settled rule of equity in this case, or that it went further than to see that substantial justice should be done.

There is a motion to dismiss upon which in view of our decision the defendant in error would not desire to insist, and on the other side a petition for certiorari in case its appeal should be dismissed. In the circumstances the distinctions become of little importance. But the Cambria bill asserted a lien under the judgment of a Federal court and the petition of the appellant asserted title under a decree of a Federal court, so that the decree may be affirmed upon the appeal. *Cooke* v. *Avery*, 147 U. S. 375. *Commercial Publishing Co.* v. *Beckwith*, 188 U. S. 567, 569. The case has been so fully discussed below that we think it unnecessary to go into further detail.

Decree affirmed.

THE CHIEF JUSTICE and MR. JUSTICE VAN DEVANTER are of opinion that upon the findings of the Master the decree should be reversed, and therefore dissent.